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BARTOLUS
OF
SASSOFERRATO
HIS POSITION IN THE HISTORY OF MEDIEVAL POLITICAL THOUGHT

BY

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"We doubted of Ulpian, and are now more perplexed with Bartolus and Baldus."

MONTAIGNE, *Essays*, III. 13 (Cotton's Translation).

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MATRI PRIMITIAS

PREFACE

I HAVE to thank the Adjudicators of the Thirlwall Prize for kindly allowing me to make all such additions and alterations, as I thought necessary to my essay before publication. I have accordingly added a few pages to the introductory Chapter I; the pages in Chapter III dealing with Dante, Petrarch and other Italian thinkers; and the short concluding Chapter. The material for these additions had been almost entirely collected before the essay was submitted to the Adjudicators, though lack of time had then prevented me from working it up. On the other hand, as a result of some further research, I have recast the end of Chapter III and made one or two small additions to Appendix A.

Next year will be the six-hundredth anniversary of the birth of Bartolus, and the history of his posthumous fame, which is written in the catalogues of most large libraries, is instructive. For two centuries after his death he was recognised as "the prince of jurists"; from the invention of printing to the close of the sixteenth century, one edition of his works followed another. But Humanism, slowly, it is true, and not without protest, shattered his reputation. His works ceased to be printed, and the old editions were consigned

to the dust and cobwebs, which were for long thought the proper hiding-place of such "Gothic" authors. It was only the last century which restored Bartolus to "polite" learning.

Bartolus has returned, not merely as a great lawyer, but as a political thinker—an important, if not a great, one. Of course, there must always be a large tract of debatable border-land between Law and Politics, however rigidly we separate one science from another. But this does not alter the fact that, to call Bartolus a political thinker, is to give him a title to which he himself made no claim, and which would, I think, have rather surprised him. This has seemed to me a distinction of great importance. I have referred to it more than once in the essay itself, the form and scope of which it has necessarily affected.

I may refer here to a topic, which I have considered outside the range of this essay. The authenticity of many of the works of Bartolus was already doubted at the Renaissance, and even earlier. Clearly, this is a question of some importance; and Savigny[1], who is, so far as I know, the only modern authority who has handled it, does not pretend to have done so exhaustively. But the material for deciding the question finally was not to be found in England, even supposing I had been competent to decide it. The obvious course was, therefore, to follow Savigny—and this I have done with one or two exceptions. I have followed him in accepting the authenticity of the Commentaries on the *Digestum Vetus* (with the exception of two "Repetitiones") and on the *Infortiatum*; I have also followed him in

[1] *Geschichte des röm. Rechts im Mittelalter*, vol. VI. c. LIII.

rejecting the Commentary on the *Institutes*. But I have accepted the Commentary on the *Authenticum* as genuine, as to which Savigny does not seem decided; and I have similarly accepted the whole of the Commentary on the *Tres Libri*. The evidence against this latter is merely the very decided statement of Jason and Diplovatacius, two famous fifteenth century lawyers of the Bartolist tradition, that the share of Bartolus in the work ends at the "Lectura" on C. XI. tit. 34, the rest having for author one Contes de Perusio. Now as this division corresponds with no ostensible difference; as the "Lectura" on C. XII. 1. 1 is admittedly genuine; as many of the "Lecturae" after, as before, the "Lectura" on C. XI. tit. 34 are signed, as being by Bartolus, in the one MS.[1] of the Commentary on the *Tres Libri*, which I have seen; and, finally, as the author of the "Lectura" on C. XI. 71. 1 expressly refers to a certain opinion of his, as held by him in the *Tractatus Minoritarum*[2], which is admittedly by Bartolus, I can see no reason to reject the latter part of this work. The Commentary on the *Digestum Novum* has never been suspected (though it will be found in Appendix A of this essay that the "Repetitio" on D. XXXIX. 4. 15 has been shown not to be by Bartolus). The *Consilia*, *Quaestiones* and *Tractatus*, referred to in this essay, present no difficulty.

A word of explanation is also necessary, I think, with regard to Chapter III. It will be remarked that

[1] Venice, Bibl. Naz. Cl. v. Cod. III.

[2] P. 113, § 5 of the Bâle ed. (1588–9): "Per hoc patet quod si legatum relinquitur ecclesiae S. Francisci, quod illud legatum est nullum...licet tenuerim contrarium in libello Minoritarum."

the political thinkers and publicists examined in that chapter are, with a few exceptions, all of a date anterior to that of Bartolus himself, and that the four political thinkers of prime importance, who were his contemporaries—Marsiglio of Padua, William of Occam, Lupold of Bebenburg, and the author of the *Somnium Viridarii*—receive only incidental notice. My apology must be that this is a work which has had to be finished within a given time, and that though, had the time and space at my disposal been unlimited, I should have attempted to continue my survey of political thought down to the close of the period with which this essay is concerned—and the proper close seems to me to be the return of the Popes from Avignon—to do so was not essential to my thesis. My aim in Chapter III was to demonstrate the existence of what I have called the Problem of the Empire, in the period which followed the fall of the Hohenstaufen, and to show that, while the problem faced the political thinker and publicist no less than the lawyer, the answers given to the problem by the former were very deeply affected by two causes, which operated hardly at all, or at least very little, on the answers given by the latter. Thus, to take an example, if I have succeeded in demonstrating the German answer to this problem by my analysis of the *De Praerogativa Romani Imperii* of Jordan of Osnaburg and the *Notitia Saeculi*, it was not necessary, however interesting it would have been, to compare these earlier treatises with the treatise written some sixty years later by Lupold of Bebenburg, *De Jure Regni et Imperii*. The earlier treatises can, of course, bear no comparison with the brilliant and acute treatise of

Lupold; but, as regards this problem, the answers of all three are, in essentials, the same—German. Similarly, to demonstrate the French answer, it was not necessary, after my analysis of the *De Potestate Regia et Papali* of John of Paris and other contemporary treatises, to analyse the *Somnium Viridarii*. Where the later treatise in one very important regard has advanced beyond the earlier treatises, I have noted it; but, this point apart, the answer of the *Somnium* may be fuller than the earlier answers, but it is not a new answer. Neither in the German nor in the French answers to this problem was there the sort of development, which, I have attempted to show, took place in the Italian answer.

Whether any apology is necessary for the amount of Latin which I have quoted in the text of this essay, I do not know. The practice is clearly disadvantageous from the point of view of literary form; but I think that there is a more than balancing compensation in having before one, as often as possible, the actual words of the thinker, with whom one is concerned. What men say is not the only important thing: often it is equally important to know how they have said it. Besides, the works of Bartolus, despite innumerable editions, are not always accessible; and, in all cases to have put his own words into footnotes, and to have translated, or given the sense of the passages quoted, in the text, would have been to expand the essay to an unwieldy size.

In addition to my thanks to the Adjudicators of the Thirlwall Prize for their permission to alter or add to my essay, I owe a great debt of gratitude to Dr Figgis.

It was he who set me on the subject of Bartolus, and—to leave out of account what this essay owes to his published books, to which my footnotes bear testimony—my thanks here can be no adequate acknowledgment of all I owe to the advice, which he has always been ready to give me. By reading the proofs, as the essay went through the press, he has honoured it in a way which only makes me wish the more that it were somewhat worthy of his notice. I have also to thank Mr Morant, of the India Office, for his kindness in reading the proofs, and my brother, Philip Sidney Woolf, who has helped me with the Index—but that is the least of the obligations which this essay owes him, but which neither he nor I would number or repay with public thanks.

C. N. S. W.

London,
October 1913.

NOTE ON AUTHORITIES

Throughout this essay, unless the contrary is specially stated, I quote from, and refer to, the works of Bartolus in the edition published at Bâle[1] in 1588–9, in eleven volumes folio (including a volume of index). In making my references or quotations, I have referred to the title of the volume in the Bâle edition. Thus

Commentary on Digestum Vetus	
Part I. (i.e. *Dig.* I.—XI.)	= Bâle ed. vol. I.
Part II. (i.e. *Dig.* XII.—XXIV. tit. 2)	= „ „ „ II.
Commentary on Infortiatum	
Part I. (i.e. *Dig.* XXIV. tit. 3—XXIX.)	= „ „ „ III.
Part II. (i.e. *Dig.* XXX.—XXXVIII.)	= „ „ „ IV.
Commentary on Digestum Novum	
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Part II. (i.e. *Dig.* XLV.—L.)	= „ „ „ VI.
Commentary on Codex	
Part I. (i.e. *Cod.* I.—V.)	= „ „ „ VII.
Part II. (i.e. *Cod.* VI.—IX.) Tres libri (i.e. *Cod.* X.—XII.)	= „ „ „ VIII[2].
Commentary on Authenticum (i.e. *Novels*)	= „ „ „ IX.
Consilia, Quaestiones, Tractatus	= „ „ „ X.

[1] The references are to this Bâle ed., but as I was not always able to obtain it, when writing this essay, the actual wording of some of the quotations has been taken from other editions, chiefly a Turin ed. (1577) and a Venice ed. (1596). The texts differ occasionally in the different editions, but the differences are purely verbal and do not affect the sense of the passages in any way.

[2] The *Comment. on the Tres Libri* has separate pagination.

Of the other authorities referred to, or quoted, in this essay I have used the following editions (works which are referred to in this essay as existing in periodical publications, the proceedings of societies, collections of treatises or monographs, being included in the general heading of the work containing them):

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legislate on its own internal affairs (146). But the question at issue was, less the abstract right to legislate, than the limits within which the legislation was valid (147). The "collisio statutorum" (148). The collision of statutes or customs with the "jus commune" or the higher laws (149). The Civitas, which owns no superior, can legislate, as it wills, within its own boundaries (153). In fact, it is, within its own boundaries, the Empire in miniature—"sibi princeps" (154). Importance of this phrase. (160). The Civitas can now be considered a "State," and Bartolus regarded the fact that the majority of these Civitates were actually in the hands of tyrants, as a non-normal episode in their existence (162). Analysis of his *Tractatus de Tyrannia* (163). It now remains to consider the Civitas, as a State, with regard to (i) internal government (174). While refusing to be dogmatic, Bartolus considers democracy the best form of government for the ordinary Civitas (175). The people is sovereign, the government dependent upon the people for its authority (181). This is illustrated by his treatment of the "ambitiosa decreta" of the Decuriones (182). Significance of this democratic theory of the Civitas (188). The *Tractatus de Guelphis et Gebellinis* (189); (ii) external relations (195). The de jure universal Empire remains intact, in spite of de facto disobedience to the Emperor. The Emperor's place is taken by Law (197). This is illustrated by the views of Bartolus on war, as between independent Civitates (198), and by his views on the Banniti (exiles) (200). Bartolus bases his scheme of international relations on the unity of western Christendom in one Populus Romanus or Roman Empire, and on the universal validity of Roman Law (201). His *Tractatus Repraesaliarum* (203).

CHAPTER III

THE PROBLEM OF THE EMPIRE (208—383)

The Empire again to be the centre of our inquiries (208). The problem of the Empire after the fall of the Hohenstaufen (209). Political conditions at the opening of the period (1) in southern Italy (212); (2) in northern Italy (213); (3) in western Europe generally. The growth of nationalism (214). Attempts of Charles of Anjou to secure the election of French Popes and a French Emperor (215). Radical reforms projected by Urban IV (218) and Clement IV (219). Proposals of Humbert de Romanis (220). Plans of Nicholas III (221). Significance of these projects (222). The treatise *De Praerogativa Romani Imperii* of Jordan of Osnaburg. Question of its authorship

(227). Analysis of Chapter I (231). In spite of differences, the standpoint both of Chapter I and of the remaining chapters is essentially the same. They give us the German answer to the Problem of the Empire (234). Analysis of the remaining chapters (236) and of the *Notitia Saeculi* (251). Neither of these treatises shows any trace of being influenced by the new political theories based on Aristotle's *Politics* (266). The Aristotelians had to account for two great institutions foreign to the world of Aristotle himself—the Papacy (267) and the Empire (272). The attempt of the continuation of the *De Regimine Principum* of Aquinas to account for the Empire (275). The similar attempt of Engelbert of Admont (278). Analysis of his treatise *De Ortu et Fine Romani Imperii* (281). Its significance (289). The Italian answer to the problem of the Empire as given by Dante (303), by Cino da Pistoia (308), and by Petrarch (309). The German and Italian answers illustrated by a comparison between poems of Lupold of Bebenburg and Fazzio degli Uberti (312). The struggle between Boniface VIII and Philip the Fair produced the French answer to the problem of the Empire. The Papal claims to superiority over France. The Donation of Constantine (315). The Pope "verus imperator" (322). Importance of the "Imperial" claims of the Popes in the present struggle (328). The alliance of Boniface VIII and Albert, king of the Romans (332). Boniface recognises the universality of the Empire (333), nor is he unique among the Papalists in doing so (335). Such recognition is not inconsistent with the doctrines of Papal supremacy (337). The French position—its aggressive side (341). Its defensive side (342). The Papal claims, so far as they were based on the Donation of Constantine, easily refuted (343). As Aristotelians, the French publicists could almost ignore the Empire (350). At other times, they allow that the Empire may be subject to the Papacy, but deny that the same is true of France (353). But this line of argument was dangerous (355), and in fact we find them compelled to link the cause of the Empire to their own (358). We even find John of Paris more than once recognising the universality of the Empire (364). The real solution of the problem was contained in the phrase, current by the middle of the fourteenth century—"Rex in regno suo est Imperator regni sui" (368). The phrase is not to be found in the literature of the present struggle, except in the *Quaestio in Utramque Partem* (369), the date of which is disputed (370). History of the phrase (372). Bartolus was not the author of the phrase—the author was possibly Oldradus—but his "Civitas sibi Princeps" is the exact counterpart of the "Rex Imperator regni sui" (380), and he was the first to adopt the solution of the problem of the Empire, which these phrases imply, fearlessly, consistently and regularly (381).

CHAPTER IV

CONCLUSION (384—394)

Divergent estimates of Bartolus by Dr Figgis and Dr Chiapelli (384). Bartolus not an Aristotelian (385). Importance of his distinction between Law and Fact (388). He must be judged, not in isolation, but as one of the medieval civilians (389). His influence on political thought has survived his popularity, which the Renaissance shattered (392).

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CHAPTER I

INTRODUCTION

BARTOLUS[1] was born in the year 1314 at Sassoferrato. Nearly all that we know of his early life he has told us himself[2]. His first master was a Friar Peter[3], who afterwards established a home for foundlings at Venice—"vir est expertus," Bartolus wrote of him long after, "nullius hypocrisis, mirae sanctitatis apud me

[1] In the first few pages of this introductory chapter I merely attempt to give a brief outline of the known facts of Bartolus' life. The greater part of what we know of Bartolus comes from his own works: I therefore give references to these wherever possible. After his own works, our chief authority must always be Savigny's *Geschichte des römischen Rechts*, vol. VI. chap. 53. But Savigny wrote more than sixty years ago, and there are naturally both additions and corrections to be made. Some of these I have attempted to collect in an Appendix from the following sources:—1. Works published since Savigny's history, which throw light on Bartolus' biography; these, so far as I know, are only two—(i) the publication by Rossi of documents relating to Perugia University (those which concern Bartolus are in vols. V. and VI. of the Perugian *Giornale di Erudizione Artistica*, 1876–7); (ii) a short pamphlet by Lattes, *Un Punto controverso nella biografia di Bartolo*. 2. Passages in Bartolus' works which were not noticed by Savigny. 3. The few MSS of Bartolus' works which I have been able to see. Vide Appendix A, below.

[2] Bartolus, *Comment. on Dig. Nov.* Part II. (D. XLV. 1. 132), pp. 148–9, § 8.

[3] Savigny has shown that the fable of Bartolus himself having been a foundling rests on a misunderstanding; the home was established at Venice long after Bartolus had grown up.

et omnes qui eum bene noscunt...et ex multo amore quem ad illius fratris Petri bonitatem gero, cum calamus hoc scribit, cordis oculus lacrymatur." At a very early age, thirteen or fourteen, Bartolus went to Perugia and studied law under Cino da Pistoia[1], famous both as a poet and as a lawyer, the friend of Dante and Petrarch. Bartolus told his great pupil Baldus that "illud quod suum fabricabat ingenium erat lectura Cyni[2]." Later, but probably not for long, Bartolus studied at Bologna, again under famous lawyers—Jacobus Buttrigarius[3], Oldradus de Ponte[4], Raynerius Forlivensis[5] and Jacobus de Belvisio[6]. Here he took his doctor's degree in 1334, when not yet twenty. For the

[1] Bartolus refers to opinions of Cino as given "me audiente" several times. Vide *Comment. on Dig. Vet.* Part II. (D. XVI. 3. 33), p. 320, § 4; *Comment. on Infort.* Part II. (D. XXXII. 1. 22), p. 156; *Comment. on Dig. Nov.* Part II. (D. XLVI. 7, sup. rubric.), p. 299, § 4 and (D. XLVII. 2. 63, § Quod vero), p. 355, § 5; and the important autobiographical passage referred to in the last note but one.

[2] Quoted by Savigny, p. 142, note i.

[3] Bartolus mentions him as his master in *Comment. on Infort.* Part I. (D. XXVIII. 3. 17), p. 315, § 8; *Comment. on Infort.* Part II. (D. XXXVIII. 11. 10, § Sunt et ex), p. 539; *Comment. on Dig. Nov.* Part I. (D. XLI. 2. 3, § Ex contrario), p. 247, § 4; (D. XLI. 3. 15), p. 311, § 72 and Quaest. XV.—"Hanc quaestionem disputavit do. Bart. in scholis domini Jac. Butrig. Anno domini MCCCXXXIII die XV mensis Decembris" (p. 245).

[4] The only mention I have found is in *Comment. on Codex*, Part I. (C. V. 10. 1), p. 531, § 7. And vide Savigny, p. 143, note k.

[5] Mentioned as his master in *Comment. on Infort.* Part I. (D. XXVIII. 3. 17), p. 315, § 8; *Comment. on Dig. Nov.* Part I. (D. XLI. 3. 15), p. 299, §§ 4 and 8; *Comment. on Dig. Nov.* Part II. (D. XLV. 1. 73, § Stichi), p. 84; *Comment. on Codex*, Part I. (C. V. 10. 1), p. 532, § 10; and Quaestio XIV. § 14, p. 242. And vide Appendix A.

[6] Bartolus frequently refers to Jac. de Belvisio, but never mentions him, as far as I have been able to see, as his master. Vide Savigny, however, p. 143, note k.

next five years of his life it is difficult to fix the order of events with certainty: we only know that he was Assessor at Todi[1] and Pisa[2], and that he spent some considerable time in solitude "ad studendum et revidendum libros per me ipsum[3]." Then in 1339 he became Professor at Pisa[4] University. Here he remained until 1343, when he migrated to Perugia, the city and University most closely connected with his fame. In 1348 he and his brother were made citizens of Perugia, Bartolus being specially exempted from the statute which forbade citizens from holding the professorships of the University[5]. In 1355 Bartolus represented Perugia on an embassy to the Emperor Charles IV at Pisa[6]. The Emperor received him with great marks of honour, made him a Privy Councillor, gave him a coat of arms and the privilege, both for himself and such of his heirs

[1] Vide *Comment. on Infort.* Part II. (D. XXXV. 2. 24), p. 392: "Quaestio erat quaedam Tuderti...Ego dixi per istam legem." *Comment. on Dig. Vet.* Part I. (D. VIII. 3. 38, § Idem juris), p. 603: "Habui hanc quaestionem in civitate Tuderti." Vide *Tract. de Guelphis et Gibellinis*, ad init.

[2] *Comment. on Dig. Nov.* Part I. (D. XLI. 3. 15), p. 309, § 50, and (D. XLI. 1. 63, § Quod si servus), p. 233.

[3] *Comment. on Dig. Vet.* Part I., Prima Constitutio (Omnem, § Haec autem tria), p. 13, § 2.

[4] Vide *Comment. on Infort.* Part II. (D. XXXV. 2. 59), p. 398, § 2; *Comment. on Dig. Nov.* Part II. (D. XLV. 1. 73, § Stichi), p. 84; *Comment. on Infort.* Part I. (D. XXVIII. 5. 29), p. 338, § 9. Below, p. 5, n. 1.

[5] The documents are in Rossi, nos. 66–8, vol. v. pp. 184–8, and were printed in the sixteenth century by Lancellotti, *Vita Bartoli.*

[6] Vide *Comment. on Infort.* Part I. (D. XXVIII. 2. 29, § Forsitan), p. 301, § 1; *Comment. on Const. ad Reprimendum*, sup. rubric., p. 261; *Tract. de Insign. et Armis*, § 3, p. 341; *Tract. de Reg. Civ.* § 18, p. 420; *Tract. Testimoniorum*, § 80, p. 445, and the diplomas in Rossi, nos. 96–9, vol. v. pp. 374–80. No. 99 is also in Lancellotti, op. cit.

as should be doctors of law, to legitimate bastards and grant the "venia aetatis." Bartolus died not long after, almost certainly in 1357[1].

In this essay we are to examine Bartolus as a political thinker. This bare outline of the known facts of his life shows us that Bartolus was a lawyer, that his whole life was spent in the study, practice and expounding of law. In fact we shall have continually to keep in mind that Bartolus was no political philosopher; that his political thought is to be found in his commentaries and treatises on Law, not Politics. Just for this reason it is important, before we turn to his political thought, to get some insight into the position of Bartolus as a lawyer.

Bartolus is a Postglossator, the greatest and most famous of the Postglossators. The period of the Glossators had ended and been summed up in the great Gloss of Accursius. The work of the Bolognese Glossators had been primarily to restore the text of the Law Books and then to interpret those texts literally. Their position was very nearly that of the present-day expounder of Roman Law; but they differed from him, not only in the relative poverty of the material at their disposal, but also because to them Justinian's Law Books represented a still living system of law. This we shall find is a point of great importance. The Law Books were compiled in the sixth century; the Glossators were living in the twelfth and thirteenth centuries. Law and fact necessarily contradicted each other in numerous cases, and where this was so, the

[1] Savigny shows that this must almost certainly be the date, as that 1314 is almost certainly the date of his birth.

Glossator attempted to bend facts to meet a literal interpretation of the law, or else made concessions to fact only with great reluctance.

The position of the Postglossator was very different. It is not that there was any definite break in the tradition; the work of the Postglossators was the direct continuation of that of the Glossators. Only, in the first place, between the Postglossator and his texts now stood the Glossa Magna; in the second place the aim of the Postglossator was essentially, rather to evolve a law practically effective for the world in which he lived, than to expound a law scientifically correct according to the texts. Let us see how Bartolus stands with regard to these two points.

Whatever may be true of the Postglossators generally, Bartolus himself was no slavish dependent on the Gloss. Indeed, a reaction against the overwhelming authority of the Gloss had already begun under his master Cino and the French "Ultramontane" lawyers with whom Cino is, intellectually, in close connexion[1]. A single quotation will illustrate Bartolus' attitude to

[1] Vide Chiapelli, *Vita e Opere Giuridiche di Cino da Pistoia*, pp. 186–91. Vide Bartolus, *Comment. on Dig. Nov.* Part II. (D. XLVI. 1. 17, § Cum fidejuss.), p. 201: "Pet. de Bella Pert...dicit quod hanc glossam diabolus revelavit." Cf. *Comment. on Dig. Nov.* Part I. (D. XLII. 2. 2), p. 384, § 6; *Comment. on Dig. Nov.* Part I. (D. XLIV. 2. 7, § Et generaliter), p. 499. Bartolus also records cases of condemnation of the Gloss by others besides Cino and the Ultramontani. Vide e.g. *Comment. on Infort.* Part II. (D. XXXV. 2. 39), p. 396: "Glossam quae est in...damnavi vobis per istum textum et ibi damnat Dynus et Jac. de Arena." *Comment. on Infort.* Part II. (D. XXXII. 1. 22), p. 157, § 5: "Glossa male loquitur et bene reprehenditur per Jac. de Arena." *Comment. on Dig. Nov.* Part I. (D. XXXIX. 1. 5), p. 32, § 3: "Quando legi Pisis, librum habui d. And. de Pisis aliquibus diebus et reprobabat istam opinionem glossae."

the Gloss. "Nota quod non debemus sequi consilium Imperatoris si videtur nobis quod non sit bene latum, et hoc est contra eos qui judicant secundum dicta nostrarum glossarum. Unde non est mirum si recedatur a dictis glossae, si veritas est in contrarium aut ratio aut lex[1]." On the other hand the Gloss formed a necessary part of his exposition of the Civil Law; in fact by the statutes of Perugia University the Professor was bound to read the Gloss immediately after the text which he was about to expound[2]. Thus the Gloss must always be considered[3], no less than the text; only Bartolus was ready to accept[4] it or reject[5] it, as he thought fit. Nor was Bartolus altogether unmindful of

[1] Vide *Comment. on Codex*, Part II. (C. VII. 45. 13), p. 195.

[2] Vide Padaletti, *Contributo alla Storia dello Studio di Perugia nei Secoli XIV e XV*, p. 93: "Item statuimus quod omnes doctores actu legentes in jure canonico et civili immediate postquam legerunt capitulum vel legem, glossas legere teneantur, nisi continuatio capituli vel legis aliud fieri suadeat...."

[3] A glance at any page of Bartolus' commentaries will illustrate this—as a random example vide the opening words of his Repetitio on D. XLI. 3. 55, *Comment. on Dig. Nov.* Part I. p. 298 (this, he tells us, was the first Repetitio he ever delivered): "Haec lex difficilis est in textu, difficilior in glossa et difficillima in materia extra glossam."

[4] Vide e.g. *Comment. on Dig. Vet.* Part I. (D. IV. 3. 19, § De eo qui), p. 426: "Glossa ponit hic unam distinctionem valde pulchram melius et plenius quam in aliqua parte mundi et doctores recitant eam ut jacet." Cf. *Comment. on Infort.* Part II. (D. XXX. 1. 37), p. 32: "Signa illam glossam ut magistram in hoc titulo." *Comment. on Infort.* Part I. (D. XXVIII. 2. 29), p. 286.

[5] Vide e.g. *Comment. on Dig. Nov.* Part I. (D. XXXIX. 1. 1), p. 20, § 10: "Sed glossa potest cantare quantum vellet, quia solutio ista est contra dict. §." Cf. *Comment. on Dig. Nov.* Part II. (D. XLVI. 3. 95), p. 272, § 1: "Est quaedam glossa super verbo 'interim' quae intricat istum textum qui de se procedit clare et plene: ideo de illa glossa non curo." *Comment. on Infort.* Part I. (D. XXVIII. 7. 9), p. 386. *Comment. on Dig. Nov.* Part II. (D. XLVII. 1. 2), p. 332, § 11.

the text. The story how he and his friend and colleague, Franciscus de Tigrinis, sent from Perugia to consult the famous Pisan manuscript of the Digest, now in the Laurentian library at Florence, is well known[1]. Undoubtedly too much stress is not to be laid on what is, after all, an isolated incident. The main concern of Bartolus was not with the scientific correctness of his texts or their literal interpretation; even so the incident is all the more noteworthy in the age of the Postglossators.

If he was independent of the Gloss, as an authority, still more independent was Bartolus with regard to other lawyers; he boasted that where he borrowed from his predecessors, he made no attempt to hide his borrowing, as others had done[2]—nor need we doubt the truth of this[3]. Elsewhere Bartolus has explained his views

[1] Vide *Comment. on Codex*, Part I. (C. IV. 6. 2), p. 387: "...Misimus usque ad Pisas do. Franc. Accursius (Savigny has shown that this ought to be Franciscus Tigrinis) et ego ad videndum Pandectas." Bartolus recalls this again in *Comment. on Dig. Vet.* Part II. (D. XX. 5. 7, § Quaeritur), p. 442. The "litera Pisana" is mentioned again in *Comment. on Dig. Vet.* Part II. (D. XII. 1. 1), p. 3, § 6; the "vel Florentina," found in some editions, being of course an addition, since the MS was not removed to Florence till after Bartolus' death; it is wanting in the only MS of Bartolus' *Comment. on Dig. Vet.* Part II. which I have seen.

[2] Vide *Comment. on Dig. Nov.* Part I. (D. XXXIX. 1. 8, § Morte ejus), p. 41, §§ 9, 10: "Et quia iste § singularis est, circa eam materiam protestationis tractabo, quam primo latius tractavit Jo. Monacus Cardinalis...et Jo. Andreae eam recitat de verbo ad verbum...Item And. de Pisis posuit istam materiam in quadam repetitione quam fecit et Jo. praedictum quasi in omnibus est secutus; de eo tamen nullam mentionem facit. Ideo ego de omnibus mentionem facio, ut quod suum est furari non videar; in eo vero quod est meum cognoscar; et si minus bene dixero, ego redarguar; si vero bene, Deus laudetur; ego vero ut minimus instructor reputer."

[3] Savigny indeed quotes a passage from Baldus—"...d. Bart...

on authority with great precision. The Middle Ages were no doubt far too inclined to bow to authority; but the charge is often somewhat vague, and it is therefore well worth noting his own words, well worth seeing what authorities the man, whom we are to examine in this essay, was prepared to recognise. "Debes scire," he says, "quod quaedam scripta seu authoritates sunt approbatae ab Imperatore vel a summo Pontifice, et istae probant et concludunt necessarie...Quaedam sunt scripta per summum Pontificem vel Principem nec approbata nec reprobata; et ista sunt duplicis generis: quaedam sunt scripturae enunciativae, alias recitativae, ut libri historiales, chronica et similia, et istis, si a nostris antiquis creditum videmus, et nos etiam debemus credere, sicut aliis antiquis scripturis....Quaedam sunt scripturae quae procedunt disponendo et determinando, non enunciando, et in his advertendum quid servant studia. Quaedam enim scripturae, tamquam authenticae in studiis reputantur, ut dicta Aristotelis et Hippocratis et similium, quae tamquam scripturae authenticae in studiis servantur, et istis est standum... Quaedam sunt scripturae quae a studiis non approbantur, nisi probentur per rationem, et istae dicuntur magistrales probationes, non tamen necessariae. Istis quidem non est standum si contrarium videretur, et nisi quatenus necessarie concluderent[1]."

Certainly the passage makes no wide claim for unfettered thought. But we note—and this is the important thing for us—that neither the Gloss nor any

furatus fuit Petro (a Bella Pertica)," but we need not lay too much stress perhaps on a single statement of this sort.

[1] Vide *Comment. on Dig. Vet.* Part II. (D. XII. 1. 1), p. 5, §§ 21–3.

individual lawyer[1] is given the same position in the lawyer's Studium as Aristotle is allowed to enjoy in the philosopher's or Hippocrates in the physician's Studium—"quae tamquam scripturae authenticae in studiis servantur." The opinion of the Gloss is thus only "probable," not "necessary," just as is that of any doctor—"nullus te cogit stare opinioni doctoris[2]."

We shall so often in the coming pages of this essay have occasion to note how Bartolus was concerned to evolve a law practically effective for the Italy of his day, that it is unnecessary at present to dwell at any length on this characteristic of his work. It is indeed just this characteristic which redeems the otherwise far from pleasant reading of the voluminous commentaries of Bartolus and their uncouth Latin. At every page we are transplanted into the active many-sided life of the Italian cities of the fourteenth century[3]; there is always

[1] Of course this does not apply to the old Jurisconsulti from whose works the Digest is composed. Vide the following passage which immediately precedes the passage on authority already quoted: "Hic habes locum ab authoritate quia jurisconsultus probat dicta sua per authoritatem Celsi. Sed contra hoc facit quia authoritas doctoris, licet sit probabilis, non est necessaria...Solutio: illa jura loquuntur de doctore simplici, sed Celsus, de quo hic loquitur, erat doctor et jurisconsultus, qui habebat potestatem condendi legem, unde et ejus interpretatio, cum sit necessaria, sicut interpretatio principis...merito potuit allegari."

[2] Vide *Comment. on Codex*, Part I. (C. I. 14. 1), p. 87, §§ 7–9: "Debes scire quod est interpretatio generalis et necessaria et in scriptis redigenda et istam potest facere solus Princeps, ut hic. Quaedam est interpretatio necessaria et in scriptis redigenda, non tamen est generalis, et istam potest facere quilibet judex et proferre sententiam procedendo de similibus ad similia...Tertia est interpretatio probabilis, tamen non est necessaria, et potest in scriptis redigi, ut interpretatio doctorum, quia nullus te cogit stare opinioni doctoris." Cf. *Comment. on Dig. Vet.* Part II. (D. XII. 1. 1), p. 2, § 6.

[3] The following quotations will serve as examples. Vide *Comment.*

something that reveals the man and his age. We have remarked that most of our knowledge of Bartolus is derived from what he himself tells us; the references, which we have already given, might easily be supplemented. Bartolus, for example, is always ready to illustrate a legal point by appealing to his own experience—to cases he has known or to opinions he has given both at Pisa and Perugia, the two cities most closely connected with his name, as at Florence, the small dependent cities near Perugia, such as Spoleto or Assisi, and elsewhere[1]. Similarly he will recall cases

on Dig. Nov. Part I. (XLIII. 19. 1, § Quaesitum), p. 468: "Hic est bonus textus et est argumentum ad quaestionem. Equus qui currebat ad bravium per seipsum primo ivit, cum ragatius qui equum ducebat inde ceciderit, quod (sic) ille equus debet habere bravium. Breviter ego consuevi dicere sic, quod debemus advertere verba statuti, utrum dicunt, 'si quis cum equo primo venerit,' vel 'ei equitatori qui primo venerit,' et similia, et tunc non habeat bravium; vel dicant, 'domino equi qui primo venerit debeatur bravium,' tunc equo veniente sine equitatore debeatur bravium." Horse-races took place in numbers of Italian cities at certain times of the year; Dante refers to the famous Lent foot-race at Verona (*Inf.* xv. 122). Bartolus' decision is very curious and it would be interesting to know if such a rule ever actually held good. Then vide *Comment. on Dig. Vet.* Part II. (D. XII. 2. 30, § In popularibus), p. 95, § 4: "...ut fuit de facto in civitate ista, facta fuit quaedam societas vel liga per cives hujus civitatis contra aliquos contra formam statutorum, quae liga adhuc durat...." Finally we may well notice the number of passages in which Bartolus refuses to consider a matter "quia pendet de facto." Vide e.g. *Comment. on Dig. Nov.* Part II. (D. L. 1. 6, § Filius), p. 648, § 3: "Non determino modo quia quaestio est in civitate Clusina, et forte examinabitur in civitate ista." Cf. *Comment. on Dig. Vet.* Part I. (D. IV. 4. 38), p. 444, § 7.

[1] *Comment. on Codex*, Tres libri (C. X. 43. 1), p. 53: "Nota... quod quando quis subit onera sponte, debet protestari, ne prejudicet sibi vel suo privilegio: et sic feci, quando fuit imposita mihi praestantia, de qua potui excusari, tamen nolui me excusare: feci tamen scribere in catastro in lib. solutionum quod illud faciebam non animo

in which other famous lawyers have appeared, or record incidents of their lives[1]. The ten volumes of his commentaries are a curious and little-worked mine, from which many sides of medieval history, besides that one which concerns us in this essay, might with little difficulty be enriched.

praejudicandi mihi in privilegiis et pactis mihi factis." *Comment. on Infort.* Part I. (D. XXVIII. 5. 29), p. 338: "In civitate Pisana tempore conflictus civitatis Lucanae, quo tempore ibi actu legebam, factum fuit unum statutum, quod quicumque acceperit vexillum Florentinum haberet centum. Duo acceperunt nec apparebat quis primo, et dom. Franciscus Tigrinis erat de Ancianis et scripsit mihi, et ego respondi...." *Comment. on Infort.* Part II. (D. XXXIII. 2. 30), p. 211, § 4: "Facit ad quaestionem in qua consului in civitate Spoleti." *Comment. on Infort.* Part I. (D. XXIX. 1. 1), p. 440, § 1: "Et istam legem induxi semel ad pulchram quaestionem. Cavetur statutis civitatis Assissii...." *Comment. on Infort.* Part II. (D. XXXVIII. 18. 2, § Videndum), p. 550, § 3: "Et sic de facto consului in civitate Florentiae." *Comment. on Infort.* Part II. (D. XXXVI. 1. 4), p. 421: "Et sic de facto consului in quadam civitate imperii." On one occasion he says, *Comment. on Infort.* Part II. (D. XXXV. 2. 90), p. 408, § 12: "Quaero de una quaestione quae me multum facit dubitare. Non habui de facto, sed hac nocte fui imaginatus."

[1] Vide e.g. *Comment. on Infort.* Part I. (D. XXVI. 2. 11), p. 132, § 27: "Iste quaestio fuit semel in civitate ista pro tutela filiae Bernardini Comitis de Merciana et fuit comissa Bononiae quatuor doctoribus, scilicet Ric. de Mal. qui erat ibi tunc relegatus, Jac. de Bel., Jac. But. et Ray. de For. qui fuerunt discordes." *Comment. on Dig. Nov.* Part II. (D. XLVIII. 16. 1, § Suspecti), p. 521: "Istam opinionem Jac. Balduini Dynus tenuit semel, cum legeret pro Franc. Accursio...Do. Franc. in sequenti die legit...ubi resolvit eandem materiam meri et mixti imperii et tenuit glossam sui patris. Tunc quidam scholaris ivit ad do. Dynum, et do. Dynus incontinenti misit per scholas quod volebat disputare illam quaestionem et tenere opinionem Jac. Balduini et reprobare opinionem glossae; et istam dissensionem audivi ore tenus a do. Cyno." *Comment. on Dig. Vet.* Part II. (D. XVII. 1. 26), p. 336, § 1: "Jo. Andreae fuit missus ambasiator a legato ad Papam; dum reverteret fuit derobatus apud Papiam. Quaerebatur utrum deberet sibi restitui a legato. Convocati doctores dixerunt quod sic...."

We may now turn to consider how Bartolus views the chief material of all his thought—that "civilis sapientia" of the five volumes, into which the Corpus Juris Civilis was divided by the medieval lawyers[1].

In his very remarkable *Tractatus Testimoniorum* he attempts to show[3] that "jus nostrum"—i.e. the Civil Law—may be called, according to different considerations, a Sapientia, a Scientia and an Ars[4]. He defines[5] Sapientia as "habitus speculationis, considerans causas altissimas"; and while this, he thinks, chiefly applies to theology or metaphysics, it may also be applied to the work of the jurist. "Est enim res sanctissima ista civilis sapientia, ut Ulpianus ait[6]. Ipsa enim causas altissimas considerat: quia est divinarum

[1] Vide *Sermo in doctorat. do. Johannis de Saxoferrato*, p. 508, circa fin. He compares them to the five miraculous loaves. The five volumes are, of course, the *Dig. Vet.*; *Infortiatum*; *Dig. Nov.*; *Codex* I.–IX.; and the *Volumen* = Codex X.–XII., Institutes, Authenticum. Most editions of Bartolus are bound up in five volumes, the *Consilia*, *Quaestiones* and *Tractatus* being bound with the *Comments. on Authenticum* and *Institutes*; the *Comment. on the Codex*, Tres libri, being sometimes bound in with the Comments. on the other two parts of the Codex, sometimes separately with the index, which is found in most of the later complete editions.

[2] Pp. 434–53.

[3] Vide §§ 70–2, p. 444. He is considering the four cardinal moral virtues, first of which he names Prudentia (§ 68). Accordingly in § 69 he proceeds to consider Prudentia—"ad quod declarandum, sciendum est quod Sapientia, Scientia et Prudentia differunt." He then returns to Prudentia in § 73 and ff., after those which here concern us.

[4] § 72.

[5] § 70: "Est enim Sapientia habitus speculationis, considerans causas altissimas, et haec pertinet principaliter ad theologiam et metaphysicam, quae Deum et primas causas considerat et de principiis omnium aliarum scientiarum judicat, et etiam de ista ad juristas; unde merito dicitur. Est enim res sanctissima, etc."

[6] Referring presumably to D. I. 1. 1 and D. I. 1. 10.

atque humanarum rerum notitia et cognitio, judicat de principiis aliarum scientiarum; reprobat enim principia omnia, quae fidei catholicae repugnant, et hac consideratione bonus judex recte sapiens dicitur, et cum ad consilium sapientis recurritur vulgo de jurisperito intelligitur." Scientia[1] is defined as "habitus speculationis demonstrativus ratione vera considerans causas inferiores." This especially applies to the natural sciences, but is also applied to "jus nostrum" by the Emperor in the first preface to the Digest[2]—"et merito, quia etiam causas inferiores considerat. Non solum enim divinarum, sed etiam humanarum est cognitio[3], sed etiam de universalibus judicat. Jura enim non ad singulares personas, sed generaliter constituuntur et etiam de necessario se habentibus. Leges enim constringunt hominum vitas, et eis omnes obedire oportet, maxime quia est inventio et donum Dei, ut ait Demosthenes et retulit Martianus[4]. Nec praedictis obviat quia mutabilia sunt per Principis Imperium, vel alterius cui attinet, quia etiam quae jura naturalia sunt, mutabilia sunt divino Imperio vel alterius cui Deus concesserit, ut in miraculis declaratum est: nec tamen per hoc minus dicuntur necessariae se habere." Finally Ars[5] is defined as "habitus ratione naturae factivus"; this term is also applied to Jus by the Jurisconsultus, when he says, "Jus est ars boni et aequi[6]."

We ought especially to note how the term Sapientia is applied to the Jus Civile, along with theology and metaphysics, each a science "quae Deum et primas

[1] § 71.
[2] Vide D. Prima Const. § 1.
[3] Vide D. 1. 1. 10.
[4] Vide D. 1. 3. 2.
[5] § 72.
[6] D. 1. 1. 1, where Ulpian quotes the saying as of Celsus.

causas considerat et de principiis aliarum scientiarum judicat." This places the Civil Law on a level with the highest branches of learning. Elsewhere Bartolus goes even further. In a speech made when his brother Bonaccursius was created a Doctor[1], Bartolus is led to take into consideration the "essential goodness and perfection of this Civilis Sapientia[2]." He finds that it manifestly excels all other sciences, in that, unlike them, it is "perfect in itself," needing the "suffrage" of no other science. The perfect philosopher must be a logician, the perfect physician a philosopher, the perfect canonist must first have this very Civilis Sapientia. But the Civilis Sapientia says of itself: "I sit a queen and am no widow and shall see no sorrow." It is truly a queen, for it rules, like a Prince, over good and bad, gives peace to whole provinces and scatters gifts with princely magnificence. All other sciences are only sciences in so far as they are recognised and supported by it, though he is bound here to except theology, to which, he confesses, even the Civilis Sapientia is inferior.

[1] The two speeches of Bartolus are very interesting. At the beginning of the one for Johannes de Saxoferrato he says, "tres sermones me fecisse in hoc loco memini" (p. 507); but only two have survived. In the first two, he says, he had quoted authorities from the Civilis Sapientia and Scripture "permistim," in the third only from the Civilis Sapientia; so here in the fourth he will only refer to Scripture, "et quia hic pro quo sermo effunditur, est Johannes," he will refer only to S. John.

[2] Vide pp. 506–7. He takes as his text Accursius' own proud explanation of his name in the Gloss to D. xxxvi. 1. 63, ad verb. "conditio":..."nomen meum, scilicet Accursium: quod est honestum nomen, dictum quia accurrit et succurit contra tenebras juris civilis." Among the many titles of praise bestowed on Bartolus, and which most of his old biographers recount, is "Optimus auriga in hac civili sapientia."

But he makes no other exception. As medicine without philosophy is "vidua," so Canon Law without the Jus Civile is "vidua et imperfecta scientia," while Civil Law "alterius adminiculo non eget, vidua non est, et vidua esse non potest."

So exalted a view of the Civil Law was one which could hardly find general acceptance. The immense popularity of the study of Civil Law from the eleventh century onwards had raised up powerful enemies against it. The theologians were against it; and while the Canon Law had also, to some considerable extent, to face the hostility of the theologians, Civil Law had to bear the hostility of the canonists as well.

Bartolus is well aware of this hostility. In the same speech[1], after his praise of the Civil Law, he turns to the jurist. The Civil Law, as a science "in se perfecta," produces a son like itself—the son is of course the jurist. Of him may be said, in the psalmist's words: "The stone, which the builders refused, is become the head stone of the corner. This is the Lord's doing: it is marvellous in our eyes." He gives two examples. In Perugia the jurists are forbidden any share in the city's government; yet, he says, at the time of processions we see them precede all others. Again in the Roman Curia and Church the clergy are forbidden "hac civili sapientia imbui." "Tamen Romana curia

[1] P. 506: "Lapis reprobatus est per substantiam cujuslibet juristae, qui in hac civitate ad regimen per eorum statuta totaliter est remotus: tamen hic lapis, seu jurista, factus est in caput anguli. Nam videtis juristas omnibus praecedere, et tempore processionum faciunt juristas, qui omnibus patrocinantur, praecedere et etiam in recognitionem dominii certum largiuntur: sic et curia Romana, sic et Romana ecclesia hunc lapidem in clericis reprobat, vetando eos hac civili sapientia imbui; tamen, etc."

in hac scientia obtinet principatum. Longe enim plures sunt ibi legistae, quam canonistae, quare hoc a Domino factum et est mirabile in oculis nostris." In another speech[1] he says that though the clergy and religious may be forbidden to learn the Civil Law, yet without it there will be no justice in their courts.

This is all the more remarkable in that Bartolus was, as we shall see later, in no sense hostile to Canon Law. Hostility there had been between the two sorts of lawyers. Cino, the master of Bartolus, was a bitter and contemptuous opponent of the canonists, so much so that canonists, as late as Panormitanus, note his hostility and reprove him. Bartolus himself wrote no works on Canon Law[2], but he stood at the juncture of two epochs. The great lawyers who followed him were mostly doctors "in utroque jure." Old-fashioned theologians might still complain of the neglect of theology for law, but the epoch of hostility was over, at least so far as concerns the Civil and Canon Laws[3].

Bartolus thus thinks of the Civilis Sapientia as a

[1] P. 508: "...et licet Petrus dixerit, Domine non lavabis pedes meos in aeternum, tamen ei responsum est, Si non lavero te, non habebis partem mecum. Ita in proposito, licet statutum sit per Ecclesiam, ut jura civilia per religiosos et clericos in sacris non discantur, et sic pedes non laventur, tamen si haec scientia non lavabit, in curiis eorum justitia non erit...."

[2] The authenticity of Bartolus' *Tractatus de Differentia inter Jus Canonicum et Civile* is very doubtful. It is denied by Diplovatacius, who says that it is composed from a similar treatise by one Jacobus Albertus de Bononia, who lived at Verona, and flourished 1330 (vide Introductory note in Bale ed. p. 402). Stintzing also, in his *Geschichte der populären Literatur des römisch-kanonischen Rechts in Deutschland*, pp. 70–1, doubts its authenticity.

[3] Vide Marcel Fournier, "L'Église et le Droit Romain au XIII^e siècle" (in *Nouvelle Revue Historique de Droit Français et Étranger*, 1890), p. 114.

branch of study comparable to any in dignity and independence and superior to all save theology. It need not, then, surprise us if we find that this Civilis Sapientia is thought a proper material for the solution of problems which to us would seem entirely foreign to law. Bartolus was far from being a man who knew only law. He had studied Hebrew[1] and Geometry[2]; the *Tractatus Testimoniorum* alone would show that he was a student of Aquinas[3]; he commented on a Canzone of Dante[4]

[1] Vide *Tract. de Insign. et Armis*, § 29, p. 344. Bartolus records a dispute with his master as to the rationality of writing from right to left, as in Hebrew.

[2] Vide *Tyberiadis*, Proem. p. 363, where he names his friend Guido of Perugia, "magnus theologus universalis in omnibus qui meus fuerat et erat in geometria magister." Bartolus wrote this treatise when on a holiday in a villa by the Tiber. The river, its banks and its bed, suggested various legal problems to him, which he began to work out merely for his amusement, until warned in a vision to make them into a treatise. When he was in great doubt about certain "figurae" in the second book (there are wood-cut "figurae" in all the editions), Guido of Perugia chanced to visit him, and, by reason of the heavy rains, was compelled to spend the night with him: "cum ipso praedicta contuli et figuras secundi libri formare complevi et multa spiritualia gaudia ex collationibus spiritualibus secum habui," etc.

[3] With the passages quoted from the *Tractatus Testimoniorum* above may be compared Aquinas, *Summa Theologica*, II. 1, quaest. 55–62.

[4] Bartolus mentions Dante twice. On one occasion he refers to Dante's *Monarchia*—we shall consider the passage later in dealing with Bartolus' political theories. But even more interesting is his other mention of Dante, in his *Comment. on Codex*, Tres libri (C. XII. 1. 1). Bartolus is discussing "Quid sit nobilitas?" and introduces "Dantes Allegeri de Florentia, poeta vulgaris laudabilis recolendae memoriae, qui circa hoc fecit unam cantilenam in vulgari, quae incipit 'Le dolce rime d'amor.'" He disagrees with Dante's doctrine of nobility, but does so reverently—"salva reverentia tanti poetae." However incongruous Bartolus' legal criticisms of the Canzone may seem to us, we may well remember Dante's own analysis of his poems,

and wrote a treatise on Heraldry[1]. But in all his studies and all his interests the Civilis Sapientia was the medium through which they were approached. This is not sufficiently explained by saying that law was to Bartolus a "passion rather than a pursuit[2]"—though perhaps true in itself. It must rather be explained by the conception of the Civilis Sapientia as a branch of learning, which considers not only the "altissimas causas," but "causas inferiores" as well, and which, as only theology besides, is complete in itself, needing no other "adminiculum." Someone once asked

both in the *Vita Nuova* and the *Convivio* (the Canzone in question is in the *Convivio*, Trattato IV.). Bartolus' Repetitio on this Law (C. XII. 1. 1) is not found in all editions—not e.g. in the Turin ed. of 1577. Both his references to Dante were published separately by the great Dante scholar, Witte, in 1861, on whose reprint there are a few pages of just criticism by Negroni, "Dante Allighieri e Bartolo di Sassoferrato" (in *Rivista di Cose Dantesche*, and published separately, 1890). Witte's reprint may also be found in Bernabei, "Bartolo da Sassoferrato e la Scienza delle Legge," *Documenti*, p. 168 and ff.

[1] *Tract. de Insign. et Armis.* As a treatise on heraldry we should nowadays think it very insufficient—in fact it has nothing about what we should call the "Laws of Heraldry." On the other hand the opening words are significant of Bartolus' whole intellectual standpoint: "Horum gratia de insigniis et armis quae quis in vexillis et clypeis portat videamus, et primo an hoc sit licitum, et eo casu quo est licitum, qualiter sint pingenda et portanda." Heraldry, no less than the Tiber, suggests legal problems. Having decided in what cases it is lawful—and Bartolus allows anyone to adopt arms, provided they do not already belong to someone else—Bartolus gives some very fanciful explanations of the heraldic colours, and there can be no doubt that Rabelais in Book I. chaps. 9 and 19, is laughing at this treatise; especially since he mentions a treatise of Laurentius Valla, attacking Bartolus on the same subject.

[2] Figgis, "Bartolus and European Political Ideas" (in *Transactions of Royal Hist. Society*, vol. XIX. 1905), p. 151. But these pp. 151–6 of Dr Figgis' paper, as a whole, give an admirable picture of Bartolus' intellectual characteristics.

Johnson whether Lord Coke was not a "mere lawyer." Johnson feared he was—but thought that Lord Coke "would have taken it very ill if you had told him so." To Bartolus the phrase a *mere* lawyer would have meant little. Had he been accused of being one, he would have answered that he was indeed "minimus inter legum doctores[1]"; but that, apart from theology, law was complete and sufficient in itself—he might have pointed to his library of 34 books of theology and 30 of law[2], as containing the sum total of all wisdom.

If then, in the matter that concerns us particularly, we say that Bartolus was not a political thinker, we must remember that this distinction between law and politics is rather ours than his. His Civilis Sapientia is a term that can include far more than our term Law. The field of action which Bartolus sketches out for the jurist is very significant. In my Father's house, that is to say in this Civilis Sapientia, there are, he says[3], "many mansions." "Quidam enim ad legendum in civitatibus regiis assumuntur, quidam ad assidendum in locis insignibus praeponuntur, quidam ad advocandum in curiis principum et regiis attrahuntur, alii ad consulendum in cameris assidue requiruntur, alii ad consilium principum assumuntur. Hi enim sunt quibus respublica regenda committitur." Similarly, in his treatise *De Regimine Civitatis*, when he is about to discuss the best form of government, he says—"Haec investigatio necessaria est juristis: quoniam domini

[1] Bartolus usually signs his "Repetitiones" thus.

[2] Savigny, p. 152, note e, gives these numbers on the authority of Diplovatacius.

[3] *Sermo in doct. do. Jokannis de Saxoferrato*, p. 508.

universales, dum de reformatione civitatis tractant, vel juristas consulunt, vel eis committunt; vel cum ipsi assident apud eos, de regimine civitatis querela proponitur[1]."

With this conception of the lawyer's task in mind, we may now turn to the political theories of Bartolus. Those theories, we must remember, are the "disjecta membra" of a system, scattered up and down his legal commentaries. Our task cannot be analysis, but rather the reconstruction of such a system of thought, as we may suppose existed in the mind of Bartolus. For this reason we must especially endeavour to avoid an arbitrary or incomplete choice of topics, on which to examine his political theories.

[1] *Tract. de Reg. Civ.* § 6, p. 418.

It is interesting to compare with these views of the Jurist's field of action the following passage from Bodin, in the introductory (Latin) letter to his *De la République*. Bodin, we may remember, was a Bartolist, in days when lawyers were divided into two very hostile camps—Bartolists and Novitii: "Juris consulti...peti consueverunt qui quidem respublicas instituere, fines imperiorum regere, causas regum disceptare, populorum mores sanare, principum foedera sancire, civium lites et controversias dirimere, divinas humanasque leges ad hominum inter homines societatem accommodare didicerunt."

CHAPTER II

THE POLITICAL THEORIES OF BARTOLUS

"MAGNA et ardua sunt et fundamentum totius juris nostri," says Albericus de Rosate[1], a contemporary of Bartolus, discussing questions connected with the extent and character of the Empire, in his commentary on the Law Cunctos Populos. The opening words of this first law of Justinian's Code—"Cunctos populos quos clementiae nostrae regit temperamentum"—invited discussion on the universal lordship of the Emperor. These words "Cunctos populos quos," says Bartolus[2], imply that there are certain peoples who are not "sub

[1] Vide *Comment. on Codex*, Part I. (C. I. 1. 1), p. 6 verso and ff. The whole of this long commentary is well worth attention—"Quid ergo," he asks in § 11, "sub praedictis pro veritate tenebimus? Quia magna et ardua sunt et fundamentum totius juris nostri, et non reperi tacta per alios, secundum mei paucitatem ingenii subjiciam quod verum fore crediderim correctione cujuslibet melius sententientis, altius exordiendo materiam et distinguendo tempora et originem et progressum imperii." It is to be noted that he refers both to John of Paris' treatise *De Regia et Papali Potestate* and to Dante's *Monarchia* —and again in his *Commentary on Codex*, Part II. (C. VII. 37. 3), p. 108. The lawyers show a fairly general acquaintance with Dante's *Monarchia*. The canonist Zabarella, in his Comment. on the Decretal Venerabilem, similarly refers to it, as well as to the *Defensor Pacis* of Marsiglio of Padua—not "is qui late de medicinis scribit," he adds. This is interesting, in view of the fact that it is generally stated that Marsiglio had studied medicine.

[2] *Comment. on Codex*, Part I. (C. I. 1. 1), p. 7.

Imperio," while elsewhere[1] in the Law Books the Emperor is said to be "dominus totius mundi." Bartolus solves the difficulty by offering two explanations of the word "regit[2]." Either the Emperor meant that he ruled all peoples de jure or de facto. In the latter case, the relative "quos" must be taken "restrictive," since de facto there are some who do not obey the Emperor. But Bartolus considers that the former meaning was in the Emperor's mind, and so the relative must be taken "declarative." This distinction between right and fact—the acceptance of the Imperial claims in right, with the accompanying recognition of their invalidity in fact—is at the basis of all the political theories of Bartolus. But if de jure the Emperor's position as lord of the whole world is unassailable, this does not imply that all other "dominium" is merely de facto. The Emperor is "dominus totius mundi vere," but others can be domini "particulariter"; the world considered universally is the Emperor's, but "singulae res" are not necessarily his[3]. Again he discusses the question in his Commentary on the first preface to the Digest[4]

[1] Bartolus refers, for an example, to D. XIV. 2. 9—"Respondit Antoninus Eudaemoni, 'Ego quidem mundi dominus etc.'"

[2] "Aut verbum 'regit,' hic positum intelligitur prout de jure est, et tunc de jure regit (i.e., the Emperor) omnes populos; et sic relativum ponitur declarative—'quos,' scilicet 'omnes.' Et hoc puto fuisse de mente Imperatoris. Aut vis intelligere prout de facto est: et tunc quia quidam de facto non obediunt, et sic talis qualitas non competit omnibus de genere, tunc relativum ponitur restrictive."

[3] Vide *Comment. on Dig. Vet.* Part I. (D. VI. 1. 1, § Per hanc autem), p. 553: "Ego dico quod Imperator est dominus totius mundi vere. Nec obstat quod alii sunt domini particulariter, quia mundus est universitas quaedam; unde potest quis habere dictam universitatem, licet singulae res non sint suae."

[4] *Comment. on Dig. Vet.* Part I. (Prima Constitutio, § Omnem), p. 9,

(De ratione et methodo juris docendi). He recalls the controversy between Bulgarus and Martinus, the successors of Irnerius, the two most famous of the "four Doctors," and records that the Gloss decides in favour of Bulgarus, who held that the Emperor was not lord of the world in so far as that implies a universal ownership[1]. Thus, Bartolus continues, "ratione protectionis et jurisdictionis," the Emperor is lord of the world, because he is bound to defend the whole world; and in the same way "ratione protectionis vel administrationis" anyone is called "dominus" of that which he protects or administers. But, on the other hand, in his Commentary on the Constitution of the Emperor Henry VII, "Ad Reprimendum[2]," on which Bartolus commented near

§ 3: "Quaerit glossa...numquid secundum quod Imperator dicitur habere dominium universalis jurisdictionis, ita et particularium rerum. Quae quaestio fuit antiquitus agitata inter Martinum et Bulgarum... Glossa hic determinat pro opinione Bulgari, quod Imperator non sit dominus rerum particularium. Ad leges contrarias...respondetur quod ratione protectionis et jurisdictionis Imperator dicitur dominus mundi, quia tenetur totum mundum defendere et protegere....Item probatur quia ego video quod ratione protectionis vel administrationis dicitur quis esse dominus....Et haec opinio est vera." Cf. also *Comment. on Codex*, Tres libri (C. XI. 49. 2), p. 104, § 2: "Omnia sunt Principis ad jurisdictionem et universale dominium, sed non quantum ad particulare."

[1] Savigny, *Geschichte des römischen Rechts im Mittelalter*, vol. IV. pp. 180–3, records this controversy and gives the evidence for the well-known story, how Martinus for his answer received a horse from the Emperor Frederick I, Bulgarus nothing—"Amisi equum, quia dixi aequum, quod non fuit aequum."

[2] *Comment. on Constitut. ad Reprimendum* (ad verb. Totius Orbis), p. 262, § 8: "Imperator recte dicitur dominus mundi, scilicet universalis, licet singulares sint domini praediorum suorum. Unde a possessoribus ipse posset vendicare mundum, nec est opus quod omnia sint sua quo ad protectionem etc. ut notatur in prima constitutione Digestorum (in principio), quia imo sunt (i.e. omnia) ipsius, si universaliter considerentur."

the end of his life, in honour of Henry's grandson, Charles IV, he maintains that it is unnecessary to say that the Emperor is lord of everything "quo ad protectionem," since everything is really his, taking everything as a part of the "universitas" of the world, not in its particular aspect, as a separate part of this whole. Thus the Emperor is "rex universalis," lord of the world, but not proprietor of everything in the world. And therefore as "rex universalis" he is above all other powers; for the Empire is of divine origin, and so goes by election, like ecclesiastical offices, while the "reges particulares" are kings by succession, which is less "divine[1]." Men owe the Emperor all loyalty and must honour him with all their hearts; for he is "Deus in terris[2]," and "respectu officii," which must have no end, he may be called "sempiternus[3]." To dispute his power is sacrilege[4]; to

[1] *Tractatus de Reg. Civitatis*, § 23, p. 420: "Omnis rex aut mediate aut immediate a Deo eligitur, vel ab electoribus inspirante Deo....Et ex hoc nota quod regimen quod est per electionem est magis divinum quam illud quod est per successionem. Ideo in rebus ecclesiasticis successio omnino detestatur....Et ideo electio Principis, qui est rex universalis, fit per electionem praelatorum et principum, non autem vadit per successionem....Hoc enim Imperium Deus de coelo constituit....Reges vero particulares sunt magis ex constitutione hominum." Lucas de Penna, *Comment. on Codex*, Tres libri (C. xi. 71. 1), p. 637, § 1, says however—"Rex quoque plus juris habet in regno, quam Imperator in Imperio, nam ex successione est, ut vivente patre filius ejus rex dicitur...et Imperator ex electione."

[2] *Comment. on Constit. ad Reprimendum* (ad verb. Fidelitatis), p. 262, § 5: "Tota fidelitas debet Principi. Est enim Deus in terris ...Et ibi nota de Deo scriptum est 'Diliges Dominum Deum tuum ex toto corde tuo, et ex tota mente tua, et ex omnibus viribus tuis.'"

[3] *Comment. on Codex*, Tres libri (C. xi. 9. 2), p. 79, § 1: "Imperator respectu officii, quod non debet habere finem, potest dici sempiternus." He adds that it is wrong "to adore" the Emperor, unless "pro quadam exhibitione reverentiae."

[4] *Tractatus de Insignibus et Armis*, § 3, p. 341: "De Principis enim potestate disputare sacrilegium est."

deny that he is "dominum et monarcham totius orbis" (de jure of course) is perhaps heresy[1].

Grotius[2] was very severe on Bartolus for this last expression, though not quite just. It comes from one of the most interesting and important passages in his works. He is discussing—"Quis dicatur populus Romanus." Dismissing the opinion of the Gloss, which divides mankind into five "genera gentium," he maintains that there are but two "principaliter," the Populus Romanus and the Populi extranei. As to the Populus Romanus, the Gloss, he continues, says that it stands for the whole Roman Empire (accipitur pro toto Imperio Romano). "Sed diceres tu, cum modicae gentes sint, qui Romano Imperio obediant, ergo videtur quod sit parvus populus Romanus." To this Bartolus answers by an analysis of the various "gentes" who made up the western European world of his time. "Quaedam sunt gentes quae Imperio Romano obediunt, et istae sine dubio sunt de populo Romano." Then there are those

[1] *Comment. on Dig. Nov.* Part II. (D. XLIX. 15. 24), p. 637.

[2] Grotius refers to the "stultum titulum"—"quem quidam tribuunt Imperatori Romano, quasi ipse etiam in remotissimos et incognitos hactenus populos jus imperandi habeat, nisi, Jurisconsultorum diu princeps habitus, Bartolus haereticum ausus esset pronunciare qui id negat." Vide *De Jure Belli ac Pacis*, p. 348. Bodin pretends that this is Bartolus' return to the Emperor Charles IV, "qui annoblist Bartol, et luy donna le lyon de Guelles en champ d'argent, et puissance d'ottroyer benefice d'aage, pour luy et pour les siens qui feroient profession d'enseigner le droit: et en recognoissance d'un tel bienfait, Bartol a laissé par escrit, que tous ceux-là sont heretiques, qui ne croient pas que l'Empereur soit seigneur de tout le monde, ce qui ne merite point de response etc." (Vide *De la République*, pp. 138–9.) There is no need to give this explanation—nor is there any evidence to show that Bartolus wrote this passage after his embassy to Charles IV, which in fact took place not two years before his death.

"gentes" who do not obey in everything, but do in certain points—"ut quia vivunt secundum legem populi Romani, et Imperatorem Romanorum esse dominum omnium fatentur, ut sunt civitates Tusciae, Lombardiae et similes; et isti etiam sunt de populo Romano. Nam cum populus Romanus in eis exerceat jurisdictionem in aliquo articulo, totam jurisdictionem retinet." Then there are those who, like the Venetians, obey the Emperor in no point —"nec istis legibus," claiming exemption by concession of the Emperor, "et isti similiter sunt de populo Romano," from the very fact that they hold their exemption on the basis of concession from the Roman Empire. Then there are those who do not obey the Emperor, "tamen asserunt se habere libertatem ab ipso ex contractu aliquo, ut provinciae, quae tenentur ab Ecclesia Romana, quae fuerunt donatae ab Imperatore Constantino Ecclesiae Romanae; posito pro constanti, quod donatio tenuerit, quodque revocari non possit, adhuc dico istos de populo Romano esse. Nam Ecclesia Romana exercet illas in terras jurisdictionem quae erat Imperio Romano et istud fatetur; non ergo desinunt esse de populo Romano, sed administratio istarum provinciarum est alteri concessa. Vide in simili, jurisdictio in clericos est concessa totaliter Papae; desinuntne propter hoc clerici esse cives Romani? Certe non, quod apparet, quia retinetur jus succedendi." Finally the kings of France, England, etc., and presumably their subjects too, are also a part of the Roman people—"si enim fatentur ipsum (i.e. the Emperor) esse dominum universalem, licet ab illo universali dominio se subtrahant ex privilegio vel ex prescriptione vel consimili, non desinunt esse cives Romani per ea quae dicta sunt.

Et secundum hoc quasi omnes gentes qui obediunt sanctae matri Ecclesiae sunt de populo Romano. Et forte," he continues, " si quis diceret dominum Imperatorem non esse dominum et monarcham totius orbis, esset haereticus. Quia diceret contra determinationem Ecclesiae, contra textum S. Evangelii, dum dicit, 'Exivit edictum a Caesare Augusto, ut describeret universus orbis,' ut habes Luc. II. Ita etiam recognovit Christus Imperatorem ut dominum."

The whole passage is very significant and we shall return to it more than once in the following pages. What for the moment we have to observe is that Bartolus does not make independence of the Emperor mean exclusion from the Populus Romanus or " totum Imperium Romanum." That independence, if it is de jure, must be, he argues, by concession from the Emperor; and, therefore, those who base their independence on such concession, must recognise the Emperor as de jure " dominus omnium," more especially since not to do so is contrary to the teaching of the Church, the Gospel and the example of Christ. This may be a not very solid line of argument—but the conclusion is of the greatest importance. It means that the conception of all western Europe as forming one community can survive, even when the local independence of the units, who compose it, is allowed: we shall return to this point again later. We see, to begin with, that the Populus Romanus is not a " small people."

But Bartolus has not, as Grotius accuses him of doing, made any claim for the Emperor " in remotissimos et incognitos hactenus populos." The truth is that he does not mention any very remote and unknown

peoples, whether within the Populus Romanus or the Populi extranei. He maintains that within the Populus Romanus are all who obey the Roman Church, and he shows that all these, as obedient to the Roman Church and as independent by concession from the Emperor, must recognise the Emperor as de jure "dominus omnium." The Populi extranei are those who do not recognise the Emperor as de jure lord of the world—"Graeci, qui non credunt Imperatorem Romanum esse dominum universalem, sed dicunt Imperatorem Constantinopolitanum esse dominum totius mundi. Item Tartari, qui dicunt Grantchan esse dominum universalem. Et Saraceni, qui dicunt dominum eorum esse dominum totius orbis. Idem in Judaeis." All these, we must note, were actually outside the western Church. Bartolus may have thought that they ought to recognise the western Emperor as lord of the world—but he does not say so. What he does do is to make that recognition the test of inclusion within the Populus Romanus, which, he argues, is therefore conterminous with western Christendom. The line of argument, we may repeat, is weak perhaps: but the conclusion is clear and very important.

But if the Emperor was still lord of the Roman people, it could not be denied that he was a German, seldom in Italy and powerless in Rome itself. Bartolus' patron, the Emperor Charles IV, had come into Italy to be crowned, under a solemn promise to the Pope to stay no more than one night in his capital city of Rome—a promise Charles had religiously kept. That the Roman Emperor was in fact a stranger had to be both recognised and accounted for.

"Imperator est modo in Alemannia et est de jure superior[1]," says Bartolus, discussing reprisals. Later we shall see him recognise the German princes as the Electors to the Roman Empire; and in his *Tractatus de Regimine Civitatis*[2] he discusses how it is that the Empire has been translated to the Germans. All Christians are our brothers, he suggests. The Empire could not have been transferred to a Saracen or other infidel; for this reason examination is necessary before the Emperor's coronation. This explanation is fully in accord with his former definition of the Populus Romanus. Rome is the "communis patria[3]," in which national distinctions disappear. Yet this explanation

[1] *Tractatus Repraesalium*, Quaestio II. 5, § 11, p. 331. The phrase "Imperator venit in Italiam," used more than once by Bartolus, shows how men realise that the Emperor is away in Germany, and that it is exceptional for him to come to Italy. Vide e.g. *Comment. on Codex*, Part II. (C. VI. 25. 6), p. 56; or on *Codex*, Tres libri (C. X. 1. 4), p. 7, § 1: "Imperator venit in Italiam et reperit quandam civitatem, quae erat contra Imperium etc."

[2] *Tractatus de Regimine Civitatis*, §§ 24–5, p. 420: "Nota quod periculosum est habere regem alterius gentis. Sed dices ergo: quomodo per Ecclesiam translatum est Imperium in Germanos, id est Teutonicos...Respondeo, omnes Christiani dicuntur fratres nostri...In hominem vero Saracenum, paganum vel infidelem non possit transferri, et ideo sequitur 'Nec poteris alterius gentis Regem habere.' Et propter hoc necessaria est examinatio ejus qui coronandus est Imperator. Vel expone illa verba secundum Augustinum...'non poteris' i.e. 'non debebis per regem,' cum alterius regnum non ita fideliter conservatur. Et ideo postquam etc." as above.

[3] Vide *Comment. on Dig. Nov.* Part II. (D. L. 1. 33), p. 653: "Quaero, ad quid dicitur communis patria Roma? Respondeo, quia quilibet potest ibi conveniri...Praeterea quilibet de Imperio Romano est ibi civis." Cf. *Comment. on Infort.* Part I. (D. XXVII. 1. 7, § Romae), p. 199: "Dicit Jac. de Arena quod ille qui est in curia Romana debet habere fructus sui beneficii prout si esset in patria sua, quia Roma est communis patria."

does not altogether satisfy Bartolus. He is after all an Italian, and we shall see in later pages of this essay how closely, in the fourteenth century, claims to the Empire were connected with the growing spirit of nationalism, alike in Italy, France and Germany. Bartolus, no less than Dante or Petrarch, must sometimes think of the Empire as rightly and historically an Italian possession. Within the Populus Romanus we have seen many "gentes," and he owns that the "Imperium Romanum postquam fuit ab Italicis separatum semper decrevit in oculis nostris; hoc tamen," he adds, "absque Dei judicio occulto factum non fuit."

Beside the fact that the Emperor was away in Germany, the medieval civilian had to consider another point of contrast between the Roman Empire of his own day and the old Empire of his Law Books. The medieval Emperor only received his title after the Imperial coronation at Rome; before that he was Rex Romanorum[1]. The title came into use in the eleventh century; up till then the uncrowned Emperors had styled themselves merely kings of the Franks, Saxons, etc.[2] The question which the medieval lawyer had especially to consider was, whether the Rex Romanorum could exercise Imperial authority and use Imperial rights before his coronation, or whether these also

[1] Vide *Comment. on Dig. Vet.* Part I. (Prima Constitutio), p. 8, § 15: "Quaero quando quis dicatur Imperator esse. Et dico quod ante coronationem non est Imperator sed Rex Romanorum...Sed post coronationem dicitur Imperator sive Princeps...nam Princeps et Imperator sunt idem." Cf. *Comment. on Infort.* Part I. (D. XXIX. 1. 43), p. 448, §§ 1–2: "Habes quod ex sola electione non est quis miles nec aliquam dignitatem consequitur ex electione sola...Item nec Imperator efficitur Imperator, nisi suscepta infula."

[2] Vide Bryce, *Holy Roman Empire*, Note C, pp. 530–1.

depended, like the Imperial title, on the coronation at Rome. Bartolus maintains decidedly that he can. The Rex Romanorum is "generalis dominus[1]." He points to the Constitution "Ad Reprimendum," on which he is commenting, and which deals with High Treason, whether against the Imperator or Rex Romanorum. Moreover he had himself seen letters of Charles IV—"quae literae sunt Perusii sub bulla aurea"—quashing "omnes et singulas sententias processus et condemnationes, mulctas et sorbanitationes per quoscumque divos Romanorum *Imperatores et Reges*...latas seu promulgatas," and other letters granting various privileges "tamdiu, quamdiu per successorem nostrum, *Regem Romanorum seu Imperatorem*, non fuerit revocatum." Bartolus points to these as a decisive answer to the

[1] Vide his *Comment. on the Constitutio ad Reprimendum* (ad verb. Reges), p. 264: "Nota diligenter quod ante coronationem habetur (i.e. the rex Romanorum) generalis dominus. Si enim esset privata persona, contra eum facientes non inciderent in legem Juliam Majestatis, ut hic patet. Et sic potest administrare et dare privilegia.. et sic cessat disputatio Jac. de Arena quam posuit Cynus in lege Bene a Zenone...Potest etiam facere condemnationes: ut patet ex literis domini Caroli Imperatoris, concessis communi Perusii, cum ego tunc apud ipsum legatione fungerer, ubi inter cetera sic ait: 'Omnes et singulas sententias processus et condemnationes, mulctas et sorbanitationes per quoscumque divos Romanorum Imperatores et Reges, praedecessores nostros, contra vos et singulas civitates et communis Perusii personas latas seu promulgatas tollimus et relaxamus.' Potest etiam ante coronationem concessiones aliorum Imperatorum tollere et revocare, quod patet ex aliis literis ejusdem Imperatoris, ubi inter cetera concessit quaedam, et addit, 'tamdiu quamdiu per successorem nostrum, Regem Romanorum seu Imperatorem, non fuerit revocatum,' quae literae sunt Perusii sub bulla aurea. Et praedicta vera, postquam persona est electa in Romanorum regem et per sedem Apostolicam fuerit approbata. Aliter autem videtur tenere Glossa in c. 1. de jurejur. in Clementinis, quod etiam electi in discordia possunt administrare."

question. In them Rex and Imperator Romanorum are put on the same level, and they are of course especially authoritative as the words of Emperors themselves. Discussion is unnecessary—"sic cessat disputatio Jac. de Arena quam posuit Cynus in lege Bene a Zenone." In his own Commentary on this law[1] Bartolus refers again to Cino's reproduction of Jacobus de Arena's solution of the question, as also to Durandus (Speculator), but here too he himself seems to think the discussion unnecessary; he adds nothing of his own, except that "de hoc non est nostrum disputare, sed quod Imperator velit, dicit."

But though Bartolus says "cessat disputatio Jacobi de Arena[2]," it is well worth turning to this very

[1] *Comment. on Codex*, Part II. (C. VII. 37. 3), p. 168. Cf. *Comment. on Authenticum* (Collatio VI. Constitutio quae de dignitatibus, § Quidquid), p. 92, § 8, where he again refers to the disputatio of Jac. de Arena, "quam disputationem refert Cynus," and refers to his own commentary on C. XII. 3. 5 (p. 123), where however he does not touch the real question at issue (i.e. the rights of the Rex Romanorum after election), but says generally: "Nota...quod videatur posse dici, quod ex sola electione jus non tribuatur, sed tunc cum electionis literae praesentantur," which is hardly very pertinent.

[2] Hugelmann, *Die deutsche Königswahl im Corpus Juris Canonici*, does not identify the "Jaco. de Are.," mentioned both by Bartolus and by Johannes Andreae (in the Gloss to the Clementine Decretals) as the author of the Disputatio, which Cino "ad literam posuit." Vide p. 123, n. 1: "Wer mit der Abkürzung Jaco. de Are. gemeint ist, vermochte ich bisher nicht mit Sicherheit festzustellen. Ich vermute darunter Jacobus de Ardizone." In the only edition of Jacobus de Arena, which I have seen, the Disputatio is not to be found; I have not succeeded in seeing any edition of Jacobus de Ardizone. But in the edition of Cino, which I have used (Frankfort, 1597), the author of the Disputatio is given as "Jacobus de Arena," in full. In the editions of Bartolus we often find "Jac. de Are.," "Jac. de Aret.," "Jac. de Aren." each within a few lines of the others. Failing decisive evidence to the contrary, it seems more natural to refer the Disputatio to the more famous Jacobus de Arena.

interesting discussion, as reproduced "de verbo ad verbum" by Cino[1]. After a long argument it is decided that the Rex Romanorum obtains "potestatem et jurisdictionem imperialem" immediately after election, and is not dependent for them on the Imperial coronation. The coronation has spiritual effects—"dona spiritualia, sive dona Spiritus Sancti et gratiam consequitur Imperator." Jacobus de Arena and Cino thus answer a difficulty which would naturally suggest itself—if the Rex Romanorum has all the Imperial rights and jurisdiction before his coronation, is the coronation itself necessary, or at any rate does it do more than give a mere change of title? Such an idea, said Albericus de Rosate[2], "nemo sanae mentis approbabit." But Bartolus leaves the point unquestioned. He notes that the Emperor is not Emperor "nisi suscepta infula," but at the same time, as regards the exercise of Imperial authority, he makes the Rex Romanorum in no way inferior to the crowned Imperator.

We may notice one other point of interest. Bartolus makes the Papal approbation a necessary preliminary to the exercise of Imperial authority by the Rex Romanorum—the mere election is not enough. Here he differs not only, as we should expect, from staunch Imperialists like Cino, but it would seem even from some of the canonists. Bartolus himself has noted that the Gloss to the Clementine Decretals maintains that "etiam electi in discordia possunt administrare." Elsewhere he has referred to Durandus, who says that the Emperor "ex sola principum electione etiam ante

[1] *Comment. on Codex*, Part II. (C. VII. 37. 3), p. 446.
[2] *Comment. on Codex*, Part I. (C. I. 1. 1), p. 108 verso.

confirmationem aliquam verus est Imperator et consequitur jus administrandi[1]." Bartolus clearly does maintain the necessity of Papal approbation—we shall find Bartolus a very shy thinker wherever the Papacy is concerned. The question of Papal approbation was one of great importance. The necessity of going to Rome itself for the Imperial coronation made it often impossible for the coronation to follow immediately, or even soon, after the election in Germany. To make the exercise of Imperial authority dependent upon the coronation was, at least for everyone but the Pope, highly undesirable. Later the title "Imperator electus" superseded that of "rex Romanorum," and as, in ordinary usage, the "electus" was left out, those who were never crowned at Rome received the full Imperial titles. Thus the really important question was the necessity of Papal approbation. In Bartolus' own day its importance is illustrated by the history of the Diet of Rense. Bartolus, however, does no more than affirm its necessity, referring us at the same time to contrary opinions. He himself offers no discussion.

We have seen above that Bartolus contrasts the elective "rex universalis" with the hereditary "reges particulares." Election is a more divine method of

[1] *Speculum Juris*, II. Partic. I., De Rescript. Praesentat., § Ratione, p. 71, § 18: "Et sunt hic argumenta quod donatio facta Ecclesiae Romanae per dominum Rodolphum regem Alemaniae, nondum coronatum in Imperatorem, non teneat....Arguitur tamen quod valeat rescriptum et praedicta donatio....Imperator enim ex sola principum electione etiam ante confirmationem aliquam verus est Imperator et consequitur jus administrandi." However he goes on to maintain that the donation was really a restitution of lands which rightly belonged to the Church and had been held back by "principes tyranni."

appointment than succession, and therefore the Princeps is elected by the princes and prelates "inspirante Deo." The conception of the Imperium as "a Deo" went back to the Christianised Empire[1], but it never excluded the conception of the Imperium as a delegation from the people, and two famous texts invited the medieval lawyer to consider the people as the source of Imperial authority. But if the Law Books pronounced the Empire a delegation, by means of the Lex Regia, from the Roman people, none the less the electors to the Empire were now the German princes. So far indeed as the "populus Romanus" stood for the "whole Roman Empire," the electors might be considered as representing the Populus Romanus[2]. But we have to remember that the medieval lawyers applied the term "populus Romanus" not only to the whole Empire, but also, in a narrow sense, to the populace of the medieval city of Rome. Twice in medieval history that populace had attempted to play the rôle. The Revival of Roman Law had not only served for the foundations of the Hohenstaufen Empire, but had recalled to men's minds that, before the old Empire had existed, there had been a Populus Romanus, itself sovereign over the world, and that the very sovereignty of the Emperor had been in origin a delegation from this people. It was with this narrow "populus" in mind that the lawyers, for the most part, discussed the relations of the Populus Romanus to the Emperor.

[1] Vide Gierke, *Deutsche Genossenschaftsrecht*, vol. III. p. 128.

[2] The Pope too, so far as he was allowed to have instituted the Electors, might be considered a delegate of the People. Vide Gierke, *Pol. Theories of the Middle Age*, notes 155–7, pp. 149–50, more especially for the references to Occam.

The lawyers on this topic discussed two questions—first, whether the delegation of Imperial power by the Lex Regia was a revocable grant, and secondly, whether, after the act of delegation, any power still remained with the Populus, in particular the power of making laws; at the same time they considered whether the Senate had still authority to pass Senatusconsulta.

Bartolus discusses and decides the two questions together. The Emperor alone can make and interpret law. Originally, even after the delegation of the Imperium to the Emperor, the Populus retained the power of making law, because they still retained the power of election and deprivation. But nowadays "omnis potestas Imperii est abdicata ab eis." The German princes have the right of election, the Pope alone the right of deprivation. The people retains "nihil de Imperio," and so cannot retain their legislative power. But the passage is well worth quoting in full. "Nota," says Bartolus, "quod solus Imperator potest legem condere et interpretari....Opponitur et videtur quod imo et alius quam Imperator potest legem condere, scilicet populus Romanus....Item senatus...Solutio: dicunt quidam, Imperator solus potest, et nullus alius solus. Alii dicunt, quod illi faciunt Principis auctoritate, et hoc magis placet. Sed an hodie populus Romanus et senatus possit (sic) facere legem? Gl. dubitat hic et in lege 'Non ambigitur.' Breviter dicebam ibi[1], ego

[1] *Comment. on Dig. Vet.* Part 1. (D. 1. 3. 8), p. 53. Bartolus is not quite so decided here. "Videtur quod soli Principi sit licitum condere legem....Timore hujus contrarii fuit revocatum in dubium, utrum hodie isti possint condere legem. Quidam (i.e. say) quod sic...Quia verum est quod solus Princeps potest, non tamen alius solus, sed simul. Unde senatores possunt condere legem et populus Romanus idem

credo quod populus Romanus et senatus non possunt facere legem. Ratio est: postquam populus Romanus transtulit potestatem in Principem, adhuc apud eos remansit potestas eligendi et privandi...et illo tempore poterat populus Romanus condere legem, et etiam senatus: sed hodie omnis potestas Imperii est abdicata ab eis. Jus enim eligendi habent principes de Alemannia, et jus privandi habet solus Papa....Cum enim nihil sit quod de Imperio remanserit eis, non video quo possint legem condere, quod nota. Et hanc rationem nullus facit[1]."

We may next turn to a passage from the Commentary on the Code[2]. Bartolus is considering various difficulties, and the solution of these difficulties, in this particular law, C. VIII. 52. 2—"Secundum Placentinum (quod) dicta lex 'De quibus' (D. I. 3. 32) loquitur secundum tempora antiqua, secundum quae populus Romanus poterat facere legem generalem; ergo et consuetudinem generalem contrariam legi, et illam contrariam legem

poterit, cum populus Romanus posset Principis potestatem revocare. Sed tamen hoc glossa non tenet, sed tenet quod populus non posset hodie. Unde Gulielmus (de Cunio) bene dicit, quod est differentia inter legem et senatusconsultum. Nam legem nullus potest facere nisi Princeps, sed senatusconsultum potuerunt facere senatores"—(he does not say "possunt"). He then goes on to discuss whether Populus Romanus "possit revocare potestatem Imperatoris," and gives Gulielmus de Cunio's arguments to prove that they can—"imo dicit plus, quod possit eum degradare"; he does not decide himself, but goes off to ask—"Quid si coram senatoribus est impetrata venia aetatis, an ipsi hoc possunt?"

[1] *Comment. on Codex*, Part I. (C. I. 14. 11), p. 92, §§ 2–4.

[2] *Comment. on Codex*, Part II. (C. VIII. 53. 2), pp. 324 and 325. This law runs: "Consuetudinis ususque longaevi non vilis auctoritas est, verum non usque adeo sui valitura momento ut aut rationem vincat aut legem."

tollentem. Haec lex loquitur secundum tempora moderna, secundum quae populus Romanus non potest legem generalem facere: ergo nec consuetudinem contrariam illam vincentem.... Quod non videtur bene dictum, quia secundum hoc dictae legi 'De quibus' esset derogatum seu abrogatum...quod in casu dubii dicere non debemus....Praeterea Gulielmus de Cunio in dicta L. 'De quibus' illud impugnat et aliter fatetur, quod in Principem translata est potestas condendi legem expressam et scriptam, non autem consuetudinariam, quae in eum non potuit transferri, cum procedat ex tacito consensu....Et sic dicit hodie populum Romanum posse facere consuetudinem generalem, cum potestas ipsius legis consuetudinariae inducendae non sit translata in Principem; et secundum hoc dicta lex 'De quibus' hodie remanet in suo statu, quod placet Mar. Suli. (Martinus Sulimanus), ubi dicit hodie populum Romanum legem posse facere generalem scriptam et expressam: de quo hic non insisto, quoniam plene est tractatum in lege finali, supra, 'De legibus et constitut.'" (C. I. 4. 14).

We see here that while Placentin and Gulielmus de Cunio both decide that as regards laws—"scriptae et expressae"—the Roman people have no power left them, Martinus Sulimanus clings to the opinion that they still have that power. Here again Bartolus does not decide, but refers us back to the passage, which we have quoted above, from the Commentary on C. I. 14. 12, where he maintained that the Roman people no longer has the power to legislate[1].

[1] Jacobus Buttrigarius, Bartolus' master, maintained the right both of people and senate, and his argument is well worth quoting. Vide

The attempts of Arnold of Brescia and of Rienzi may warn us against dismissing these discussions as absurd or purely academic. On the other hand the very failure of these attempts had made quite clear that the world would not accept either laws or commands from the Roman populace. Bartolus, at any rate, denies the Populus any power to make general laws. We may note, however, that in the second passage, quoted above, the discussion is not merely on the right of the Roman people to make laws—"scriptae et expressae"—but also on the right to give their customs the force of law. Placentin denied them this last right, Gulielmus de Cunio allowed it: Bartolus himself seems to lend some support to the latter view[1]. Yet here too

his *Comment. on Codex*, Part I. (C. I. 14. 2), p. 31 verso: "Quaero an populus Romanus possit hodie legem condere et Imperium revocare. Resp. sic, quia quaecunque disponuntur per modum legis possunt revocari per contrariam legem...sed ita est quod Imperium fuit translatum in Principem per legem revocatoriam; ergo per contrariam legem possunt revocare. Praeterea, nonne potestatem dedit prius populus Romanus senatui et revocavit et dedit Principi?...Sed potest dubitari an senatus hodie possit legem facere: nam ab eo Imperator potestatem non habet, sed a populo. Sed dic quod nullus solus potest facere nisi Princeps, sed omnes senatores simul qui sunt centum numero possunt facere. ..Nam tempore quo fuerit facta illa lex jam erat translatum Imperium in Principe, cum post primum Codicem fuerit compilatum Dig. vetus, et tamen ibi dicitur quod possunt legem facere. Vel dic quod faciant auctoritate Principis."

[1] We may continue the passage above:—"Sed contra praedicta instatur. Nam non debemus sequi quod pop. Rom. fecit, scilicet utendo moribus contra legem, sed quod facere debeat, scilicet utendo lege communi....Sed gl....sic respondet et bene, videlicet quod non debemus sequi illud quod pop. Rom. facit perperam et erronee...Sed bene sequi debemus illud quod pop. Rom. ex certa scientia fecit consuetudinem inducendo...quia Roma est communis patria...et est caput mundi, et sic aliae civitates debent sequi ipsius consuetudinem, non autem ipsa aliarum civitatum...unde illud vulgare: 'Roma caput mundi tenet orbis frena rotundi.'"

the discussion was, if we should not say academic, at least a question that in fact was decided; and Cino, realising this, had told his readers that he did not care which view they held—either as regards the power to make law or custom—since he knew that no one would observe them outside of Rome itself. "De his opinionibus tene quae magis tibi placet, quia ego non curo. Nam si populus Romanus faceret legem vel consuetudinem de facto, scio quod non servaretur extra urbem[1]." The whole discussion as to the power of the Populus Romanus, with regard to law or custom, was by this time merely a remnant of an antiquated conception of the Populus Romanus, as represented by the actual Roman populace. Rome might always be the "communis patria" or the "caput mundi," but no longer in the sense that its populace was, or represented, the Populus Romanus.

The Emperor, then, alone can make general laws. But we have seen that this Emperor, though de jure "dominus omnium," is de facto not obeyed by many kings and peoples. Is this same distinction between de jure universality and de facto disobedience to hold good in the case of the laws of this Roman Emperor?

If we turn back to the discussion as to the extent of the Populus Romanus, we see that, though in this passage Bartolus refers to obedience to the Roman Law, as a sign of obedience to the Empire "in aliquibus"—in the case of those "qui non obediunt Romano Imperio in totum, sed in aliquibus obediunt: ut quia vivunt secundum legem populi Romani, et Imperatorem

[1] Cino, *Comment. on Codex* (I. 14. 12), p. 29.

Romanorum esse dominum omnium fatentur, ut sunt civitates Tusciae, Lombardiae et similes"—and again refers to those who, like the Venetians, "nullo modo obediunt Principi nec istis legibus,"—he does not finally introduce this question of obedience or disobedience to Roman Law as the decisive test of inclusion within the Populus Romanus[1].

With this we may compare another passage, which follows immediately after his explanation of the words "Cunctos populos quos etc.," in the first law of the Code, which we have noticed above. He explains that these words may be either understood de jure—and that he believes was what the Emperor meant—or, if the words are to be explained de facto, then the relative "quos" must be understood "restrictive," and this is given as Cino's opinion—"per duas rationes. Primo ne leges sint apud eos ludibrio, quod esse non debet....Secunda ratio quia non sunt digni (i.e. those who do not obey the Emperor) legum laqueis innodari.' As a matter of fact the reasons, though given by Cino, were given before him by Petrus de Bella Pertica, whose words are well worth quoting. "Diceret aliquis," he says[2], "quae est ratio sui dicti, ex quo omnes Imperio subjacent, ad quid tunc dixit, 'quos nostrae clementiae etc.?' Breviter, quia sunt de jure sub Romano Imperio, et de facto non reguntur, quia reputantur viles, ut non sint digni legum laqueis innodari; unde alias Graeci noluerunt legem Romanis tradere, nisi essent digni. Unde cum illi, qui non obediunt Imperio, viles reputantur, hinc est ut non sint digni legibus ligari: et ideo

[1] Vide above, p. 28.

[2] Repetitiones in Aliquot...Cod. Leges (C. I. 1. 1), p. 8, § 3.

dixit Imperator, 'cunctos populos quos etc.'...Quaedam sunt personae, quae propter eorum vilitatem legum laqueis non sunt dignae innodari....Item alia ratione Imperator noluit comprehendere eos, qui non reguntur: nam licet posset omnes cohercere, tamen quia illi, qui non recognoscunt Imperatorem dominum, non servarent statutum, ne ex errore uno sequatur alius error...ne statuta sua reputarentur frustatoria et delusoria, quod esse non debet, ideo Imperator talibus noluit statutum suum extendi[1]."

Now the argument of Petrus means this, that obedience to the Emperor means obedience to his laws, that those who do not obey are unworthy of his laws, and that therefore the Emperor, rather than let his laws be illusory, renounces his superiority over those who do not obey him. There could be no more curious or interesting example of the difference between our conception of law and that of the Middle Ages. To

[1] As Bartolus refers here to Cino it may be well to give Cino's words as well as those of Petrus. Vide Cino, *Comment. on Codex* (C. I. 1. 1), p. 1 verso, §§ 2–3: "...Videtur innui quod Imperator non regit totum populum ut colligitur ex litera ista 'quos etc.' Sed lex alibi dicit quod Imperator est totius mundi dominus....Praeterea lex cavetur quod Deus de coelo constituit Imperium....Ergo temporaliter sub Imperio omnes populi omnesque reges sunt, sicut sub Papa sunt spiritualiter. Ergo contra. Respondeo, litera ista 'quos' potest sumi duobus modis. Uno modo implicative....Secundo modo restrictive.... Et secundum hoc respondeo quod Imperator totius mundi de jure dominus est: sed de facto sunt aliqui qui resistunt, propter quod ponit hic istam literam restrictivam, et hoc facit duobus rationibus: prima, ne suae leges apud illos sint illusoriae, quod esse non debet...et sic ex uno errore sequeretur alius....Secunda ratio est, quia illi, qui non recognoscunt Imperatorem suum dominum, reputantur viles et indigni laqueis suae legis innodari....Unde alias dicitur quod Graeci noluerunt tradere leges Romanis, nisi essent digni legibus, et ideo experti sunt eos per signa, sicut refert Glossa."

them law was the "gift and invention of God," and was therefore something too good for the "vile" and the "unworthy"; while to us, who have brought law down from Heaven, and put it, as a command, into the mouth of a "sovereign," the notion of law as too good for its subjects, the notion of a "sovereign" voluntarily abdicating his claims over a part of his subjects, "ne leges sint apud eos ludibrio," is almost incomprehensible. To Bartolus also the view of Petrus and Cino was unacceptable. Not, indeed, because to him law was anything but the "gift and invention of God," but simply because Bartolus, far in advance of these other lawyers, perceived that Imperial law could not be restricted merely to those who remain subject to the Emperor. "Hoc non multum placet," he says after having given the "duas rationes" of Cino, "quia sequeretur quod leges Imperiales non ligarent Florentinos, et alios qui non obediunt Principi de facto"; and therefore, as we saw above, he prefers the "declarative" interpretation of the words "Cunctos populos quos clementiae nostrae regit temperamentum"—i.e. "prout de jure est."

Bartolus here is doubtless thinking chiefly of Italy, but it would be a mistake to suppose that he restricts the universality of Roman Law to Italy[1]. Roman Law

[1] In the case of Frederick II's Constitution "Cassa et Irrita," which was included in the Code, its universal validity is definitely stated, though the "praeceptum de publicando" was only in Italy. Vide *Comment. on Codex*, Part I. (C. I. 2. 12, Authentic. Cassa et Irrita), p. 42, §§ 1–2: "Dicit hic 'per Italiam.' Quaeritur utrum ista constitutio habeat locum alibi quam in Italia. Gl. dicit quod sic, quia eadem ratio, et dicit verum. Nam ista constitutio est generalis in toto mundo, preceptum vero de publicando non fuit nisi in Italia, ubi magis expedit." Albericus de Rosate is very clear; vide his *Comment. on Codex*, Part I. (C. I. 12. 6), p. 45: "Ratio quare haec lex in ea

is the Jus Commune, and the laws of all other peoples are no more than Statutes, valid only within their limited boundaries, and, even within them, as elsewhere, inferior to the Jus Commune. And if his decision that obedience to Roman Law was not to be dependent upon recognition of the Roman Emperor, was important for the future of Roman Law in Italy, it was still more important for Europe at large. We have to remember that, though we are still a century off the "Reception," the encroachment of Roman Law on the national, customary laws had long since begun, in Germany, France and even England. At any rate it is certain that, if Roman Law was to be "received," it would have to be divorced completely from its connection with the Emperor; it must come as Common Law, not Imperial Law, if it was to be accepted by the sovereign "Princes." To Bartolus Roman Law is still essentially the Emperor's law—he had himself glossed two constitutions of the Emperor Henry VII and placed them as an eleventh collation in the Authenticum. But he has taken a step of the greatest importance in separating obedience to the Emperor's laws from recognition of the Emperor himself. We shall have to return to this point more than once in later pages.

Thus far, then, our analysis of Bartolus' thought gives us a picture of an Imperator or Rex Romanorum, who is de jure lord of the whole world. This is

(i.e. Constantinople) locum non habeat, statim subditur, quia personaliter est Imperator, qui providere potest. Ex qua ratione dicunt quidam leges non servari in Alemannia vel alibi, ubi sit Imperator; quod non puto verum. Regulariter autem lex communis est omnibus civitatibus et locis."

explained as meaning that he is lord of the whole world considered as one "universitas," but that he is not lord of each particular part, all of which together make up that "universitas." Then "the world," we found, is practically synonymous with western Christendom; all Christians (i.e. western Christians) are the Populus Romanus. This is all de jure; Bartolus has already made it quite clear that de facto the majority of the European powers do not obey the Emperor; though, whether they do or not, he has managed to retain them within the Roman people. We must now, therefore, turn from right to fact, and see how Bartolus handles the relations of this de jure "dominus omnium" with those who de facto do not obey him. This we shall do most conveniently under three heads: (1) the relations of the Empire with the Papacy; (2) the relations of the Empire with the national kingdoms; (3) the relations of the Empire with the Civitates—which means the cities of Lombardy, Tuscany and Central Italy.

We have still, however, one more point to consider, before we turn to the relations of the Empire and the Papacy. So far we have seen no check to the Imperial omnipotence save such as came from fact; we must now, to complete our view of the Empire, consider restrictions of a different kind. Not only the Emperor, but his own laws—the Jus Commune et Imperiale—and all other human laws, are dependent upon higher laws—the Jus Divinum, the Jus Naturale and the Jus Gentium. And even as regards his own laws, though he submits to them "de voluntate," not "de necessitate," it is still "aequum et dignum" that he should

be bound by them. On the other hand a compact the Emperor is bound to observe, for a compact is "de jure gentium," and the Jura Gentium are immutable[1].

A question much discussed by the medieval civilians was whether the Emperor can take away without cause another man's "dominium" in a thing. Jacobus Buttrigarius, says Bartolus, said "simpliciter" that he can. Bartolus, who denies, as we have seen above, that the universal lordship of the Empire interferes with particular ownership, maintains the contrary[2]. The Emperor cannot make a law containing anything unjust or dishonest, for that is contrary to the substance of law, which is "sanctio sancta, jubens honesta et prohibens contraria." God gave him jurisdiction, but not for the purpose of sinning or injustice. The Emperor can take

[1] Vide *Comment. on Codex*, Part I. (C. I. 14. 4), p. 87: "Breviter hic dicitur, aequum et dignum est Principem et legibus vivere, et quemlibet habentem imperium. Opponitur quia in veritate Princeps est solutus legibus....Solutio: fateor quod ipse est solutus legibus. Tamen aequum et dignum est quod legibus vivat. Ita loquitur hic. Unde ipse submittit se legibus de voluntate, non de necessitate. Ita debes intelligere hanc legem. Quaero, quid si Imperator facit pactum cum aliqua civitate, utrum teneatur illud pactum servare? Videtur quod non quia est solutus legibus....Contrarium est veritas. Nam pacta sunt de jure gentium....Jura gentium sunt immutabilia."

[2] Vide *Comment. on Codex*, Part I. (C. I. 22. 6), p. 112, § 2: "Quod non puto verum," says Bartolus. "Nam Princeps non posset facere unam legem quae contineret unum inhonestum vel injustum. Nam est contra substantiam legis. Nam lex est sanctio sancta, jubens honesta et prohibens contraria....Eodem modo si vellet auferre mihi dominium rei mei injuste, non posset, quia Princeps habet jurisdictionem a Deo....Deus non dedit ei jurisdictionem peccandi, nec auferendi alienum indebite." Cf. *Comment. on Dig. Vet.* Part I. (Prima Constitutio, § Omnem), pp. 9–10, §§ 4–6. He also asks, "Quid de civitate?" and answers, "Dico idem multo fortius quod etiam legem condendo dominium rei mei sine causa auferre non potest."

away "quaedam de jure civili, ut actiones, quaedam de jure gentium, ut dominium," he cannot[1].

The question of usury furnishes another interesting example. That usury was tolerated by the Civil Law was clear, while strictly condemned by the Canon Law and the general public opinion of the Middle Ages[2]. But it is forbidden, not only by Canon Law, but also by Divine Law. "Hodie de jure canonico, imo potius de jure divino, obligatui usurarum lex resistit in totum[3]." It cannot be denied that it is allowed by the Civil Law, and the Emperor, who allowed it, is not therefore to be considered a heretic, because Moses also permitted usury "propter duritiem populi[4]." But it is "de voluntate juris civilis," not "de potestate," for "non potuit Imperator tollere legem majoris, scilicet legem divinam," as expressed in the Gospel prohibition of interest[5].

In this context it is interesting to turn to one or two of the many passages in which Bartolus calls attention to the fact that the Digest is the work of

[1] Vide *Comment. on Codex*, Part I. (C. I. 19. 2), p. 105, § 3. But "ex causa" he can; vide *Comment. on Dig. Vet.* Part I. (D. VI. 1. 15), p. 557: "Nota quod Princeps ex causa potest auferre jus meum seu rem meam et dare alteri. Idem puto in republica alterius civitatis."

[2] Vide *Comment. on Infort.* Part II. (D. XXXIV. 6. 2), p. 316: "Sicut enim de jure civili usurae sunt prohibitae ultra certam quantitatem, ita hodie de jure canonico sunt prohibitae in totum." So *Comment. on Infort.* Part I. (D. XXIV. 3. 43), p. 77: "Omnes usurae, etiam legales, sunt hodie prohibitae et correctae de jure canonico."

[3] *Comment. on Dig. Vet.* Part II. (D. XII. 6. 26), p. 159.

[4] *Comment. on Codex*, Part I. (C. IV. 32. 16, Auth. ad Haec), p. 485: "Non possumus negare quin usurae de jure civili sunt permissae, licet permitti non potuerunt: nec propter eas haereticus fuit Imperator, quia Moyses propter duritiem populi permisit usuras."

[5] Vide the "Antiqua Lectura," §§ 5–6 on the same law.

Pagan authors. Thus, in commenting on the first preface to the Digest, Bartolus considers[1] the propriety of the invocation of the Divine Name at the beginning of a work by Pagan lawyers—"cum omnes istae leges fuerint factae per paganos." He accepts, as explanation, that it is Justinian himself—"fuit Christianissimus," said Cino[2], "et in nullo erravit"—who is speaking as the author of this first preface, and that he is speaking here, not of the laws themselves, but of his compilation. The same discussion occurs at the beginning of his Commentary on the Digestum Novum[3]. The passage is also interesting in another regard. Realising that the Jurisconsulti were Pagans, Bartolus seems to think that this should mean that they lived before Christ. "Dicitur quod tempore Caesaris

[1] Vide *Comment. on Dig. Vet.* Part I. (Prima Constitutio), p. 1, § 1: "Et prima nota quod hic fit invocatio divini nominis, scilicet Christi....Et certe hic dubitatur de uno, ut in glossa quadam antiqua, quae communiter non habetur, et quaerit quomodo est hoc possibile quod invocatio Jesu Christi fuerit facta hic, cum omnes istae leges fuerint factae per paganos. Et respondet hic Justinianus et Inst. in proemio....Et voluerunt quidam dicere quod, quamvis hoc sit, nihilominus ille, qui loquitur, ut est Justinianus, potest hoc facere, qui fuit hujusmodi constitutionis compilator. Item non loquitur hic de legibus, sed loquitur de compilatione sua."

[2] Vide Cino, *Comment. on Codex* (C. I. 1. 1), p. 2, § 6.

[3] Vide *Comment. on Dig. Nov.* Part I. (XXXIX. 1, sup. rubric.), p. 1: "Quaesitum fuit a compilatoribus quoniam in omni operis principio consuevit invocatio fieri secundum sectarum diversitatem. Quaero quem vos invocabitis in isto principio. Respondent compilatores, Nos sumus Christiani et Imperator Justinianus, ideo invocabimus nomen domini nostri Jesu Christi....Oppono, cum ab alia secta quam Christiana nomen Christi invocatur, videtur fieri in contemptu....Sed isti fuerunt Jurisconsulti, qui fuerunt ante Christum, et sic pagani. Ergo etc. Nam in Legibus 1 et 2, De orig. juris dicitur quod tempore Caesaris fuerunt et Christus fuit natus tempore Octaviani."

fuerunt," whereas Christ was born in the time of Octavian. Another lawyer, whose commentary on Book XXVII. of the Digest is included in most editions of Bartolus, points to a law of the Infortiatum as showing expressly that the laws of the Digest were made after the advent of Christ, though he refers to several contrary Glosses[1].

But however weak these passages may show the medieval civilian's history to have been, they are exceedingly interesting as illustrating his mental outlook. A lawyer like Bartolus, in daily touch with a work that was obviously pre-Christian, was compelled, to some extent, to realise that, though the Corpus Juris was a living system of law, none the less it belonged to a different age, with different ideas and ideals. Bartolus had as little history as most medieval thinkers, but he does certainly seem to realise, dimly perhaps, but continually, that there are changes in the modes of life

[1] Nicholas de Neap. (Spinellus), a contemporary of Bartolus, *Comment. on Infort.* Part I. (D. XXVII. 1. 17, § Jam Autem), p. 217: "Ibi, 'non Judaeorum' exponit glossa i. 'Christianorum,' et sic secundum istam expositionem habes expresse quod leges Digestorum fuerunt factae post adventum Christi in Virginem. Tu habes glossam contrariam in Lege Titia, § finali, infra, De auro et argent. legat. (D. XXXIV. 2. 38, § Seia) et Lege i. D., De justitia et jure (D. I. 1. 1)...." Of the Glosses referred to, that on D. XXXIV. 2. 38, § Seia, says on the words of the Law "volo jubeoque signum Dei"—"ut crucem, secundum Hug. Sed certe hoc tempore Christus non venerat in Virginem, unde dic quandam imaginem." The other Gloss is on the words "In nomine Domini"—"Hoc in compilatione Digestorum fuit dictum, non quando leges factae fuerunt, quia pagani erant." In the *Comment. on Dig. Nov.* Part II. (D. XLV. 1. 34), p. 43, Bartolus says: "Ista lex non habet respectum ad Judaeum vel hereticum vel de Christiano, cum isti condentes jura Digestorum erant pagani, cum leges fuerint factae per trecentos annos antequam Christus veniret, vel plus."

and thought, no less than the visible political changes in the succession of Empires and Kingdoms.

This is illustrated, in connection with our present inquiry, in an interesting manner. In cases of discrepancy between texts in different parts of the Corpus Juris Bartolus is, as a rule, very unwilling to accept, as explanation, that the later has *corrected* the earlier[1]. In the present instance, however, we shall see this allowed. "Videtur quod testator non possit prohibere Falcidiam," he says in his *Commentary on the Code*[2]; and answers—"Aliud olim aliud hodie, et sic illa jura corriguntur," that is to say, the law "Quod de bonis" of the Digest is corrected by the Novels. The prohibition

[1] *Comment. on Dig. Vet.* Part I. (D. I. 1. 9), p. 26, § 2: "Dicunt quidam quod haec (lex) per illam (C. de leg. l. final.) corrigitur: quod non placet, quia debet evitari legum correctio quantum potest." Cf. *Comment. on Infort.* Part I. (D. XXV. 1. 5), p. 92, § 1: "Dic quod nos debemus leges legibus concordare, si possumus."

[2] Vide *Comment. on Codex*, Part II. (C. VI. 49. 19, Auth. Sed cum testator), p. 138, § 1: "Videtur quod testator non possit prohibere Falcidiam....Solutio: aliud olim, aliud hodie: et sic illa jura corriguntur. Illud est certum, sed unum fecit me jam dubitare secundum rationem Legis Quod de bonis § 1, quae dicit quod ideo testator non possit prohibere, quia est contra publicam utilitatem. Si illa ratio esset vera, videretur quod adhuc hodie non possit prohibere. Domini, pro certo ista nostra jura moralia variantur ex tempore secundum morum varietatem. Lex Quod de bonis fuit facta tempore quo erant pagani, nec vita in alio seculo sperabatur. Sed aliud cogitabant nec aspiciebant merita animae et ideo cogitaverunt quod si haeres non lucraretur ex aditione haereditatis, omitteret haereditatem et sic testamentum remaneret nullum, quod esset contra publicam utilitatem....Postea tempore hujus authenticae Romanum Imperium erat Christianum et Imperator Justinianus fuit Christianus, et sic ipse considerabat aliud seculum et salutem et merita animae; unde cogitavit quod licet haeres non lucraretur aliquid commodi pecuniarii, tamen ex eo solo quod facit istum pium actum, quod adimplet voluntatem defuncti, habet meritum apud Deum et propter lucrum istius meriti cogitavit quod non omitteret aditionem haereditatis."

was not allowed formerly as being contrary to public utility: "to-day" it is no longer contrary, and therefore allowed. "Domini," Bartolus continues, "pro certo ista nostra jura moralia variantur ex tempore secundum morum varietatem." The law "Quod de bonis" was made in Pagan times, when an after-life was unthought of. It was therefore thought that, if the heir received no pecuniary advantage from the "hereditas," he would repudiate it, which would have been contrary to the public advantage. But "tempore hujus authenticae" the Roman Empire was Christian and the Emperor Justinian himself a Christian, who took account of another world and the salvation and merit of the soul. And so he thought that though the heir had no pecuniary advantage, yet in fulfilling the will of the dead he would obtain merit and reward in the eyes of God[1].

This acknowledgment that "nostra jura moralia variantur ex tempore secundum morum varietatem" is very noteworthy. It must be taken in connection with the general aim which dominated the work of the Post-glossators. Their aim was to adapt the texts into a law practically effective for the Italy of their day. The revival of Roman Law associated with the school of Bologna in the eleventh and twelfth centuries was, we must remember, the first general and direct contact of the European mind with Pagan antiquity. Thence onwards, till the revival of Greek at the end of the Middle Ages, Pagan learning flowed back into western

[1] Cf. similar passages in *Comment. on Infort.* Part II. (D. xxx. 1. 58), p. 45, §§ 5–6, and in *Comment. on Dig. Vet.* Part I. (D. II. 14. 47), p. 302, § 2: both treat of the same matter and bring out the difference in the attitude of the Pagan Jurisconsulti and the Christian Justinian.

Europe in a continuous stream. That learning had to be assimilated with the Christian ideas and ideals, which were the foundation of medieval thought. The process of assimilation is most conspicuous, and perhaps most interesting to watch, in the case of Aristotle. But we have to remember that there is a similar process in the case of the Corpus Juris. It is true that the Corpus is the compilation of a Christian Emperor, and is only in part the work of Pagan jurists; but then, even in its Christian parts, the Corpus Juris is built on foundations that lie far back in the Pagan past. The importance of this we shall see later, in dealing with the theories of Bartolus on the relations of the Empire and Papacy. It is enough for our present purpose to see that his clear recognition of the Pagan character of the Digest falls into line with the practical aim of all his work—namely to adapt Roman Law to the conditions of his own day.

Finally, we should note that certain distinctions, both subtle and logical, were made, by which, while the superiority of these higher laws over purely human law was safeguarded, the scope of legislation, either by Leges or Statuta, was not restricted within too narrow limits. "...Dicimus de jure divino quod distinguatur, non tollatur, per humanum[1]." This is explained more in detail in the commentary on the law "Omnes Populi," where Bartolus developes his theory of statutes[2]. As far as the Jus Divinum is concerned with "spiritualia," statutes, like Imperial laws, contradicting it are invalid. But so far as it is concerned

[1] Vide *Comment. on Infort.* Part I. (D. XXIV. 3. 25), p. 49, §§ 40–1.
[2] *Comment. on Dig. Vet.* Part I. (D. I. 1. 9), p. 30, § 22.

with "temporalia" it may be amplified by human laws. Thus Divine Law says—"Thou shalt not kill"; but elsewhere it says that the slayer shall himself be killed. Hence "ex causa potest permitti per leges et statuta quod quis occidatur." Again Divine Law says—"In ore duorum vel trium stat omne verbum." Civil Law, however, says seven witnesses are required to a will. In this case Civil Law holds, because it excludes sin—that is to say, the extra witnesses exclude the chance of fraud. But if the Civil Law does not exclude sin, it is invalid where contrary to Divine Law, since it is then no longer amplifying, but revoking the superior law.

As regards Natural Law and the Law of Nations a similar distinction was made. "Si quidem statuta fiant super his, quae nullo jure disposita sunt, valent...Si autem super his, quae disposita sunt a jure naturali vel gentium, non valent tollendo in totum, sed in aliquo derogando vel addendo, sic[1]."

I. THE EMPIRE AND THE PAPACY

It is nowhere more important to realise that the Corpus Juris is only in part a Christian book than when we come to the topic with which we are to deal in this section. Even in its Christian parts the Corpus Juris represents political conceptions which are fundamentally Pagan[2]. The Corpus Juris represents, as

[1] Ibid. § 21.

[2] Vide Gierke, *Deutsche Genossenschaftsrecht*, vol. III. p. 128: "Das Corpus Juris überlieferte auch in seiner aus christlicher Zeit herrührenden Bestandtheilen der Nachwelt keinen specifisch christlichen, sondern den mit christlichen Zuthat äusserlich geschmückten heidnischrömischen Staats- und Rechtsbegriff."

regards the relations of Church and State, the system which is known as Byzantinism, and which means the absorption of the Church in the State. Christianity had come into conflict with the Empire, just because it was opposed to the Pagan conception of religion as existing "in the State, for the State and through the State[1]." When Christianity became a lawful religion, and finally the only lawful religion, the Imperial conception of the omnipotence of the State over religion underwent little, if any, change. The change came far more from the side of Christianity, first demanding, through the Apologists[2], admittance within the Empire, and then in part accepting the Imperialist standpoint. In the famous words of S. Optatus—"Non (enim) est respublica in ecclesia, sed ecclesia in republica, id est in imperio Romano[3]."

But this by no means represented the universal view of the fourth century Churchmen, and whether S. Optatus or S. Ambrose[4] represent the dominant

[1] Gierke, op. cit. p. 111 and cf. Ramsay, *The Church in the Roman Empire*, chap. xiv., espec. pp. 354 and ff. Cf. also p. 236—the Christians were regarded as "enemies to civilised man and to the customs and laws which regulated civilised society, etc."

[2] Vide, as an excellent example, the well-known passage in chap. xvii. of Justin's first Apology. The Apologist has to show that Christianity is not incompatible with citizenship.

[3] The passage is quoted in full by Carlyle, *Hist. of Med. Pol. Thought in the West*, vol. i. p. 148, note 3.

[4] Carlyle, op. cit. vol. i. p. 1, brings together a number of examples to show that there was "a more general appreciation at that time of the independence of the Church relatively to the State than has been always recognised." Still it is worth noting that a good part, if not most, of his examples come from pens engaged at the moment in violent controversy, in which the other side had Imperial support. This however is not true of S. Ambrose, who

opinion, there can be no doubt, when we come to the fifth century, that the western Church was not going to accept the Byzantine conception of the relations of Church and State. Byzantinism remained the theory and practice of the East. The fifth century saw the break-up of the Empire in the West, and the definite rejection of Byzantinism by a theory, which we may call "Gelasianism," not because Pope Gelasius was by any means the first to deny the supremacy of the temporal power in the spiritual sphere, but because the form, which he gave to that denial, was to be of lasting influence on the thought of the whole of the Middle Ages[1]. Thus in the centuries which lie on the borderland between ancient and medieval history we have two distinct conceptions of the relations of Church and State. We have the Imperial conception of the omnipotence of the State, *within* which is the Church, and we have the "Gelasian" conception, in which Church and State are conterminous, and which insists on the independence, equality and co-ordination of the spiritual and temporal powers. In both cases the conception of Church and State in antithesis was absent, but in the former case the Church was absorbed in the State, while in the latter, under the influence of the actual break-up of the State in Western Europe, and still more

certainly represents quite an opposite conception of the relation of Church and State to that of S. Optatus.

[1] "Duo quippe sunt, imperator Auguste, quibus principaliter mundus hic regitur: auctoritas sacrata pontificum et regalis potestas, in quibus tanto gravius est pondus sacerdotum, quanto etiam pro ipsis regibus hominum in divino reddituri sunt examine rationem" (Epist. XII. § 2 to the Emperor Anastasius). Vide other passages from Gelasius, quoted with this, in Carlyle, op. cit. pp. 187–91.

under the influence of S. Augustine, the secular State tended to merge into the Church or Civitas Dei. In both conceptions there is but one society; but in the East that society is a State, in the West it is a Church[1].

The result is that, in considering the political thought of the early Middle Ages, we must get rid of the terms Church and State, which nowadays inevitably imply an antithesis. The political problem of the early Middle Ages was to define the relations of the two powers in the one Church-State, Civitas Dei or Populus Christianus. And this was the more difficult in that, while no one doubted that theoretically the Pope was the vicar of Christ and the spiritual head of Christendom, the temporal power was at the same time very generally recognised as the "rector et defensor Ecclesiae," also the vicar of Christ, and even the "rex Ecclesiae[2]." The vigorous attempt to assert the independence of the spiritual sphere, which was made when

[1] Cf. Bury, *The Constitution of the Later Roman Empire*, pp. 33–4.

[2] Vide Ohr, *Der Karolingische Gottesstaat in Theorie und Praxis*. His very interesting dissertation brings this out, with regard to Charlemagne's relations to the Papacy, with great force. On p. 8 Ohr, having given a number of discordant opinions by modern authorities on those relations, remarks—"Diesen einander mannigfach wiedersprechenden Urteilen gegenüber ist zunächst festzustellen, dass die Beurteilung der Frage, wie Karls eigene Stellung gewesen sei, stets verquickt zu werden pflegt mit der anderen Frage, welche historische Bedeutung dieser Karolingischen Idee von Gottesstaate zuzusprechen ist. Und dabei herrscht vielfach die Neigung vor mit den heutigen Vorstellungen von Staat und Kirche in einer Zeit zu operieren da es weder einen Staat, noch eine Kirche im modernen Wortsinne gab." Vide also Döllinger, "The Empire of Charles the Great and his Successors" (in *Hist. and Lit. Addresses*, transl. by M. Warre), pp. 109–10.

the Carolingian Empire was breaking up in the ninth century, and associated with the names of Nicholas I, John VIII, Hincmar of Rheims, and the forged Decretals, was premature. To understand the Investiture struggle, we have to remember that up to its very beginning the temporal power has exercised an effective supremacy *in* the Church-State, alike in temporal and spiritual matters, while at the same time the theoretical separation of the two spheres, each under its independent head, the Imperium or Regnum and Sacerdotium respectively, was generally maintained. And not even Charlemagne, or, perhaps, even Justinian himself, seems more obviously supreme, than Henry III, deposing three Popes and appointing three others in succession. Yet a whole world of difference lies between Henry's or Charlemagne's position and Justinian's. Justinian represents ideas that go back to days long before the Empire became Christian—the "jus sacrum" as a part of the "jus publicum[1]"; Henry or Charlemagne represent those Christian Emperors, whose picture S. Augustine[2] had drawn, thinking of Constantine and Theodosius, but in fact constructing an ideal for the Middle Ages.

The result of the Investiture struggle was to recast both theory and practice.

Gregory VII and the Papalists were combating the supremacy of the temporal power *within* the Church.

[1] Vide Hinschius, "Allgemeine Darstellung der Verhältnisse von Staat und Kirche" (in Marquardsen's *Handbuch des oeffentlichen Rechts der Gegenwart*, vol. I.), p. 192. Cf. Gierke, op. cit. p. 114, and Knecht, *Die Religionspolitik Kaiser Justinians I*, p. 147.

[2] Vide *De Civitate Dei*, Lib. v. chap. 24–6 (in Migne's *Patrologia Latina*, vol. XLI.).

This applies not only to the Empire, but to all kingdoms; be the temporal power Imperium or Regnum, it must stand below the Sacerdotium. But if Henry was, on the occasion of the excommunications, in Gregory's eyes merely "rex Theutoniae[1]," we must remember that, earlier at least, he had recognised in Henry the "caput laicorum" and "Romae, Deo annuente, futurus Imperator[2]." The reason why Gregory could keep the peace with other kings, but not with Henry, was, in great part, just because Henry was *not* merely King of Germany. Henry was heir to the supreme position of Charlemagne, Otto and his father Henry III—supreme, not only in Germany, but in Italy too, and, most important of all, in the Church. To that supremacy Henry was heir, and that supremacy the Pope was determined not to allow.

This is the basis of the struggle. The Papacy was refusing to acquiesce in the traditional supremacy of the secular power *in* the Church, which formally indeed it had never recognised. Up till now the Papacy had contented itself—at least if we leave out of account the short period in the middle of the ninth century—with insisting on the "Gelasian" conception of the equality and co-ordination of the two powers and therefore of the supremacy of the Sacerdotium in its own sphere of "spiritualia." That conception no longer served.

[1] In the first excommunication we read: "...totius regni Teutonicorum et Italiae gubernacula contradico." Vide Reg. III. 10 (in Jaffé, *Monumenta Gregoriana*), p. 224. In the second: "Et iterum regnum Teutonicorum et Italiae...interdicens ei." Vide Reg. VII. 14 a, p. 403. Henry calls himself "Romanorum dei gratia rex." Vide Reg. I. 29 a, p. 46.

[2] Vide Reg. I. 20, p. 35 and cf. Reg. I. 11, p. 22.

Gregory demanded the absolute supremacy of the Sacerdotium, not its mere independence within its own sphere. On the other hand, Gregory was as desirous as any of his predecessors for concord. This can be illustrated by his relations both with other kings[1], and also with Henry himself—only the price of that concord must be the obedience of the temporal power to the spiritual in case of conflict. He praised the Empress Agnes that through her zeal "for the peace and concord of the universal church" she has helped "pontificatum et imperium glutino caritatis astringere[2]," by restoring Henry to the communion of the Church: we know as a matter of history that the price of that restitution was Henry's promise of obedience, in language, as Gregory himself says in a letter of the previous year, such as had never been addressed before by any king to any Pope[3]. In a letter[4] written to Henry himself, he lamented

[1] Vide in 1073 the letter to the Emperor Michael at Constantinople in return for "literas...plenas vestrae dilectionis dulcedine et ea, quam sanctae Romanae ecclesiae exhibetis, non parva devotione." "Scitis enim," he says, "quia, quantum antecessorum nostrorum et vestrorum sanctae apostolicae sedi et imperio primum concordia profuit, tantum deinceps nocuit, quod utrimque eorumdem caritas friguit." Vide Reg. I. 18, pp. 31–2. Cf. Reg. I. 75, pp. 93–5, a letter of 1074 to Philip of France. Gregory is rejoiced to see from Philip's letters, "te beato Petro apostolorum principi devote ac decenter velle obedire et nostra in his quae ad ecclesiasticam religionem pertinent monita desideranter audire atque perficere." He reminds him that, "virtus christianorum principum in ejusdem Regis castris ad custodiam christianae militiae nobiscum convenire debeat." Cf. also letter to William I of England, Reg. VII. 25, p. 419.

[2] Vide Reg. I. 85, pp. 106–8.

[3] Vide Reg. I. 25, p. 42. The letter of Henry is in Reg. I. 29 a, pp. 46–8.

[4] Vide Reg. II. 31, pp. 144–6. "Sed quia magna res magno indiget consilio et magnorum auxilio, si hoc Deus me permiserit

that men should sow discord between them, and proposes that he should leave the Roman Church itself to Henry's protection, while he himself led his projected Crusade. The proposal contained in this letter is proof in itself that Gregory was sincere in wishing for concord between the two powers. The Crusade, we know, was never led and, in the end, it was in Rudolf, not Henry, that the Pope found the king who would accept the new position of inferiority. It is very necessary to do justice both to Gregory and Henry, because by understanding them we have the key to the whole difference between the Papalist and Imperialist standpoint. Gregory was, as we have said, obviously sincere in his desire for concord, and we may go further and say that he obviously had a place of great importance for the secular power within the Church. But it must be an obedient power. It is equally clear that Henry could not be expected to accept this position. Between the two parties is the "Gelasian" theory of concord, co-ordination, equality. Both parties maintained that they were upholding the old tradition. In truth neither of them was. The Papalists would throw over the theoretical co-ordination and equality of the two powers. The Papalists were the innovators. The Imperialists pleaded, not in reality for the "Gelasian" system, but for the system which had in practice obtained for nearly three centuries—the practical superiority of the royal power. Henry was the

incipere, a te quero consilium et ut tibi placet auxilium; qui, si illuc favente Deo ivero, post Deum tibi Romanam ecclesiam relinquo, ut eam et sicut sanctam matrem custodias et ad ejus honorem defendas. Quid tibi super his placet et quid prudentia tua divinitus aspirata decernat, mihi quantocius potes remittas, nam, si de te plus quam plurimi putent non sperarem, verba haec frustra proferrem."

heir of Charlemagne and Henry III, and the heir to their position of superiority.

Thus conflict was inevitable, and it was in the midst of the struggle in 1081 that Gregory wrote his famous denunciation of kingship as of human and sinful—even diabolical—origin. "Itane dignitas a saecularibus—etiam Deum ignorantibus—inventa non subjicietur ei dignitati, quam omnipotentis Dei providentia ad honorem suum invenit mundoque misericorditer tribuit? cujus filius—sicut deus et homo indubitanter creditur—ita summus sacerdos, caput omnium sacerdotum, ad dexteram Patris sedens et pro nobis semper interpellans, habetur; qui saeculare regnum, unde filii saeculi tument, despexit et ad sacerdotium crucis spontaneus venit. Quis nesciat: reges et duces ab iis habuisse principium, qui Deum ignorantes, superbia rapinis perfidia homicidiis, postremo universis pene sceleribus, mundi principe diabolo videlicet agitante, super pares, scilicet homines, dominari caeca cupidine et intolerabili praesumptione affectaverunt[1]." We cannot say that these words were adopted to suit the controversy of the moment, for they occur in the most important of all Gregory's letters, in one that may properly be called the apology for his policy. And though one cannot find anything in his other letters to compare with their violence, the main idea of the human, and even sinful, origin of kingship can certainly be paralleled[2]. In the same letter he

[1] Vide Reg. VIII. 21, pp. 456–7.

[2] Vide Reg. IV. 2, p. 243: "Sed forte putant, quod regia dignitas episcopalem praecellat. Ex earum principiis colligere possunt, quantum a se utraque differunt. Illam quidem superbia humana repperit, hanc divina pietas instituit. Illa vanam gloriam incessanter captat, haec ad coelestem vitam semper aspirat."

compares the inferior power of a temporal Emperor with that of an exorcist, that is to say, with the lowest but one of the minor orders. The exorcist is a "spiritual Emperor" over the demons—shall he not have power over those who are subject to the demons? And if an exorcist, how much more a priest[1].

This last passage is especially interesting, because it contains the one actual quotation from S. Augustine to be found in Gregory's letters[2]. But that it is to Augustine that Gregory has gone back for this conception of kingship is of course indubitable. We are back once more in the old distinction between the earthly and the heavenly city. Priests, says another Papalist writer, excel kings as the angels, the sons of God, excel the sons of men—"filii autem hominum nuncupantur qui de terreno regno gloriantur[3]."

Gregory was by no means alone among the Papalists in tracing back kingship to a human foundation. Already, as is well known, we have the idea of a compact between king and people, as the basis of the secular power[4]. But Gregory did not maintain merely the human origin of kingship; its origin is sinful, even diabolical; and it is not merely the origin of kingship, which he condemned, but the office itself. Now Gregory

[1] p. 459.

[2] Vide Mirbt, *Die Stellung Augustines in der Publizistik der Gregorianischen Kirchenstreits*, p. 34.

[3] Vide Honorius Augustodunensis (in Lib. de Lite, vol. III., in *Monumenta Germaniae Historica*), pp. 66–7.

[4] Vide Manegold of Lautenbach, *Ad Gebehardum Liber* (Lib. de Lite, vol. I.), p. 365. And vide a very interesting passage in Gerhoh of Reichersberg (Lib. de Lite, vol. III.), pp. 345–6, on kings as "hominum creaturae," obtaining by priestly benediction the office "ad quod divina ordinatione assumpti sunt."

may not stand alone even here, but it was emphatically not the general Papalist position.

Nor was it in reality what we may call the primary position of Gregory himself. It was a secondary position, on which he was compelled to fall back, when his primary conception of the proper relations between the temporal and spiritual powers was rejected—and naturally enough—by Henry. But if not in Henry, at any rate in Rudolf, Gregory found the king, whom he needed. How far Gregory really was from viewing the Imperium as the work of the devil comes out, as clearly as could be, in a letter written to Rudolf in 1073[1]. "Licet ex praeteritis," he writes, "nobilitatis tuae studiis clareat, te sanctae Romanae ecclesiae honorem diligere, nunc tamen, quanto ipsius amore ferveas quantumque ceteros illarum partium principes ejusdem amoris magnitudine transcendas, litterae tuae nobis transmissae evidenter exponunt. Quae nimirum inter cetera dulcedinis suae verba illud nobis videbantur consulere, per quod et status imperii gloriosius regitur et sanctae ecclesiae vigor solidatur: videlicet ut sacerdotium et imperium in unitate concordiae conjungantur. Nam sicut duobus oculis humanum corpus temporali lumine regitur, ita his duabus dignitatibus in pura religione concordantibus corpus ecclesiae spirituali lumine regi et illuminari probatur." At that date—Rudolf was not yet king—Gregory still had hopes of Henry, "quod ipsum in regem elegimus," as well as for the sake of his father. But, Gregory added, "concordiam istam, scilicet sacerdotii et imperii, nihil fictum, nihil

[1] Vide Reg. I. 19, pp. 33–4. Rudolf was not yet king.

nisi purum decet habere." Here is the key to the Papalist position. Gregory wished for the concord of the Sacerdotium and Imperium, if it could be pure and real, as he understood those words—that is to say, if the temporal power accepted the ultimate superiority of the Sacerdotium. The right place of the Imperium is within the "corpus ecclesiae," its duty to govern and illuminate in conjunction with, and in dependence on, the Sacerdotium. If it will not accept that position, it must be put outside the Church and rule in the earthly State.

There are thus two distinct lines in the Papalist theories, which cannot be harmonised, because they are properly alternative. Primarily, we may say, the Papalists wished to maintain the temporal power *within* the Church, but in dependence on the spiritual power; if that position of dependence were rejected, the temporal power must be put *outside* the Church[1]. And if the temporal power goes outside the Church, we return to the distinction between State and Church, and a distinction—this is the point of importance—which placed the sinful, even diabolical, State in antithesis to the holy Church. Now that was an antithesis which neither Gregory, nor the Papalists throughout the Middle Ages, were really ready to maintain.

If we turn back for a moment to S. Augustine, we see that his whole condemnation of the State is concerned with the Pagan State. Augustine's *De Civitate*

[1] This is expressed, almost in so many words, by a Papalist poet: "Ergo vel ecclesiae membrum non dicatur | Caesar, vel pontifici summo supponatur." Vide Gualterus de Insula (in Lib. de Lite, vol. III.), p. 559.

Dei is, in part at least, a controversial work, an answer to the Pagan's complaint that the sack of Rome in 410 had fallen in Christian days. Augustine set out, and his disciple Orosius followed him, to show that Rome had been no more fortunate in Pagan days. In a famous passage he condemns all kingdoms, without justice, as "fair, thievish purchases[1]," and denies that justice is possible in the Pagan State. He refuses to allow that Cicero's definition of "respublica" could properly apply to Pagan Rome[2]. For Cicero showed that a State cannot exist without justice; but the Pagan Romans were without justice—"for where man does not serve God, what justice can be thought to be in him?" And though, by another definition of his own, he proves Rome to have been a true "respublica," he only does so by abandoning the criterion of justice, which would bar Rome, as it would the Empires of the Egyptians, Assyrians and others. "For in the City of the wicked, where God does not govern and men obey, sacrificing unto Him alone, and consequently where the soul does not rule the body, nor reason the passions, there is generally found wanting the virtue of true justice[3]."

True justice can exist only in the Christian State, and the Christian State—Christian Rome—is not "the

[1] Vide Lib. IV. chap. 4, col. 115. John Healey, the author of the first English translation of the *De Civ. Dei*, translates "magna latrocinia" by "fair thievish purchases." His translation is by no means always clear or accurate, but like all sixteenth and seventeenth century English translations, very fine and vigorous.

[2] Vide Lib. XIX. chap. 21, coll. 648–9.

[3] Vide Lib. XIX. chap. 24, coll. 655–6.

Babylon of the West[1]," the "head[2]" of the Civitas Terrena, but becomes merged in the Civitas Dei, which may lawfully use the earthly peace[3] on its pilgrimage, and which needs the Christian Emperor for its defence against infidels and heretics[4]. Augustine had a very real place for a Christian Emperor in his Civitas Dei. He was the opponent of the Donatists—and it was they, not Augustine, who had asked—"Quid est Ecclesia Imperatori[5]?" The result is that, though Augustine could identify Pagan Rome with the Civitas Terrena[6], it was impossible for the medieval Papalist,

[1] Vide Lib. xv. chap. 17 at end, col. 497, Lib. xviii. chap. 2, col. 561 and chap. 22, col. 578.

[2] Vide Lib. xv. chap. 5—and cf. the comparison between the foundation of the Civitas Terrena by the fratricide of Cain and the foundation of Pagan Rome by the fratricide of Romulus.

[3] Vide Lib. xix. chaps. 17 and 26.

[4] Vide Lib. v. chap. 25, col. 173, where the Emperor Theodosius is praised, because in the troubled times of his reign, "ex ipso initio imperii sui non quievit justissimis et misericordissimis legibus adversus impios laboranti Ecclesiae subvenire, quam Valens haereticus favens Arianis vehementer afflixerat, cujus Ecclesiae se membrum esse magis quam in terris regnare gaudebat."

[5] Vide the passages quoted by Carlyle in op. cit. p. 149; cf. Gierke, *Deutsche Genossenschaftsrecht*, vol. iii. p. 125.

[6] Ideally of course neither the Civitas Dei nor the Civitas Terrena is of any one place, date or nation—vide Lib. xiv. chap. 1, col. 403—and Augustine particularly insists that there are "non quatuor, duae scilicet Angelorum totidemque hominum, sed duae potius civitates, hoc est societates, una in bonis, altera in malis, non solum Angelis, verum etiam hominibus constitutae" (Lib. xii. chap. 1, col. 349). But, in the controversial parts of the work especially, Pagan Rome and the Christian Church tend to stand opposed as the two cities on earth—vide e.g. Lib. xxii. chap. 6, the comparison between the love that made Rome worship Romulus its founder, and the faith in the divinity of Christ which makes the citizens of the heavenly City love its Founder. In Lib. xviii. chap. 2, col. 560, Augustine calls other kings and kingdoms "velut appendices" of the two great Empires of

when Pagan Rome was long since dead, to revive the distinction between Church and State as the distinction between the Civitas Dei and the Civitas Terrena. Alone the development of the Antichrist legend had given Rome its holy task in the world's history, differentiating the Roman Empire from all the Empires which had gone before it[1]. Papalist theory left the Investiture struggle, not with a denial of the divine ordination of the State, not with the conception of a sinful State over against a holy Church, but clinging still to the single society, a Church-State, in which there are two divinely ordained powers, though not equal, since the Sacerdotium is to be decisively superior. Long after the Investiture struggle we shall see Pope Boniface indignantly maintain the impossibility of his denying the existence of the two divinely ordained powers.

The Imperialists were on the defensive. Whereas before the Investiture struggle it was essentially the Papalist who appealed to Pope Gelasius, in order to prove the existence of the equal and co-ordinate powers, it was now, and for the rest of the Middle Ages, as essentially

Assyria and Rome. And vide Robertson, "Regnum Dei" (*Bampton Lectures*, 1901), Lecture v. pp. 169–222.

[1] Augustine knows no such differentiation. As God gave the Empire to the Romans, so He gave it to the Assyrians and Persians, etc., vide Lib. v. chap. 21, coll. 167–8. And it is very interesting that Augustine does not commit himself to what became for the Middle Ages the generally accepted interpretation of the words in II Thess. 2—"he who now letteth will let, until he be taken out of the way"—as referring to the Roman Empire. "Ego prorsus quid dixerit me fateor ignorare"—he thinks they may "non absurde" apply to Rome, but does not pledge himself to this interpretation. Vide Lib. xx. chap. 19, coll. 685–6.

the Imperialist[1]; the Papalist now appealed to them rather to prove the greater burden imposed on the Sacerdotium, which was soon interpreted as meaning its higher dignity[2].

But the Imperialists were not merely on the defensive. They appealed to the past, and were as often arguing for the traditional supremacy of the temporal power, as for the independence and equality of the two powers. Of this the remarkable treatises of Gerhard of York are, of course, the best examples. He carried the war into the enemy's camp[3]. But he was not alone[4]. He, and the

[1] Vide e.g. *Tract. Eboracensis v.* (in Lib. de Lite, vol. III.), pp. 684–6.

[2] Vide e.g. Bernaldus Presbyter, *Apologeticae Rationes* (Lib. de Lite, vol. II.), p. 97.

[3] Vide especially *Tract. v.* pp. 685–6, and *Tract. iv.* pp. 665–6.

[4] Wido of Osnaburg, *De Controversia Hildebrandi et Henrici* (Lib. de Lite, vol. I.), pp. 462–70, has a very notable—because up to a point quite correct—appeal to history, and with him should be compared the *Dicta cujusdam de discordia Papae et Regis* (Lib. de Lite, I.), pp. 454–60. Cf. also Petrus Crassus, *Defensio Henrici IV* (Lib. de Lite, vol. I.), pp. 435–7—Gregory is injuring the memory of past Emperors "orthodoxae fidei," who, with the preachers, built up the Church; and sometimes the Emperors did more "imperando" than the preachers "praedicando." Cf. also *Tract. de Investitura Episcoporum* (Lib. de Lite, vol. II.), pp. 503–4. Then they appeal to the past reverence of the Popes for the Emperors—and especially to Gregory the Great. The author of the treatise *De Unitate Ecclesiae servandae* (Lib. de Lite, vol. II.), pp. 196–200, denies the excommunication of Arcadius by Pope Innocent—he can find no authority for it. And it is worth noting how Petrus Crassus, p. 449, makes use of the example of S. Ambrose's refusal of the Eucharist to Theodosius—a favourite example with the Papalists—to show how the Pope should provide for the "aedificatio animarum," not, as Hildebrand, "in occisione gladii." Of course he does not mention the refusal of the Eucharist—Ambrose merely "summoned him (Theodosius) to the Church, prescribed penance and took pains to salve him in soul and body." Hugo of Fleurus, in his *De Regia*

other supporters of the temporal power no less, while rebutting the Papalist claims to supremacy, took their stand on the equality and co-ordination of two powers; but they then went on to argue for a very real supremacy for the temporal power, appealing repeatedly to history[1] to show both the obedience of former Popes and the supremacy of former Emperors down to Henry III. We must remember that, if the Antipope Clement were to be defended, it was especially necessary to vindicate for Henry IV the position which his father, Henry III, had occupied at Sutri.

After the treatises of the anonymous Yorkist, none of the works produced by the Investiture struggle are more remarkable than the *Defensio Regis* of Petrus

potest. et sacerd. dignit. (Lib. de Lite, vol. II.) wrote specially to refute Gregory's condemnation of kingdoms, as of sinful and diabolical origin—he quotes Gregory's words at the opening of his treatise (p. 464).

[1] History is pretty well bandied about between the Imperialists and the Papalists. The Papalists compare the virtuous Emperors and kings of old times with the wicked ones of to-day—"Hii constructores fuerunt prius ecclesiarum, | Vos destructores penitus nunc estis earum." Vide Hugo Metellus, *Certamen Papae et Regis*, p. 715. But Gregory himself said that in all history he could not find examples of twelve saintly kings. Further the amazing statement of Bonizo, bishop of Sutri, that Charlemagne was never crowned Emperor, must be taken in connection with the history which he gives of the Patriciate, and especially his version of Henry III's "Patricialis tyrannis." "Quid namque est, quod mentem tanti viri ad tantum traxit delictum, nisi quod crediderit per patriciatus ordinem se Romanum posse ordinare Pontificem?" But it will be said, he continues, that Charlemagne himself was Patrician; to which he answers that, in Charlemagne's time, Constantine and Irene governed the Roman Empire—and therefore there was no higher title left for Charlemagne than "father and protector of the Roman city." Vide "Liber ad Amicum" (in Jaffé, *Monumenta Gregoriana*), Lib. III. pp. 617–8, and Lib. v. p. 629 and ff.

Crassus. It is full of appeals to Roman Law, to the Code and Novels in particular—for Crassus is before the period of the Bolognese Glossators, and does not seem to know the Digest, as he does the other parts of the Corpus Juris. But he bases his whole position on law[1]. Gregory is guilty according to both laws, and should be judged and deposed by them—a safer and better way than by arms[2]. The treatise announces the entry of Roman Law into medieval political thought.

We have mentioned that in a later part of this essay we shall see Pope Boniface maintain the impossibility of his denying the existence of the two powers —the reason he gives is that he is a lawyer of forty years standing. The theory of the two equal and independent powers—though Pope Boniface of course denied most emphatically the equality and independence of the temporal power—came to be essentially the position taken up by the lawyers[3]. Though the Glossators tried to force the facts of the twelfth century into theories drawn from a strict interpretation of the Roman texts, they did not attempt to maintain the superiority of the temporal power alike in the spiritual sphere and in the temporal—a theory they could with little difficulty have drawn from the Corpus Juris.

[1] Henry is king not "vi et armis," but "legibus," vide p. 434. Cf. p. 443 and ff. where he wishes to show the Saxons that Henry is their lawful king; cf. pp. 452–3. So p. 435 Hildebrand has become Pope "Julia et Plautia lege contempta."

[2] Vide pp. 438–41. Cf. p. 452—Hildebrand "sanctorum canonum contemptor," naturally rejoices rather in arms than laws. "Quis igitur huic legum inimico hanc poenam merito, qui filio (Henry IV) necem paravit, legibus addictam esse non censeat?"

[3] Vide Gierke, *Pol. Theories of the Middle Age*, Note 38, pp. 118–9.

Justinian recognises the Imperium and Sacerdotium as the twin gifts of God, proceeding from the same principle for the adornment of human life[1] and differing little one from another[2]. The Sacerdotium "rebus divinis inservit," the Imperium "humanas res regit." But the spheres are not "distinct and separate"; the Imperium does not restrict itself to temporal matters. "Nihil imperatoribus," says Justinian[3], "aequae curae fuerit atque sacerdotum honestas; si quidem hi etiam pro illis semper deo supplicant. Nam si alterum omni ex parte integrum est et fiducia dei praeditum, alterum recte et decenter rempublicam sibi traditam exornat, bonus quidem concentus existet, qui quicquid utile est humano generi praebeat. Nobis igitur maximae curae sunt et vera dei dogmata et sacerdotum honestas, quam si illi custodiunt, per ipsam magna bona a deo nobis datum in nosque et quae habemus firmiter possessuros et quae nondum adepti sumus insuper adquisituros esse confidimus."

[1] Vide Justinian, *Novellae Const.* VI. Praefatio, "Maxima inter homines dei dona a superna benignitate data sunt sacerdotium et imperium, quorum illud quidem rebus divinis inservit, hoc vero humanas res regit earumque curam gerit: quorum utrumque ab uno eodemque principio proficiscitur et humanam vitam exornat."

[2] Vide *Nov. Const.* VII. 2. Justinian is here legislating against the alienation of "res ecclesiasticae" and makes certain exceptions. He allows an exchange in certain circumstances between the Emperor and a Church or religious institution, on the condition that the Emperor gives in return something of equal or greater value than the thing taken. In such a case the exchange is to hold good and no one concerned in it to be amenable to any penalty imposed by former laws —"utique," he continues, "cum nec multo differant ab alterutro sacerdotium et imperium, et sacrae res a communibus et publicis, quando omnis sanctissimis ecclesiis abundantia et status ex imperialibus munificentiis perpetuo praebetur."

[3] Immediately following the passage quoted above note 1.

The Middle Ages referred repeatedly to these Novels, but they had to abide by the phrases which place the two powers together as the "dona Dei," not differing much one from another, and to shut their eyes to the obvious superiority over both spheres, which is expressed in the passages, taken as a whole. Here and there in the Middle Ages the plea of superiority for the temporal power would be made—above all in the lifetime of Bartolus by Marsiglio and Occam. But the plea was still, as in the Investiture struggle, for the superiority in the one society, the Ecclesia or Respublica Christiana, not for the superiority of State over Church. The Byzantine theory of the absorption of the Church in the State rarely made itself heard[1], just as the antithesis of Church and State, as the Civitas Dei and Civitas Terrena, which Gregory had found himself compelled to adopt, was, in general, rejected by the Papalist theory—even when at its highest under Boniface VIII[2].

We may expect, then, that Bartolus will place the Empire and Papacy side by side as separate and dis-

[1] On Frederick II's plans vide Huillard-Bréholles, *Vie et Correspondance de Pierre de la Vigne*, pp. 204–19. And vide Occam's reference to Justinian (in Goldast, *Monarchia S. Romani Imperii*, vol. II. p. 329). Radulf de Colonna, a Papalist, acknowledges that Charlemagne, as Patrician, had power both to order the apostolic see and to appoint bishops. The former power he did not use, but did not renounce—the latter he used. Finally Lewis the Pious gave up both rights "expresse." Vide his tract. "De Translatione Imperii" (in Goldast, op. cit. vol. I.), chap. 6.

[2] In this context it is very interesting to note how Augustinus Triumphus, *Summa de Eccles. Pot.*, Quaest. XLVI. art. 1, refers to S. Augustine's comparison of kingdoms without justice as "magna latrocinia," to deduce the necessity of obedience from all men to the Papacy, and how John of Paris, *De Pot. Regali et Sacerdot.*, chap. XIX., answers this Papalist argument by pointing out that S. Augustine was referring to *Pagan* states.

tinct, but co-ordinate, powers. "Quidam sunt habentes jurisdictiones separatas et distinctas, ita quod una ab alia non dependet, nec sunt sub eodem domino, ut Papa et Imperator[1]." Both are of Divine origin—"Imperator et Ecclesia processerunt a Deo tamquam a causa efficiente[2]"; and they are nearly related one to another[3] —"non multum differunt, tamen in aliquibus differunt[4]."

This conception of the relations of the Empire and Papacy may be illustrated throughout his commentaries. "Imperator et Papa," "Princeps et Papa"—the two go together; the Pope is another "Princeps" of the Law Books[5]. Thus "Papa et Imperator possunt concedere regibus nostris regna quae tenentur per Saracenos, quae jam (sic) fuerint nostra[6]." We have mention of captains of war, "qui per Papam vel Principem mittuntur ultra mare ad expugnandum Saracenos[7]." So, when Bartolus says that statutes

[1] *Comment. on Dig. Nov.* Part II. (D. XLVIII. 17. 1), p. 528.

[2] *Comment. on Dig. Vet.* Part I. (Prima Constitutio), p. 8, § 14. Cf. *Comment. on Authenticum*, Collatio I. (Quomodo oporteat Episcopos, § Maxima Quidem), p. 25, § 1: "Imperium et Sacerdotium processerunt a Deo et eodem tempore."

[3] Thus "dicuntur quodam modo fraternizare," vide *Comment. on Dig. Vet.* Part I. (Prima Constitutio), p. 8, § 13. Elsewhere the Church is called the *sister* of the Empire. Vide below, p. 95.

[4] *Comment. on Authenticum* (De non alien. aut permut. rebus ecclesiast. § Sinimus), p. 28: "Dicitur enim hic quod Imperium et Sacerdotium aequiparantur....Sed respondeo, quod licet Imp. et Sac. non multum differant, tamen in aliquibus differunt."

[5] In Durandus we find this definitely stated. Vide his *Speculum Juris* (Lib. II. Partic. III., de Appellationibus, § Videndum), p. 480: "Videndum restat a quibus appellari possit. Et quidem generaliter ab omnibus tam delegatis, quam ordinariis....A Principe autem, *scilicet a Papa vel Imperatore*, non appellatur."

[6] *Comment. on Dig. Vet.* Part II. (D. XIX. 1. 57), p. 391.

[7] *Comment. on Codex*, Tres libri (C. XII. 12. 1), p. 125.

against the liberty of the Church or ecclesiastical persons are invalid, we are told that such statutes are those "contra privilegia concessa ecclesiis seu ecclesiasticis personis per Principem seu Papam[1]." Similarly "scripta seu authoritates approbatae ab Imperatore vel summo Pontifice probant et concludunt[2]."

Sometimes the correspondence is carried further. The Senate is made to correspond with the college of cardinals, the Praeses Provinciae with the Papal legate. "Nota quod ad famam solus Princeps et senatus potest restituere, et eodem modo Papa et collegium, quo ad spiritualia, et quo ad temporalia in his qui sunt Ecclesiae subjecti; aliter secus secundum Innocentium[3]." Elsewhere, after saying that "si dominus legatus venit ad civitatem Perusii et hospitatur in domo domini episcopi," the bishop does not from the fact of the legate's presence lose his own jurisdiction, Bartolus refers to another text to show that "defensor civitatis non perdit jurisdictionem suam per praesentiam praesidis[4]."

[1] *Comment. on Codex*, Part I. (C. I. 2. 12, Nova const. Fred. II, Cassa et Irrita), p. 42, § 3.

[2] *Comment. on Dig. Vet.* Part II. (D. XII. 1. 1), p. 5, § 21. Cf. *Comment. on Infort.* Part II. (D. XXXIII. 10. 9), p. 253, in the same matter. Examples can be multiplied on other matters as well—"Non creditur nunciis sedis Apostolicae vel Principis nisi habeant literas," in *Comment. on Codex*, Part I. (C. I. 15. 1), p. 93, § 2. Or vide *Comment. on Codex*, Part II. (C. VII. 62. 6), p. 227, § 4. *Comment. on Dig. Nov.* Part II. (D. XLV. 1. 136, § Cum quis), p. 157, § 1.

[3] *Comment. on Dig. Vet.* Part I. (D. III. 1. 1, § De Qua re), p. 322, § 1. In the same Commentary (D. I. 16. 12), p. 131, § 2: "Legati cardinales scilicet qui mittuntur ab ecclesia Romana tenent locum proconsulis," which is not inconsistent with the correspondence of the whole College to the Senate. And in D. I. 11. 1, p. 109, the "praefecti praetorio aequiparantur cardinalibus et episcopis, quod est notabile propter multa et ideo nota eam."

[4] *Comment. on Codex*, Tres libri (C. XII. 41. 3), p. 140. Cf. *Com-*

But if we continue, we find that these two powers are considered not merely as separate jurisdictions, but rather as separate jurisdictions in separate territories. "Quaedam sunt territoria, quae sunt separata, nec tamen sub eodem domino, ut territoria Imperatoris et Papae[1]." Bartolus is here discussing whether "citatio verbalis" can be made "extra territorium citantis." Cino, says Bartolus, decided that it could, but against this stands a decretal, to which Cino said, contemptuously, that no answer was to be given, but that it might pass with the other errors of the canonists[2]. Bartolus, however, who will not speak of the canonists in this way, offers a solution. "Quaedam territoria sunt distincta, sub uno tamen domino sunt omnia, ut Imperium Romanum est divisum per praesidatus. Tunc unus praeses potest citare in provincia alterius, quae tamen est sub eodem domino; ita loquitur hic. Quaedam sunt territoria quae sunt separata, nec tamen sub eodem domino, ut territoria Imperii et Papae, et tunc non potest fieri citatio de uno territorio ad aliud. Ita sustineo istud decretalem."

The reference to the decretal "Pastoralis Cura" and to Cino shows that Bartolus has in mind the famous dispute which occasioned this decretal of Clement V.

ment. on Authenticum (Collatio II. Ut jud. sine quoquo suffr. fiant. Omnes dignitates, § Illud autem), p. 33, § 102, "Imperator potest unire duas provincias....Et sic Papa potest duos episcopatus unire."

[1] *Comment. on Codex*, Part I. (C. I. 3. 31), p. 75.

[2] Ibid.: "Secundo nota ex ista § 'Verum si apparitor' (i.e. in this law C. I. 3. 32) quod citatio verbalis possit fieri extra territorium citantis. Et ita determinat Cynus in quadam disputatione quam fecit. Sed de hoc est casus in contrarium (extra. de re jud. in c. pastoralis in Clementinis). Ad hanc decretalem dicit Cynus non est dare responsum, sed, dicit, pertranseat cum aliis erroribus Canonistarum."

The Emperor Henry VII had declared war on Robert, king of Naples, the leader of the Papalist party in Italy. Clement intervened and ordered the suspension of hostilities, on the ground that Henry was bound by his oath of fealty to respect the vassals of the Church, such as the Pope claimed the king of Sicily to be. Henry of course refused to recognise himself as bound by any oath of fealty to the Pope and summoned Robert to appear before him at Pisa. Robert not appearing, Henry declared him guilty of treason, sentenced him to be deprived of his crown and put him to the ban of the Empire. The Emperor issued his constitution "Ad Reprimendum" defining treason, and the Pope replied with this decretal "Pastoralis Cura." Henry soon after died; but the decretal was included among the Clementines, while the constitution was placed as "Collatio XI." in the Authenticum, and glossed by Bartolus himself. The legal question at issue, whether citation is valid "extra territorium[1]," continued to be widely discussed, and Bartolus considers it again in his *Commentary on the Digest*[2]. He discusses whether a

[1] There was also a question whether the citation of Robert was valid as being "ad locum suspectum." Vide *Comment. on Dig. Nov.* Part II. (D. L. 7. 4), p. 666.

[2] *Comment. on Dig. Nov.* Part II. (D. XLVIII. 17. 1), p. 528. "Facit ad quaestionem illam utrum judex istius civitatis (Perugia) possit citare aliquem extra territorium suum existentem per suum nuncium vel per literas. Decretalis dicit quod non...ubi Papa reprobat sententiam Imperatoris latam Pisis, ubi per edicta citaverat regem Robertum existentem in terris ecclesiae, et sic in alieno territorio. Dicit enim Papa, quod ipse Papa debet requiri ab Imperatore ut citaret regem in suo territorio; non autem potuit ipse Imperator citare. Cynus disputavit istam quaestionem Senis (Siena) et dicit quod ista citatio, quae sit verbo vel per edicta, potest fieri de eo, qui est in alieno territorio.... Citatio vero talis, capiendo personam, non posset fieri....Sed ad illam

judge of Perugia can cite anyone outside the territory of Perugia. The decretal "Pastoralis Cura" says no; and this time Bartolus definitely mentions the dispute between the Emperor Henry and king Robert. Again he gives Cino's opinion and records his contempt for the canonists. For himself, however, he has always defended the decretal, offering as a sort of apology that he is "in terris Ecclesiae"; and so, he says, the decretal is true "de jure." His solution is the same as that given in the passage quoted above. In the case of judges whose jurisdictions are separate, yet all dependent "ab uno principe, ut diversi praesides diversarum provinciarum constituti a Principe vel ab uno rege; tunc unus potest citari[1] in territorio alterius verbo...quasi hoc videatur permissum ab illo Principe, qui eos constituit...Quidam sunt habentes jurisdictiones separatas et distinctas, ita quod una ab alia non dependet, nec sunt sub eodem domino, ut Papa et Imperator; tunc unus non potest citare in territorio alterius. Ita loquitur decretalis Cura Pastoralis, sed debet requirere illum judicem, in cujus territorio est (i.e. the accused) ut illum citet." Comparing these two quotations we see that Bartolus, accepting the decretal of Clement V, considers that the kingdom of Naples was within the "terrae Ecclesiae," and that therefore the Emperor could not cite king Robert there, without the permission of the Pope. Of course the Emperor claimed that Naples was a part of the universal Roman

decretalem, dicit ipse, non potest dari responsum in pace, sed pertranseat cum aliis erroribus canonistarum. Ita dicit ipse. Ego consuevi tenere illam decretalem, tamquam existens in terris Ecclesiae, dicens eam esse veram de jure."

[1] Sic. "Citare" is obviously meant.

Empire, though he also claimed that Robert was bound to appear before him, being his direct vassal in regard to certain lands held in Piedmont; and Cino and the lawyers on Henry's side brought arguments to prove that citation "extra territorium[1]" is valid, therefore in part acknowledging the Pope's claim over Naples. However it is with the views of Bartolus that we are here concerned, and they are clear. The territories of the Pope and of the Emperor are distinct like their jurisdictions. This territory of the Church is, as we saw above[2], still a part of the Roman Empire and its inhabitants a part of the Populus Romanus, since it was granted out of the Empire by the Emperor to the Church. And thus it may be said that the world is divided between these two territories; what is not in the territory of the Church, must be in the territory of the Empire, except a few towns like Perugia, which are freed by privilege from both[3].

[1] Unfortunately Cino's disputatio held at Siena at the very time of the difference between Henry and Clement, and which Bartolus has mentioned, is lost. According to Bartolus Cino maintained the validity of citation extra territorium "quae fit verbo," but not "capiendo personam." But it seems that he also denied that Naples was in "the territory of the Church." Vide Chiapelli, *Vita e Opere Giuridiche di Cino da Pistoia*, pp. 126–30. On the question of the Pope's claim of an oath of fealty from the Emperor, vide Hugelmann, "Die deutsche Königswahl im Corpus Juris Canonici" (no. 98 of Gierke's *Untersuchungen*), p. 112 and ff.

[2] Vide above, p. 26.

[3] "Facit haec lex quod civitas Perusina non subsit Ecclesiae nec Imperio. Et si dicas, quidquid non subest Imperio, est sub Ecclesia, concedo, nisi civitas aliqua non subsit Ecclesiae ex privilegio concesso. Sed civitas Perusina est hujusmodi: nam Imperator donavit eam Ecclesiae, seu permutavit cum ea: et ex privilegio Ecclesiae liberavit eam." Vide *Comment. on Codex*, Tres libri (C. x. 31. 61), p. 44. There is a note on this passage by Scalvanti, "Un opinione del Bartolo

This territorial conception of the Empire and Papacy does not of course exclude the conception of the two supreme powers, each with its own sphere of temporal and spiritual matters respectively. For example, in the question of legitimation Bartolus draws two distinctions. As far as "temporalia" are concerned, the Emperor can legitimate; not, as regards "spiritualia." But, even as regards "temporalia," the Emperor cannot legitimate those who are not his subjects, that is to say in the territory of the Church; nor can the Pope legitimate, as regards "temporalia," in the territory of the Empire[1].

We see how the two conceptions meet one another. The Emperor legitimates as regards "temporalia," the Pope as regards "spiritualia." The Pope also legitimates as regards "temporalia" in his distinct territory, but here the correspondence breaks down. Bartolus cannot maintain that the Emperor can legitimate as regards "spiritualia" in the territory of the Emperor. Consequently, though the universal activity of the

sulla libertà Perugina" (in *Bolletino della R. Deput. di storia patria per l'Umbria*, vol. II. p. 59 and ff.).

[1] *Comment. on Codex*, Part I. (C. v. 5. 6, Auth. Ex complexu), p. 534, § 5: "Quaerit gl. utrum illi spurii possint legitimari per principem. Gl. dicit quod sic et bene....Quod potest esse verum quantum ad temporalia, sed quantum ad spiritualia non. Nec Papa quantum ad temporalia potest in terris Imperii." Cf. *Comment. on Dig. Vet.* Part II. (D. XXIII. 2. 57), p. 476: "Nota quod Imperator potest legitimare filios....Quod sine dubio est verum quo ad temporalia; sed quo ad spiritualia secus. Nec Imperator legitimat quo ad temporalia inter non sibi subditos." In *Consilium* 75, p. 50, § 4, on the question whether "legitimatio quod fieret ab Imperatore vel ab alio habente potestatem ab ipso valeat in terris Ecclesiae immediate subjectis," B. does not decide, but gives Innocent's decision against its validity, Jac. de Belvisio's for, whose opinion "videtur sequi Joh. Andreae."

Emperor, in temporal matters, is limited, by the conception of these "jurisdictiones et territoria distincta," to the territory of the Empire, the universal spiritual activity of the Pope must reach beyond his own distinct territory and be universally valid.

All this is further illustrated by Bartolus' treatment of the Canon Law. Canon Law was, with Roman Law, the fundamental material with which he worked, though we have seen that he considered it as dependent on, and therefore in a sense inferior to, the Civil Law. He did not, like Baldus and other legists, write any commentaries upon it. But he cited it, as decisive, authoritative, as he did the Justinian Law Books; he did not merely adduce it as an illustration, in the manner in which he cited "statuta." He had none of the hatred which Cino[1] and some other legists felt for the canonists. We have seen him defend a decretal and the canonists from Cino's contempt. He may often have disagreed with the canonists, but he was always respectful to their opinions; and generally, where "spiritualia" were under discussion, he was ready to stand by their judgment[2].

Where Canon Law itself, apart from its commentators, is concerned, it is in spiritual matters always to be preferred to the Civil Law. Just as the Pope's jurisdiction in spiritual matters is universal, while the Emperor's temporal jurisdiction is limited to the territory of the Empire, so Canon Law, in so far as it relates

[1] Vide, for the mutual hatred of Cino and the Canonists, Chiapelli, op. cit. p. 130 and p. 142 and ff. Later writers reprove him, Baldus among them. Vide also Gierke, *Deutsche Genossenschaftsrecht*, vol. III. p. 354 and note 2.

[2] For Bartolus and the canonists, vide Appendix B, below.

to "spiritualia," is of universal validity above the Civil Law, while Civil Law, even in temporal matters, bows to the Canons in the territory of the Church. "Quaero ergo quando lex contradicit canoni, vel econtra, cui sit standum. Gl. hic tangit, et videtur quod sit standum canoni...Tu dic: aut loquimur in spiritualibus et pertinentibus ad fidem, et stamus canoni...Aut loquimur in temporalibus; et tunc aut in terris subjectis Ecclesiae: et sine dubio stamus decretalibus. Aut in terris subjectis Imperio: et tunc aut servare legem est inducere peccatum, ut quod praescribat possessor malae fidei: et tunc stamus canonibus...Aut non inducit peccatum: et tunc stamus legibus[1]."

The abstract rule here laid down is confirmed by frequent decisions of Bartolus himself. Thus in discussing "An quando quis dicit judicem suspectum, sit inferenda causa,"—"omnes nostrae glossae," says Bartolus[2], "et doctores juris civilis dicunt quod non, et illud consului in quadam civitate Imperii. Canonistae contra...unde in terris Imperii tenetur opinio istius glossae." Again, "de jure canonico," he says[3], discussing a law of the Code, "ista lex est correcta, quia instantia litis non perit triennio. Ideo illa observatur in terris Ecclesiae, haec vero in terris Imperii." Finally we may give an example in which "spiritualia" are concerned. Bartolus is considering[4] "relicta ad pias

[1] *Comment. on Codex*, Part I. (C. I. 2. 12), p. 41, § 2. It is noteworthy that in this passage all the authorities given by Bartolus are from the Canon Law. I have not thought it necessary to transcribe them, but have marked their omission by dots.

[2] *Comment. on Infort.* Part II. (D. XXXVI. 1. 4), p. 421, § 2.

[3] *Comment. on Codex*, Part I. (C. III. 1. 11), p. 305, § 1.

[4] *Comment. on Codex*, Part I. (C. I. 2. 1), p. 32, §§ 79–81.

causas." "Quaero an ea quae supra dicta sunt in disponente ad pias causas in mortis articulo sint vera etiam in quolibet disponente constituto in non mortis articulo, ita quod si Imperator disponeret contrarium, non valeret. Respondeo in dispositionibus factis ad pias causas, sive per constitutum in mortis articulo, sive non, nulla requiritur juris civilis solemnitas...dum tamen talis dispositio non repugnet bonis moribus seu pietati...Et etiam si Imperator constitueret contrarium, non valeret, et omnes leges statuentes contrarium non essent servandae. Quod probo, quia leges factae super rebus pertinentibus ad pia loca vel piis actibus deputatis non valent nisi authoritate ecclesiastica fuerint confirmatae...Praeterea in his quae spiritualia sunt vel in quorum observatione emergunt peccata, jura canonica praevalent legibus." Bartolus then goes on to show that "relicta ad pias causas" are a spiritual matter, in that remission of sin is thereby obtained. In this matter, therefore, "praevalent canones legibus." He mentions two extravagants to show that this is "jure canonico expressum"—"in quibus, licet specialiter exprimatur de numero testium, tamen generaliter dicit quod talia relicta non debent judicari secundum leges humanas, sed secundum sacros canones et jura divina[1]." Further the "dicta Apostoli" prevail over the "dicta Imperatoris," and Bartolus quotes S. Paul (Galatians) and the Gloss to the Magister Sententiarum (Peter Lombard) to prove that "relicta ad pias causas" are

[1] Note also § 83 at the end of the Commentary on this law: "Ex quibus concludo quod, non obstante aliqua lege communi, municipali vel imperiali, facta vel fienda, relicta ad pias causas debent judicari secundum canones et jura divina et naturalia, seu gentium, et non secundum leges."

not bound by the "solemnitates" of Civil Law. "Item ex eo quod glossa (i.e. to the Sentences) dicit quod est in authoritate canonum, apparet quod omnes debent illud observare, sive in terris Ecclesiae, sive Imperii"—meaning, as is clear from all that goes before, that it must be obeyed both in the territory of the Church and of the Empire, not because it is in the Canons, but because it is a spiritual matter, in that it concerns the remission of sin[1].

Provided, then, that we remember the two distinct conceptions of these two powers, the Papacy and the Empire, which we may call the universal and the territorial conceptions, the views of Bartolus on their relations are so far logical and consistent; though, as we have seen, the exact balance between the two powers is destroyed in favour of the Papacy by the fact that the universal spiritual jurisdiction of the Pope and the Canons, unlike the universal temporal jurisdiction of the Emperor and the Civil Law, is never restricted to one territory.

In all this Bartolus was not merely constructing theories; he was writing with his eyes, as usual, fixed upon Italy, and interpreting very closely the actual conditions there existing. In the first place, in Italy, as in the rest of western Europe, the validity of the Canons over secular laws was, in spiritual matters, universally recognised. Canon Law was administered all over western Europe in its own spiritual courts. The validity of Civil Law was not nearly so universal.

[1] Cf. *Comment. on Dig. Nov.* Part I. (D. XLI. 3. 5), p. 293, § 8: "De jure vero canonico superveniens mala fides usucapionem vel praescriptionem interrumpit, cui juri canonici est standum ideo quia tangit peccatum."

Outside of Italy and the Pays du droit écrit in France, Roman Law was not yet anywhere received. In Italy itself, Civil Law was not the only temporal law under which men lived. The clergy did not, here as elsewhere. Among laymen there were still some living under Lombard Law[1]. Naples had its laws. The cities had their statutes. We shall examine later in this essay the relation of these to Roman Law, and we shall see how the Civil Law occupied, as it were, an international position in Italy, supplementing and correcting the Statuta. But on the other hand, though the Barons of England might declare that they would have no changes in the laws of England, and though Wyclif at the end of this century might plead that English, not Roman Law, should be taught at Oxford[2], these facts themselves are eloquent testimonies that men were looking ever more favourably on Roman Law, were tending to regard it everywhere as *the* temporal law, the most divine and reasonable of temporal laws and so superior to all local laws.

Then again, territorially, Canon Law was actually the law of the Church lands in Italy, for laymen and clerks alike; or rather it occupied in the lands of the Church the same position as Roman Law in the rest of Italy—an "international" position to conflicting, or supplementary to insufficient, local legislation. There were both pontifical and legatine constitutions for the states of the Church; where they failed, it was the

[1] Vide Pertile, *Storia del diritto italiano*, vol. II. Part 2, pp. 63–9. He quotes a passage on p. 67, note 29, from Lucas de Penna, a contemporary of Bartolus, saying that in Naples "multi utuntur eo jure."

[2] Vide Maitland, *English Law and the Renaissance*, Note 20, pp. 52–4.

Canon Law that supplemented them; the Civil Law only where the Canon Law itself was insufficient; so that in case of difference between the two laws, the Canon Law prevailed over the Civil Law[1].

There was thus ample warrant for taking Canon Law both as a universal spiritual law and as the territorial law of the territories of the Church. But in fact even these two distinctions did not quite cover all cases. A matter might be both spiritual and temporal, and be cognisable before both a lay and a clerical court. Bartolus is quite aware of the difficulty and allows for it; but the fact that there were cases, in which it was uncertain which court and which law should have cognisance of them, or which were cognisable before both courts and laws, does not destroy the general distinction between the two laws which Bartolus makes.

His view of the Canon Law is also important because it marks the end of a period in the relations between the Canons and Civil Law. The violent hostility was over on both sides. Roman Law ceased to be suspected by Popes and kings; and the great lawyers, who followed Bartolus, accepted the Canon Law as he did. The world was preparing for the great reception of Roman Law, and all the theories of Bartolus tended, as we shall see, to make that reception possible.

His attitude to the canonists is well worth noting. The enormous influence which he was to wield over the next centuries was bound to be greatly advanced by the fact that his Imperialism—in some regards extreme—was tempered by an equally extreme

[1] Vide Pertile, op. cit. vol. II. Part 2, pp. 72–4, and p. 92, note 104.

tenderness of giving offence to the Church and its laws. The enmity still felt for Cino by later canonists, like Panormitanus, would have been a great, very great, obstacle in the way of his influencing later thought, had his reputation, and perhaps we may say, his genius (as a lawyer), been equal to those of Bartolus. But the two were of different epochs; and the new epoch of concord between the two laws began with Bartolus.

Except for the inherent superiority of "spiritualia," Bartolus has so far maintained the clear separation of the Empire and Papacy, extending that separation to jurisdictions, territories and laws. But, living in the fourteenth century, Bartolus was bound to consider the matter further. The Papacy did not claim separation, but insisted on its superiority in either sphere and over all the world. "Porro subesse Romano Pontifici omni humanae creaturae declaramus, dicimus, diffinimus et pronunciamus omnino esse de necessitate salutis," Pope Boniface had, nearly fifty years earlier, declared. That Bartolus had no desire to handle the question of superiority is very certain. He was significantly silent about the great struggle between John XXII and Lewis of Bavaria, of which he was a contemporary: and one cannot help feeling that that silence is intentional[1]. The greater

[1] No one could be more shy of speaking out than Bartolus on this whole topic of the relations of the Papacy and Empire. We may however note two interesting passages in which, not the Pope, but the Roman Court, comes in for blame. The first relates to simony. Vide *Comment. on Dig. Nov.* Part II. (D. XLVIII. 14. 1), p. 517: "Nota ex hac lege quod in curia Romana cessat lex Julia ambitus, quia haec omnia pertinent ad Papam, et hoc quo ad ipsum Papam. Sed utinam hoc observaretur quo ad ipsos qui sunt adhaerentes Papae. Et ideo sciatis quod decretistae fecerunt multas constitutiones, tamen in tractatu de simonia, quae est idem quod ambitus, nullam novam

part of his theories on the relations of the Empire and Papacy were based on questions connected with Henry VII. His struggles were long over; he had been on the eve of a breach with the Papacy, but his death had averted it; his grandson, Charles IV, was the approved and obedient ally of the Avignon Popes and their candidate against the excommunicated Lewis.

We have quoted above, when considering the de jure lordship of the world, which Bartolus ascribes to the Emperor, from a passage in his *Commentary on the Constitution Ad Reprimendum* of Henry VII. After giving various explanations of the fact that the de jure and the de facto lordship of the Emperor do not correspond, he finally offers another, as the opinion of "Holy Mother Church." We shall quote the passage in full:—"Tertio, inhaerendi opinioni S. matris Ecclesiae, primo fuit Imperium Babylonis. Secundo fuit Imperium Persarum et Medorum. Tertio fuit Imperium Graecorum. Quarto fuit Imperium Romanorum. Ultimo adveniente Christo istud Romanorum Imperium incepit esse Christi Imperium, et ideo apud Christi vicarium est uterque gladius, scilicet spiritualis et temporalis. Christus enim est lapis abscissus sine manibus, cujus regnum non dissipabitur, de quo prophetavit Daniel (cap. II.), ubi haec omnia Imperia describuntur expresse. Dic ergo quod ante Christum Imperium

constitutionem fecerunt. Ratio: quia simonia non punitur, ut debet." The other relates to delays in the hearing of cases—*Comment. on Dig. Nov.* Part II. (D. XLV. 1. 72), p. 78, §31: "Licet enim tempus instantiae sit certum quia durat triennio, tamen tempus litigii est omnino incertum. Potest enim esse quod durabit anno, aliquando biennio et aliquando perpetuo, ut in curia Romana, et ideo quia expectare finem judicii esset expectare regem Sassonum." Is "to expect the king of Saxony" an Italian proverb?

Romanorum dependebat ab eo solo (i.e. the Emperor), et Imperator recte dicebat quod dominus mundi esset, et quod omnia sua sunt. Post Christum vero Imperium est apud Christum et ejus vicarium, et transfertur per Papam in principem saecularem. Unde si dicimus omnia sunt Imperii Romani, quia nunc est Christi, verum est si referamus ad personam Christi. Si vero referamus ad personam Imperatoris secularis, non proprie dicitur quod omnia sunt sua vel sub sua jurisdictione, quia non sunt terrae Ecclesiae. Illas enim sibi reservit Papa, in quo principaliter est Imperium. In hac ergo constitutione si se retulit ad Imperium (i.e. the Emperor), vel si se retulit ad personam suam, locutus est caute. Non enim dicit quod totius orbis jurisdictio sit sua, sed quod totius orbis regularitas in eo requiescat. Nam et terras Ecclesiae ipse habet certo modo regulare, scilicet defendendo eas et servando in devotione Ecclesiae, ut juravit (in c. I. extra. de re jud. in Clementinis). Et hoc pro nunc transitorie dico, quoniam opus per se requireret quae dico. Quare sic credo tenere Ecclesiam, sic credo Imperatorem sentire; et si male hoc vel aliud intelligerem, sum paratus me corrigere."

We shall see in a later part of this essay that Bartolus has almost unquestionably drawn this theory, which he gives "adhaerendo opinioni S. matris Ecclesiae," from the continuation of the unfinished treatise by Aquinas, the *De Regimine Principum*. Here let us merely note the points in which this theory contradicts former theories, which we have seen Bartolus give on his own authority, not as the opinion of the Church. In discussing who compose the Populus Romanus, we saw the territory of the Church considered as a

portion of the Empire granted by the Emperor to the Pope and clergy, who do not thereby cease to be "cives Romani." We shall see the same view as to the origin of the territory of the Church, when we come to the opinion of Bartolus on the Donation of Constantine. Here, on the contrary, the "territorium Ecclesiae" is a portion of the whole Empire, which has now become the "Imperium Christi," reserved by the Pope, as Christ's vicar; the rest of it he transfers to the secular prince. Then, whereas above he has maintained that to deny the universal lordship of the Emperor is perhaps heresy, as against the teaching of the Church and the example of Christ, who Himself recognised the Emperor as "dominus," here Bartolus says expressly that it is only true to say that "omnia sunt Imperii Romani," if we refer "ad personam Christi," in whom, and in His vicar the Pope, "principaliter est Imperium." And thirdly it is noticeable how in this passage Bartolus explains this constitution of Henry VII by maintaining that the Emperor does not say "quod totius orbis jurisdictio sit sua, sed quod totius orbis regularitas in eo requiescat." The words of the constitution itself, upon which Bartolus bases this interpretation, are—"Ad reprimendum multorum facinora, qui, ruptis totius debitae fidelitatis habenis, adversus Romanum Imperium, in cujus tranquillitate totius orbis regularitas requiescit...." Bartolus' interpretation is quite unsatisfactory. These words of the constitution contain nothing about jurisdiction, and certainly no surrender of it; the thought is, as a matter of fact, identical with Dante's—the necessity of the Roman Empire for the consummation and maintenance of peace, which can only be secured

while the Roman Empire is intact. Besides we have seen Bartolus himself explain the universal dominion of the Emperor as meaning universal jurisdiction, and in one place[1] we have seen him actually deny the necessity of explaining this universal dominion as a "regularitas," not indeed because, in that place, he maintained it to be jurisdiction, but rather a universal, not particular, ownership.

Let us now turn to another passage, in the *Commentary on the Digest*, immediately following a discussion on the question of "citatio extra territorium," which we have already noticed. It was decided that neither the Pope nor Emperor, whose territories and jurisdictions are distinct, can cite in the territory of the other—"tunc unus non potest citare in territorio alterius. Sed debet requirere illum judicem, in cujus territorio est, ut illum citet, ut hic dicitur." He continues in a passage which is doubly interesting from its mention of Dante—"Et hoc prout tenemus illam opinionem, quam tenuit Dantes, prout illam comperi in uno libro quem fecit, qui vocatur Monarchia: in quo libro disputavit tres questiones. Quarum una fuit, an Imperium dependeat ab Ecclesia? Et tenuit quod non: sed post mortem suam quasi propter hoc fuit damnatus ab haeresi. Nam Ecclesia tenet quod Imperium dependeat ab Ecclesia pulcherrimis rationibus quas omitto. Tenendo istud quod Imperium dependet ab Ecclesia: respondeo alio modo, et dico, quod unus judex potest citare in territorio alterius judicis, cui non subest.... Sed in territorio illius judicis majoris a quo habet

[1] In this very commentary on the constitution of Henry VII, vide above, p. 24.

jurisdictionem, propter ejus reverentiam non potest citare....Non habetis hic alia[1]." Here the argument is very unsatisfactory. Bartolus has laid down the rule (repeated by him elsewhere) that a judge can cite in a territory outside his jurisdiction, if the territory be not distinct,—i.e. if both his territory and the territory from which he cites are under *one* superior. If the territories are distinct, i.e. under different superiors, citation cannot take place. "And this," he continues, "so far as we hold Dante's opinion." Of course he does not mean Dante's opinion of the question of citation, for that problem does not enter the Monarchia. He can only mean—this is true if we hold Dante's opinion that the Emperor is independent of the Pope, though Dante's view of the independence of the Emperor was quite a different thing from the distinct jurisdictions and territories of Bartolus. To Dante the Emperor was supreme over all the world in temporal matters, the Pope in spiritual; he limited the power of neither territorially, and would certainly not have accepted Bartolus' opinion that the universal temporal jurisdiction of the Emperor was invalid in the "lands of the Church." But for these views, Bartolus says, Dante was almost condemned as a heretic, for the Church holds that the Emperor *is* subject to herself—"pulcherrimis rationibus quas omitto." And so, accepting the Church's opinion, Bartolus gives quite a new answer to

[1] One might be inclined to translate this "Non habetis hic alia" by a Johnsonian "There's an end on't." But as a matter of fact it is a very usual way with Bartolus of ending any discussion, as a glance at his Commentaries will show. There are variants sometimes, such as "Hic est finis," "Hic non sunt alia"; but this form is most usual.

the question of citation—"alio modo." A judge can cite in the territory of another judge, to whom he is not subject; but in the territory of his superior judge, from whom he has his jurisdiction, he cannot cite "propter ejus reverentiam[1]." That is to say, the Emperor is here considered, with regard to the Pope, as an inferior "judex." He is put in the same position as those inferior "judices," who, in the solution of this question given originally[2], were allowed to cite "extra territorium," because, though both territories were distinct, they were still both under the Emperor, from whom, as superior, both the "judices" of these territories held their jurisdiction. But now, though an inferior "judex," he cannot cite extra territorium—"propter ejus (the Pope's) reverentiam." True, this is given as the opinion of the Church—"tenendo istud quod Imperium dependet ab Ecclesia"; but it is given as accepted by Bartolus, not merely as a dialectical objection brought forward to be refuted.

[1] As regards these words "propter ejus reverentiam" Bartolus refers to what he has said in his *Comment. on the Dig. Nov.* Part I. (D. XXXIX. 2. 4, § Si tam vicinum), p. 78, §§ 3–4: but the actual question of the Pope's superiority is not discussed there. He considers "an superveniente majore judice, minor debeat silere." He decides that, in the case of a judex, who has "jurisdictionem delegatam generaliter in aliquo casu," on the appearance of the major judex, "interim cessat ejus jurisdictio"; that in the case of a judex who has "jurisdictionem ordinariam," the "minor," as regards certain insignia and the like, "defert majori et non utitur eo praesenti"; but "circa ea quae pertinent ad exercitium jurisdictionis, non debet cessare." All this is very little, if at all, to the point. The Emperor, even if the Pope is his superior, cannot have "jurisdictio delegata"; he is the Princeps of the Law Books himself, from whom all jurisdiction flows. And even if his jurisdiction were "delegata," "defert majori" only as regards insignia and the like, not, Bartolus says definitely, as regards jurisdiction.

[2] Vide above p. 77.

We have this substantially repeated elsewhere[1]. Bartolus refers once more to Cino's opinion that the decretal Pastoralis Cura "fuit compositum per errorem canonistarum." But, he says, since it was drawn up in a general council, "ubi est copia magna intelligentium[2]," it is not very likely to be an error—"unde est temeraria dicta solutio." He then gives another solution of the question of "citatio extra territorium," that of another lawyer, Paulus de Leazaria, according to whom a distinction must be made, whether the judge is judge over the cited party "ratione domicilii," or "ratione delicti vel contractus, et sic per accidens." In the first case the judge can cite "extra territorium," since the cited party has no other superior, through whom he can be cited; in the second case not. Bartolus agrees to the first distinction, but not to the second, urging the Canon Law and this constitution "Ad Reprimendum" itself against it. For, he says, it is quite clear that in this constitution the Emperor asserts that his citation of king Robert "existentem extra territorium" was legitimate, "et loquitur hic de citatione facta a quocunque qui praeest jurisdictioni." He continues: "Et si dices, hoc Imperator non potuit, concedo in terris Ecclesiae. Dic ergo quod Papa potest citare quemlibet ubicumque existentem, quia ipse est vicarius Ipsius, cujus est terra et plenitudo orbis ejus....Ita per universum Imperium officialis, qui praeest uni provinciae, potest citare homines existentes in qualibet provincia

[1] *Comment. on Const. ad Reprimendum* (ad verb. Per Edictum), p. 280, §§ 9–11.

[2] Bartolus considered Clement V himself "valde bonus jurista." Vide *Comment. on Dig. Nov.* Part I. (D. XXXIX. 2. 13, § Si alieno), p. 86, § 11.

Imperii, quia hoc facit authoritate Imperatoris....Sed Imperator vel alius princeps saecularis non potest citare quem in terris Ecclesiae, quia etiam illas terras sibi libere reservavit (i.e. the Pope)....Debet ergo scribere superiori illius loci ubi persona citata moratur." Now here Bartolus goes a step further in the destruction of his originally distinct jurisdictions and territories. The universal temporal jurisdiction of the Emperor is already limited to the territory of the Empire, while the universal spiritual jurisdiction of the Pope extends beyond the territory of the Church. Now the temporal jurisdiction of the Pope, which so far has been limited to the territory of the Church, is also made universal—the Pope can cite "quemlibet ubicunque existentem." This is, in effect, an avowal of the complete inferiority of the Emperor, temporally and spiritually, to the Pope. The Pope has reserved to himself the territory of the Church, and therefore transferred the rest of the world, which he rules as God's vicar, to the Emperor, in such a way, however, that he is still so far superior of all the world, as to be able to cite anywhere—even in the territory of the Empire, where the officials act "authoritate Imperatoris."

But before we sum up all these contradictory opinions on the relations of the Papacy with the Empire, we must consider one more question, that of the validity of the pretended Donation of Constantine. Until the Renaissance men were concerned, not with the question of its historical truth, but of its legal validity. Its legal validity, upheld by the Church, was attacked by Imperialists like Dante and Occam, by many of the French publicists and by many, if not most, of the civil lawyers.

Bartolus sets out the arguments for and against its validity[1]. The Emperor could not prejudice his successors—that is the gist of the argument against. On the other hand "ex quadam benignitate et specialitate valet." The Emperor was lord of what he gave "ratione jurisdictionis"; therefore "saltem jus illud, quod ipse habuit, donavit, quod facere potuit." A brother not only may, he is bound "dotare sororem." Therefore not only may the Emperor, he is bound to dower the Church. Finally what is "in signum remunerationis non dicitur donatio." If this is so, it follows that Constantine, who was healed by the Pope from his leprosy, offered the Church rather a remuneration than a donation; and a remuneration is a debt in so far that what otherwise is forbidden by law to be alienated may be alienated for that purpose.

Such are the main arguments, supported by authoritative texts from the Law Books. But these are not given as the "solutio," that is to say Bartolus' own opinion. So far he has only been giving, in the dialectical manner, the arguments on either side. But now—"Quid dicendum?...Videte nos sumus in terris amicis Ecclesiae, et ideo dico quod ista donatio valeat. Sed si quis vellet tenere opinionem quod non valuerit, posset respondere ad contraria, et probare opinionem suam per casum legis 'Digna vox.' Et dico quod est verum, quod potest (i.e. the Emperor) donare ob meritum in rebus particularibus. Item dotare Ecclesiam tamquam sororem. Sed illa donatio fuit respectu jurisdictionis, ut haberet temporaliter et spiritualiter jurisdictionem (i.e. the

[1] *Comment. on Dig. Vet.* Prima Constitutio (supr. rubric.), p. 4, §§ 13–15.

Pope). Sed lex alibi dicit, quod Imperium illud, si millies Imperator vellet a se abdicare, non posset, nisi superiori dare (ut lex Legatus infra, De officio praesidis[1]). Modo si hoc est verum, donatio illa non valuit. Ad contraria est responsum, ut dixi. Ex quo sequitur quod Papa non habet jurisdictionem aliquam. Sed volens favere Ecclesiae, dico quod illa donatio valuit. Et ad legem Legatus respondeo, quod Imperator et Ecclesia processerunt a Deo tamquam a causa efficiente...Ergo donando Ecclesiae abdicat a se et dat in manibus superioris, sicut est ipse Deus. Sed Papa est vicarius Ejus, et sic quasi ipsi Deo donare videtur."

In the *Commentary on the Authenticum* the Donation is again discussed[2]. Much the same arguments are adduced, but certain new points make it well worth quoting. "Nota quod Imperium et Sacerdotium processerunt a Deo et eodem tempore, et sic dicit Glossa quod istae jurisdictiones sunt distinctae, nec Papa in temporalibus, nec Imperator in spiritualibus debet se intromittere....Est autem Imperator divinitus consecutus Imperium privilegio et potestate....Circa quod vide ut

[1] D. I. 18. 20. In his Commentary on this law (*Dig. Vet.* Part I.), p. 141, Bartolus says: "Nota istam legem optimam. Et hic est casus secundum Jac. Buttrigarium, quod donatio facta a Constantino nihil valuit, quia a se ipso non potuit abdicare nisi in manibus populi Romani...Dixi in proemio contrarium...Vide Innocentium...et multa pulchra circa istam legem vide." The law itself in the Digest runs: "Legatus Caesaris, id est praeses vel corrector provinciae, abdicando se, non amittit imperium." In his *Commentary on the Dig. Nov.* Part I. (D. XLI. 2. 17, § Differentia), p. 270, § 8, Bartolus says: "Aliquis non potest renunciare nisi manibus superioris, ut ab eo abdicet jurisdictio," and refers to this law "Legatus" and to Innocent, but does not mention the Donation.

[2] *Comment. on Authenticum* (Collatio I. Quomodo oporteat Episcop. § Maxima quidem), p. 25, §§ 1–4.

ibi notat Innocentius...ubi videtur tenere, quod jurisdictio Papae et Imperatoris sunt distinctae nisi vacante Imperio: quo casu unica tamen est et inseparata....Et sic videtur quod Papa utramque gladii habeat potestatem, et ab Ecclesia Imperium dependeat, ut habetur in extravaganti Bonifacii quae incipit 'Unam Sanctam.' ...Tenet glossa ista quod donatio facta a Constantino Papae Sylvestro non valet, et ita determinat Jac. Buttrigarius....Sed contrarium videtur quod donatio valuerit et tenuerit, et quod per successorem non possit revocari tenet glossa....Et idem quod ibi tenet Gul. de Cunio...licet illam (i.e. glossam) non allegat (i.e. Gul. de Cunio), sed probat per multas rationes, et inter alia dicit quod haec non fuit proprie donatio, sed quaedam remuneratio, attento quod Imperator erat leprosus sanatus per Papam Sylvestrum. Valebat ergo donatio tamquam remuneratio....Primum, Imperium et Sacerdotium sunt a Deo, ut hic; ergo sunt ut frater et soror....Ergo Imperator dans Ecclesiae, non videtur donare sed dotare; sed frater tenetur dotare sororem.... Istam opinionem quod donatio teneat et non possit per Imperatorem revocari tenet glossa...et istud teneamus favore Ecclesiae. Sed quaero, retenta opinione quod donatio non valuerit, an Ecclesia praescripserit res ab Imperatore donatas. Jac. de Belvisio videtur hic tenere quod non per multas rationes, et idem videtur tenere Cynus. Sed contra tenet dominus Paulus...et dic ut ibi per eum."

To begin with, we must point out again the complete contradiction between these views and the view of the Empire as the "Imperium Christi." Here the territory of the Church is a piece cut out of the Empire and

granted to the Church; in the other view the Empire is a piece cut out of the "Imperium Christi," the territory of the Church being the rest of it, which is reserved to Christ's vicar, the Pope. Bartolus does not attempt to reconcile the two.

Secondly it is quite clear that Bartolus does not really believe in the validity of the Donation. Nearly all the arguments given in favour of it are given, not as his own, but as those of Innocent or Gulielmus de Cunio or the Gloss to the Canon Law. He confesses that its invalidity can be maintained. For himself he wishes to favour the Church, since he is "in terris Ecclesiae amicis[1]." Therefore he says that the Donation is valid. The only thing admirable in such a discussion is the honest avowal of so dishonest a method of arriving at a conclusion. Bartolus is so obviously not saying what he means, that to dissect his views on this topic further would be useless; but it is very significant that, having decided for the validity of the Donation, Bartolus brings in prescription, to make sure that the territory of the Church is held on some valid title. "Plane ludit[2]."

[1] Cf. above, p. 77, "tamquam existens in terris Ecclesiae."

[2] So said a sixteenth century writer, whom Dr Figgis mentions—"I think François Hotman" (*Bartolus and European Political Ideas*, p. 157, note 1). On one occasion only does Bartolus seem to speak of the Papal supremacy with anything at all like conviction—the passage is in one of the additional Consilia, first printed, so far as I know, in the Venice ed. of 1596. Vide Cons. VII. p. 185 verso—"Unde ego Bartolus de Saxoferrato consulo ut supra scriptum est, salvo tamen semper judicio Summi Pontificis et Sanctae Matris Ecclesiae Romanae, et sic Sedis Apostolicae omnium fidelium Magistrae et Dominae, quibus in omnibus me subdo, tamquam fidelis...etiam Imperatorem ipsum hortando et rogando ut antequam aliquid in praemissis declaret, consulat Beatissimum Papam." Cf. § 4: "...ad quem (i.e. the Pope) Imperatores et Reges et omnes Principes et Populi totius orbis debent

To sum up—the Papacy and the Empire are considered from two distinct points of view. In the first place they are the universal governing powers, the spiritual and temporal respectively, of the world—at least of that Populus Romanus, which, as we have seen, actually consists of all those who obey the Church. Both are of divine origin and of contemporary date; they are, as it were, sister and brother. But this conception is modified by a territorial conception of their relations. There is a territory of the Empire and a territory of the Church, and the two are distinct, with separate and distinct jurisdictions and administrations. And thus, combining the two, we arrive at this conclusion—the Emperor is temporal lord of the territory of the Empire, the Pope is temporal lord of the territory of the Church, but the Pope is also spiritual lord, as God's vicar, of both the territories of Empire and Church alike. And in the same way the Civil Law is the law of the territory of the Empire, the Canons are the law of the territory of the Church, but the Canons are also the universal law of both territories, as far as regards spiritual matters.

As to the origin of these separate territories we have two irreconcilable statements. According to one, the territory of the Church is cut out of the universal Empire by the Donation of Constantine; according to the other, the territory of the Empire is transferred to the Emperor by the Pope, as Christ's vicar; since from

ascendere pro interpretatione et decisione omnium dubiorum, cum Dominus noster Jesus Christus...dixerit Petro, Tu es Petrus" etc. But it should be noted that the question at issue concerns a spiritual matter, blasphemy.

Christ's coming the Empire has been His. Christ's vicar transfers it to the Emperor, but reserves to himself a part, which is the territory of the Church. The first view implies the validity of the Donation of Constantine. Which of these, or whether either of these, is really Bartolus' own opinion, need not be asked. His whole statement—and it occupies no inconsiderable space in his political thought—of the Papal supremacy does, one may feel confident, *not* express his own view, but the view which he wants to give on opportunist grounds—"wishing to favour the Church," or because he is in a place that is "friendly to the Church." In its result it endorses to the full the extremest view of Papalism. His own thought ends with the division of the Empire and Papacy into distinct and separate jurisdictions, administrations and territories, qualified by the universal spiritual jurisdiction of the Pope. That is his own doctrine; what he adds is "adhaerendo opinioni S. matris Ecclesiae."

The high place, which we hope to show Bartolus occupying in the history of political thought, is clearly not dependent on his theories of the relations of the Empire and Papacy. But before we pass on to consider topics, which show Bartolus in his true light as a political thinker, we ought to cast a glance back at our previous inquiries in this section. The theories of Bartolus on this topic may not be valuable in themselves, but they have a distinct value as illustrating the course of medieval thought. We may leave on one side all that Bartolus has said "favore Ecclesiae," and consider merely the conception of the Empire and Papacy as distinct and separate jurisdictions or powers.

Bartolus, we note, evidently uses "Papa," "Ecclesia" and "Sacerdotium" as convertible terms—nor, in this, is he by any means unique. Dr Figgis[1] has recently reminded us that "in common parlance the Church in the Middle Ages meant not the 'congregatio fidelium'—though, of course, no one would have denied that to be the right meaning—not the whole body of baptised Christians as distinct from those who were not, but rather the active, governing section of the Church." We cannot have a better conclusion to our inquiries than by attempting some criticism of this very illuminating paper.

Dr Figgis in this paper considers the distinction of Church and State as two societies, and maintains that this distinction "is either very primitive, dating from the days of persecution, or else very modern, dating from the religious divisions of Europe." This thesis in itself we are far from attempting to dispute. Where we venture to disagree with Dr Figgis is when he comes to trace the growth of this conception of Church and State as two societies: he traces it back through the Reformation to the growth of national States, the decay of feudalism and the Holy Roman Empire, and the "analysis of political forms, begun by S. Thomas on the Aristotelian basis, [which] set on foot the habit of reasoning about political societies." What we would suggest is that we must go further back than this, to the entry of Roman Law into medieval political thought in the twelfth century.

"The Code of Justinian," says Dr Figgis, "was

[1] "Respublica Christiana" (in *Transactions of Royal Historical Society*, 1911), pp. 63–88.

compiled subsequently to the *De Civitate Dei* of S. Augustine. The whole spirit of both is to identify Church and State. The Pagan State was also a Church, and the medieval Church was also a State; *the* Church and *the* State in theory." This is perfectly true, but it surely passes over a point of difference, which cannot be unimportant, that whereas in Justinian the State absorbs the Church, in S. Augustine the Church absorbs the State. Now up till the twelfth century medieval political thought was dominated by S. Augustine, not Justinian, and consequently the one society of which men conceived was a Church, not a State. Men might talk of "Respublica et Ecclesia," but there was no antithesis. There was a single Christian society—the Populus Christianus—and as often as not, in discussing the relations of the two governmental powers in that society, i.e. the Imperium or Regnum and the Sacerdotium, men named the single Christian society "Ecclesia" rather than "Respublica." Then came the Investiture struggle and the revival of Roman Law. We saw that for a moment it seemed as if the secular State was to return to western Europe as the sinful Civitas Terrena. But only for a moment. The Papalists in the main clung to the conception of the single Christian society. The secular State returned to western Europe as the lawyers' Imperium Romanum. Now of course it is undoubtedly true that this was a Christian Empire and might be conterminous with Christendom: but the point of importance was that, whereas up till now men thought of Christendom primarily as a Church, after the revival of Roman Law they began to think of the single society primarily as a State. Bartolus might find

that the Populus Romanus was practically identical with western Christendom, but the fact remains that western Europe was thought of as the Populus Romanus rather than as the Populus Christianus.

It may be said that we are here insisting on an unimportant distinction; that whether the single society was a State-Church or a Church-State is of little importance compared with the fact that, in any case, it *was* a single society and—be it State or Church—a Christian society. But the point which we wish to make is that, while the medieval lawyer, and those influenced by the lawyer's theories after the Bolognese revival, thought of the Christian society primarily as the Imperium Romanum or Populus Romanus, and therefore primarily as a universal State, the conception broke down when they came to consider the relations of this State to the Papacy or clergy. They did not—and could not, in view of the course of history and thought in the six hundred years and more between them and Justinian—accept the absorption of the Church in the State, as presented by the Corpus Juris. As a result they were driven to insist on the separation and distinction of the Ecclesia and Imperium.

To this it may be said that the separation and distinction for which they plead, are not the separation and distinction of Church and State, but of the ecclesiastical and secular governments of the one society. "The conflicts between the two powers," says Dr Figgis, "are habitually spoken of as struggles between the Sacerdotium and the Regnum; although the wider terms Respublica and Ecclesia are not unknown, it is surely reasonable to interpret them by the former."

We would venture to express this differently. We would say that in the early Middle Ages, that is to say, up to the Investiture struggle—and perhaps inclusive of it—the conflict is habitually considered as between the Sacerdotium and Regnum or Imperium, and, in nine cases out of ten at least, as taking place in the Ecclesia, rather than in the Respublica. Only in the later Middle Ages are Respublica and Ecclesia used as convertible terms for Regnum or Imperium and Sacerdotium respectively: and the conclusion we would draw is that, when this happens, the conception of the single society is breaking up.

So long as men merely place the Imperium or Regnum and Sacerdotium in antithesis, there is no question, and cannot be, of more than one society; but when they begin to use terms like Respublica and Ecclesia, which do not properly correspond to the other terms, it means that there is confusion—unconscious of course—in men's minds, which indicates an age of transition from one conception to the other.

To this we maintain Bartolus is witness. No doubt his territorial conception of the Empire and Papacy is not to be insisted on too much, and is to be referred in great part to the influence of local Italian conditions. But no man could have entertained that conception as Bartolus did—for it enters into almost all his thought on the relations of the Empire and Papacy—if he had had a really clear conception of both as but two "powers" in one society. And similarly no man could have used "Papa," "Ecclesia," and "Sacerdotium" in the way in which Bartolus used them, if the conception of Ecclesia, with the Pope at its head and representing it, over

against the Imperium, with the Emperor at its head, had not, as yet unconsciously indeed, been making itself felt.

We have attempted to controvert one or two passages in Dr Figgis' paper, not, be it repeated, the paper itself. The Middle Ages, as Dr Figgis maintains, did not arrive at the conception of Church and State as two societies. "Before the modern world of politics could arise," he has said elsewhere, "it was needful not merely to deprive the Emperor of any shadowy claim to supremacy, but the Pope must be driven from his international position[1]." But what we wish to show in this essay is that modern politics did not begin with the return of Aristotle to western Europe in the thirteenth century, but with the Bolognese revival of Roman Law at the end of the eleventh. Our modern State did not spring ready-made from the Renaissance, nor our modern conception of Church and State from the Reformation. Both were evolved by a long process in the Middle Ages, or rather processes. For the modern State is not merely the πόλις, it is also "sibi Princeps[2]," while Dr Figgis himself shows how late died the conception of the single society, the Respublica Christiana. The sum of our disagreement with Dr Figgis is thus, mainly, that we would date the break-up of the conception of the single society from the entry of Roman Law, not of Aristotle, into political thought.

There is one other point which may well be considered here. "The word Churchman," says Dr Figgis, "means

[1] *From Gerson to Grotius*, p. 19.

[2] We shall consider this phrase at length later.

to-day one who belongs to the Church as against others. In the Middle Ages there were no others, or, if there were, they were occupied in being burnt." Here again, we would suggest, we have to separate the early and the later Middle Ages. We cannot pass by the Crusades, which had brought Christian Europe once more into touch with non-Christian peoples. The political literature of the later Middle Ages shows a constantly widening outlook as regards these latter—a constantly growing tendency to think that, *caeteris paribus*, non-Churchmen, other than incorrigible heretics, ought not to be occupied in being burnt[1]. Bartolus himself, for example, we shall later see much concerned to prove the justice of "our" wars with the Saracens and Turks. It would be immensely interesting to trace the slow growth of this sentiment of toleration in the later Middle Ages; it cannot be attempted here. But we may consider this. Grotius made possible modern international law by his assumption of a universal law of nature, and under that law he took the great step of including the Turk. Now already in the Middle Ages we shall see Engelbert of Admont maintaining that all men, as men, are subject to the Jus Gentium, and therefore are under the Empire; and we may compare with this how Albericus de Rosate says that the Jews are subject to the Empire, but not to the Church[2].

[1] Among the many interesting discussions in later medieval writers on the relations of the Empire and Papacy to the Jews and other unbelievers, especially interesting are Oldradus, Quaestio CCLXIV. and Augustinus Triumphus, *Summa de Eccles. Pot.*, Quaestio XXIII.

[2] *Comment. on Codex*, Part I. (C. I. 4. 3), p. 42, § 1: "Ergo judaei subsunt Romano Imperio et legibus, sed Romanae Ecclesiae non"; and cf. a long and interesting passage in Lucas de Penna, *Comment. on Codex*, Tres libri (C. XI. 71. 1), p. 637.

Bartolus indeed, as we have seen, draws a sharp line between the Christian Populus Romanus and the Populi extranei, who none the less include the Greek Christians. But when men could talk as Albericus de Rosate, there can be no doubt that the conception of a single Christian society was beginning to give way.

II. THE EMPIRE AND THE REGNA

"Bartolus," says Dr Figgis[1], "never worried about the ultramontane, barbarian peoples"; and this, if somewhat overstated[2], is true. His eyes and his heart were fixed on Italy, and not even on Italy as a whole.

[1] Figgis, *Bartolus and European Political Ideas*, p. 159.

[2] It is overstated somewhat, because Bartolus is always ready to consider a foreign nation, and its customs, by way of illustration. Vide a curious example in the *Comment. on Dig. Nov.* Part II. (D. XLIX. 16. 3), p. 639: "Miles non suspenditur, sed decapitatur. Et ita servatur in Italia. Sed in Francia servatur contrarium: quia quilibet, etiam nobilis, suspenditur: nec habetur illa mors ita ignominiosa, sicut in Italia." Cf. *Comment. on Infort.* Part II. (D. XXXVIII. 17. 1), p. 540: "Dicit Petrus de Bella Pertica quod erat consuetudo in Anglia, quod si forensis decederet, succederet Ecclesia major." In *Comment. on Dig. Vet.* Part II. (D. XIII. 7. 18, § Si nuda), p. 266, he notes: "Regi Franciae fuit datus comitatus Tolosae ita quod ipse est rex et comes, non quod comitatus Tolosanensis efficiatur de regno, sed comitatus regni, et tunc debet regi secundum leges et consuetudines suas." Still that in general Bartolus' eyes are fixed on Italy and its problems is incontestable. They only wander beyond the Alps to face such a problem as the "translatio Imperii" to the Germans, or to fetch illustrations such as these. But the word "barbarian" does certainly not, I think, express Bartolus' attitude towards the ultramontane peoples. It is true that the Empire, since the "translatio," "semper decrevit in oculis nostris," but "omnes Christiani dicuntur fratres nostri," and all, in spite of national differences, are a part of the Populus Romanus.

It was those parts of Italy which he knew and whose problems were actually before him—Lombardy, Tuscany, the March and central Italy generally—with which he was concerned. Kings, after all, were far away, in Sicily, Naples or beyond the Alps, while tyrants were near at hand; and it was in the city-states, whether still free or fallen under a tyrant, that Bartolus saw the problems of his day made visible. The surroundings of each individual lawyer stamp their character on his works; and the works of Bartolus are those of a man who lived, taught and thought among the Italian cities of the fourteenth century.

Now, of course, the problem presented by the Regna was in many ways identical with that presented by the Civitates. In both cases the problem, put in its lowest terms, was to adapt the theory of one, omnipotent world-State to a world of States. To acknowledge that France or Florence were de facto independent was not enough. Even to acknowledge their independence as de jure, left over problems for solution. Suppose the king of France de jure independent—is he then the Princeps of the Law Books? The rather vague term Princeps could be, and often was, applied to others besides the Emperor; but it was none the less only after the work of many generations of lawyers, that the identification of the Princeps with any independent sovereign power could be made in so many words. The independence of the king of France, even when accepted both de facto and de jure[1], was not

[1] Bodin, we shall see in a later part of this essay, said that Oldradus was the "first of his age" to declare the king of France de jure independent. Many of the lawyers rest this independence on

completely fitted into the lawyer's theories, until in the middle of the fourteenth century they could say that the "rex in regno suo est Imperator regni sui." With the history of this phrase we shall be much concerned in a later part of this essay. Here we have only to note that we shall look for it in vain in Bartolus. But we shall find this solution, and all it means, applied by Bartolus time after time to the Civitas. The Civitas which Bartolus calls "sibi princeps" is in precisely the same position as the Rex, who is "Imperator regni sui"; and the reason that Bartolus did not apply this solution to the Rex is simply that the problems, which made this solution necessary, rarely presented themselves to him except in connection with the Civitas.

It is with the Civitas, therefore, that we shall be concerned for the remainder of our study of Bartolus'

special exemption, as we saw Bartolus do, when discussing the extent of the Populus Romanus. Cf. Lucas de Penna, *Comment. on Codex*, Tres libri (C. XI. 51. 1), p. 525: "Imperium est potestas, jussio, perpetuum regnum. Huic autem Imperio, scilicet Romano, omnes gentes subesse deberent....Sed sunt aliqui reges liberi, ab Imperio exempti, qui vel jugum nunquam susceperunt, vel susceptum rejecerunt...eos enim vocat Imperator socios et amicos....Potissime liber et exemptus est rex Francorum, qui superiorem in temporalibus non recognoscit....Item rex Siciliae." (Lucas de Penna is a Neapolitan.) Cf. Nicholas Spinellus (also a Neapolitan) whose *Lecturae on Dig.* Book XXVII. are printed in most editions of Bartolus' *Comment. on the Infortiatum.* Vide *Comment. on Infort.* Part I. (D. XXVII. 1. 6, § Grammatici), p. 209, § 2: "Nota Principem Romanum esse dominum totius orbis....Nec obstat C. de Summa Trin. L. Cunctos, ubi videtur dicere quod sunt alii non subjecti...quia ibi loquitur de facto. Nam de facto aliquae provinciae non sunt subjectae, sed de jure omnes sibi subjectae sunt. Et ita dicit Petrus (de Bella Pertica) in d. L. Cunctos....Quod credo verum nisi per aliquod tempus sit secuta praescriptio....Praeterea hoc non videtur verum, cum enim Francia ab ejus dominio sit subtracta et rex Franciae sit exemptus....Credo enim regem Franciae non subjectum esse Imperio."

own thought. We have to show the various steps by which we arrive at this solution; and we have to consider the Civitas after it has become "sibi princeps"; we shall attempt in later pages to show what the solution means and its place in medieval thought, whether applied to the Civitas or Regnum. Before, however, we pass on to the cities, we may glance at some of the few passages in which Bartolus treats of the kings and their kingdoms.

The division of the world, according to Bartolus, is "de jure gentium," and he distinguishes between divisions, such as the Provincia or Regnum, where men dwell together, "sed in aedificiis separatis," from those, such as the Civitas, Castrum or Villa, where they dwell together "in aedificiis in unum collatis[1]." Elsewhere he talks of the "regia potestas" as "de jure gentium[2]," and he must have a similar thought in mind, when he says, as we have seen above, that every king holds his office mediately or immediately from God, but that the elective "rex universalis" is more divine than the hereditary under-kings, who are "magis ex constitutione hominum."

Then we have seen these kings retained in the Populus Romanus, their independence being considered as grounded on concession from the Emperor, whom therefore, Bartolus argues, they must recognise as de jure lord of the world. We may infer from this that their internal independence is therefore de jure; and we have also seen that the universal dominion of

[1] Vide below, p. 124, note 1.

[2] Vide *Comment. on Dig. Vet.* Part II. (D. XII. 6. 38), p. 175, § 12. Cf. *Tract. Repraes.* Quaestio III. 1, § 2, p. 331.

the Emperor does not mean universal propriety. The world, as a "universitas," is his, but "singulae res" are not. The kings are de jure "domini praediorum suorum." Moreover we must remember that, even if the kings are only "majores judices," they have, as such, wide powers. They can make particular laws for their particular kingdoms, just as the Emperor makes universal law[1]. They are thus "judices supra legem[2]." And finally as Praesides Provinciarum, they have the right to exercise "merum et mixtum imperium"—and how much that implies we shall see later.

Occasionally Bartolus goes further and seems to place the Princeps and Rex together[3]. But such

[1] "Majores judices"—senators, praetors, praetorian prefects "qui aequiparantur regibus, qui sunt hodie per mundum"—can make statutes; but, as such, these laws have only a particular validity and do not exclude Imperial laws. "Sicut Princeps, qui est dominus totius facit legem universalem, ita isti, qui sunt domini in parte, faciunt statuta in parte." Vide *Comment. on Dig. Vet.* Part I. (D. I. 1. 9), p. 28, §§ 8–12.

[2] "...Judices supra legem, ut Papa vel Imperator vel alius dominus cujus dictum habetur pro lege in territorio suo." Vide *Comment. on Codex*, Part I. (C. II. 10. 1), p. 211. Cf. *Comment. on Codex*, Part I. (C. I. 14. 4), p. 87: "Aequum et dignum est Principem legibus vivere, et quemlibet habentem imperium."

[3] Vide e.g. *Comment. on Dig. Nov.* Part II. (D. XLIX. 2. 1), p. 600, § 3, where, discussing a question of appeal, Bartolus says: "Sed si esset aliquis rex vel dominus, qui in temporalibus superiorem non recognosceret, tunc putarem in eo idem quod in Principe, quia est eadem ratio." Again, *Comment. on Authenticum*, Collatio II. (Ut jud. sine quoquo suffr. § Omnes Dignitates), p. 33. If the "Princeps vel rex" extort anything from their subjects, the subjects suffer injustice. "Non obstat quod superiorem non habent" (i.e. the Princeps or Rex). But vide below, p. 155, a passage which clearly shows how little Bartolus is concerned with the Regna. Discussing "restitutio famae," as belonging to the Emperor, he says, "Si esset rex, princeps vel populus, qui Imperatorem in dominum non recognosceret, tunc quo ad seipsos, restitutio famae valeret": but then,

passages are few and far between. All we can really say is that Bartolus does recognise the independence of the kingdoms—and presumably as de jure; that he grounds that independence on concession; but that he leaves the Emperor above as the "rex universalis[1]." His thought is thus fragmentary upon this topic. The problem is there, and the elements of a solution; but the solution is not applied, as we shall see it applied in the case of the Civitas.

III. THE EMPIRE AND THE CIVITATES

For Aquinas, Egidius Romanus and in general all those who took Aristotle's *Politics*, as introduced to the later Middle Ages by Aquinas himself, as the basis of their political speculation, the State was the Civitas or

quite forgetting the Rex or Princeps, he continues, "Quia talis appellatur populus liber...et apud eosmet dicitur esse imperium sui ipsius." Still more significant is another passage on the same subject (vide below, p. 156): "Quaero, quis possit super infamia dispensare? Respondeo textus dicit quod solus Princeps vel senatus....Idem dicimus de Papa, quia potest cum infamibus dispensare. Idem in collegio cardinalium, vacante pastore. Secus in regibus et principibus." After which he goes on to allow the right to independent cities "superiorem non recognoscentes." Bartolus obviously does not intentionally pass over the Rex or Princeps in these two cases; he is simply not concerned with them; and thus, even when he mentions them along with the Civitates, disregards their existence when he comes to the crucial point.

[1] Vide, e.g. *Comment. on Codex*, Part I. (C. I. 2. 5), p. 36: "Ad quos pertinet imponere collectas de jure communi? Respondeo ad reges"; and he goes on to say also to "duces et barones in suo ducatu et civitates non pedisequas, quae merum imperium praescripserunt." Then cf. *Comment. on Dig. Vet.* Part I. (D. III. 4. 1, § Quod si nemo), p. 367: "Pro utilitate vero publica totius Imperii non posset imponere collectam aliquis nisi Princeps."

Regnum. The Imperium was clearly out of place in political theories derived from Aristotle. That a place was found for the Imperium we shall see in the next chapter. But the Aristotelians started from the Civitas or Regnum, and if they went on to form a hierarchy of political communities, beginning with the Civitas and culminating in the Imperium, the difference between one form of community and another was still only one of degree of perfection, for all alike came under the rubric of the self-sufficient and complete community[1].

The lawyers viewed the Civitas and Regnum differently, because they followed a tradition that went back nearly two hundred years behind Aquinas. To the lawyer the State was as essentially the Imperium, as to the Aristotelian it was the Civitas or Regnum. The Glossators, taking their texts literally, had found no place for independent, sovereign kings and cities; the kingdom was a Roman Province, the city a Roman Municipium, and both must fall under the common heading of the "universitas[2]." But already under the Glossators necessity drove the lawyers to develope their political theories. Hard facts made it quite impossible to force independent and powerful France into the position of a mere Roman Province, or an independent (and Guelph) city like Florence into that of a mere Roman Municipium. At a real solution of the difficulty, such as we shall find in Bartolus himself, the Glossators did not arrive; but a great step towards such a solution was taken, when the conception of the "universitas" was

[1] We shall consider the Aristotelians in detail in the next chapter.
[2] Vide Gierke, *Deutsche Genossenschaftsrecht*, vol. III. p. 199.

enlarged so as to include the Empire itself[1]. In this way the difference between the Imperium, Regnum and Civitas became, for the lawyer also, one of degree; but at the same time the difference of quality remained. The Empire as a world-embracing "universitas" has powers and rights, which do not belong to the "larga universitas," which is a Province, or the "minus larga universitas," which is a Civitas, and the same distinction holds good between the Provincia and the Civitas themselves[2]. Thus while the Civitas was to the Aristotelian the State, to the lawyer it was, strictly, merely a "universitas,"—and, we may say, the lowest in the scale of communities, which could be said normally to have in itself the elements of an independent political life. As a "universitas," the existence of the Civitas as a community, with a limited jurisdiction over its members, was secured. It was brought under the rubric of those corporations recognised as licit in general; there is thus, Bartolus says, nothing to prevent a "people" from settling down in a place and forming a Civitas. It could do so "de jure gentium," provided only that it did not tend "ad injuriam vel emulationem alterius[3]."

[1] The Glossators did not allow this in so many words, says Dr Gierke, though they do not reject such a conception, vide op. cit. p. 198: "Allerdings hätten wohl schon die Glossatoren die später geläufige Anschauungsweise, nach welcher das Reich selbst nur die oberste und umfassendeste 'universitas' ist, kaum reprobirt. Ausdrücklich aber vollziehen sie eine solche Subsumtion noch nicht. Vielmehr bleiben sie in der Theorie bei dem in den Quellen vorgefundenen unvermittelten Gegensatz zwischen dem Reich und allen übrigen Verbänden stehen, etc."

[2] Thus we shall find that Merum et Mixtum Imperium belong to the "larga universitas" "de jure communi," not to the "minus larga."

[3] Vide *Comment. on Dig. Vet.* Part I. (D. III. 4. 1), p. 365: "Omne

Now, however, when we remember the assumption running through the thought of Bartolus, that many, if not most of the Civitates, are independent, we realise at once that the theory is as yet quite inadequate. We need not take great cities like Perugia or Florence. Take a small city like Todi, where Bartolus began his active life as assessor. Unless theory was to be entirely out of touch with fact, the officials of Todi could not be classed as mere "defensores civitatis"; its independent political life could not be explained by its classification as a mere "collegium licitum." In other words, the problem was to assure to the Civitas rights and privileges which, strictly, were applicable only to higher political units—some only to the Civitas Romana, some to the officials of Rome and provincial governors, some only to the Emperor himself. These we may most conveniently consider under four heads:—(1) the right to be considered a Respublica; (2) the rights connected with the Fiscus; (3) the right to exercise Merum et Mixtum Imperium; (4) the right to make laws.

collegium est improbatum nisi appareat specialiter approbatum.... Quaero, quae collegia sunt approbata?...Item dicit gl. congregatio cujuslibet civitatis, castri vel villae, quod est novum quid. Videtur ergo quod si aliqua gens vellet se ponere in uno loco et facere civitatem, castrum vel villam, quod hoc potest. Videtur enim hoc permissum de jure gentium....Et crederem hoc esse verum nisi tenderet ad injuriam vel emulationem alterius castri vel villae." Cf. *Comment. on Dig. Nov.* Part II. (D. L. 16. 2), p. 685, § 7: "Et nos possemus intrare in istam quaestionem quando possent ex se homines constituere civitates, an possint sua authoritate, an requiratur authoritas superioris. Et dicit Innocentius quod homines sua sponte possunt sine authoritate superioris....Et ibi dicit ipse, non intelligas de ea quae habet episcopum, sed in aliis quae non habent episcopum, quia istud est in Italia, quando habent episcopum, est civitas."

(1) The Glossators had reserved the term Respublica "properly" only for the city of Rome of their day, an assumption so plainly untenable (even though it was something more than an academic theory, as is shown by the attempts of Arnold of Brescia and Rienzi) that they were compelled to agree that at least "improperly" the term might be applied to other Civitates as well[1]. Bartolus, however, fully developes this grudging admission. "Secundum glossam dic quod respublica proprie sumendo intelligitur de republica Romanorum, improprie autem quandoque sumitur pro qualibet alia civitate[2]." He offers, however, another explanation as well, namely that Respublica may be applied to a Civitas "ratione adjuncti," as in the case of this law, where the "respublica Heliopolitanorum" is mentioned[3]. But this explanation is clearly only applicable to laws such as this, where the term Respublica is definitely qualified by an "adjunct" other than the name of Rome[4]. In general the term Respublica occurs un-

[1] Vide Gierke, *Deutsche Genossenschaftsrecht*, vol. III. p. 201: "Allerdings gestehen die Glossatoren den Namen des öffentlichen Gemeinwesens den engeren Verbänden im Princip nicht zu. Sie behaupten, indem sie an dem betreffenden Quellenaussprüchen haften, dass 'eigentlich' nur auf das Reich und die Stadt Rom die Begriffe 'respublica,' 'jus publicum,' 'bona publica' anwendbar, alle anderen Gemeinheiten 'loco privatorum' seien."

[2] *Comment. on Codex*, Part II. (C. VIII. 18. 3), p. 291.

[3] The law runs: "Cum rempublicam Heliopolitanorum propter emolumentum sententiae in rerum tam heredis quam hereditariarum possessionem missam esse proponas etc."

[4] One may compare a passage in the *Commentary on the Codex*, Tres libri (C. XI. 48. 1), p. 103: "Cives Romani habitantes in urbe effugiunt onus capitationis....Potest etiam intelligi in civibus aliarum civitatum habitantibus intra urbem, et hoc patet ex generalitate hujus literae, quae dicit, 'in orientalibus quoque'"—referring to the words

qualified, and in no such case does Bartolus refuse to apply it to any Civitas. "Quaerit glossa de qua republica loquitur haec lex," he says of a law in the Code[1]. "Respondeo quod loquitur de republica Romanorum....Sed tunc quaerit quid in aliis civitatibus. ...Finaliter videtur tenere glossa quod aliae civitates restituuntur[2]." We may say, therefore, that the term Respublica is applicable to any Civitas. But the older tendency to limit the term to the actual city of Rome was not yet dead; it could not be merely disregarded. Bartolus goes on to point out that certain of the "Ultramontani" held the contrary—"nam civitas continetur appellatione reipublicae improprie....Sed nos debemus legem intelligere secundum propriam significationem." On the other hand, he says, other doctors support the Gloss[3], relying on this law and on C. XI.

of the law—"Plebs urbana sicut in orientalibus quoque provinciis observatur etc."

[1] *Comment. on Codex*, Part I. (C. II. 53. 4), p. 286, §§ 1–2.

[2] This particular law of the Codex runs: "Respublica minoris jure uti solet; ideoque auxilium restitutionis implorare potest." The question in dispute then is whether only the Respublica Romanorum can enjoy the right.

[3] We note that, according to Bartolus, some of the Ultramontani are clinging to the old view, which we ascribed to the Glossators. The Gloss, of course, means to Bartolus the Glossa Magna of Accursius, which marks the close of the period of the Glossators. In the end, we have seen, the Glossators had conceded that "improprie" the term Respublica might be applied to other Civitates than Rome; these Ultramontani are now going back and say that we have no business to understand laws "improprie." Bartolus himself again maintains the applicability of the term to any Civitas in *Comment. on Codex*, Part I. (C. IV. 31. 3), p. 476: "Quaero de qua republica loquitur hic. Quidam dicunt de republica Romanorum. Veritas est quod idem in qualibet alia civitate. Ita videtur sentire glossa."

29. 3[1], "quae loquuntur generaliter." Finally Bartolus gives other reasons to show that the opinion of the Gloss is correct[2]; and then, it is worth noting, he follows Jac. Buttrigarius in holding that, as regards "restitutio," which is the subject of this law, Castra and Villae, which "habent multitudinem hominum et habent regi per suos administratores," are on the same level as Civitates—"tunc in eis est eadem ratio quae in civitatibus."

But the best and most final proof that Bartolus, for his part, is quite determined not to limit the term Respublica to any narrow interpretation, is that he frequently and without discussion uses the term, as applicable either generally to any Civitas, or to some particular Civitas other than Rome. Thus he notes that "banniti, qui possunt impune offendi, perdunt omnia jura civitatis suae," and that the statute, by which this is permitted, "non est in beneficium offendentis, sed favore reipublicae[3]." Again, to take an example in which a particular Civitas is concerned: "Nota quod per dissensiones civiles publica res laeditur. Hoc facit pro prioribus hujus civitatis, qui habent arbitrium super bono et pacifico statu civitatis, ut possint facere statuta ut tollatur materia brigarum et dissensionum inter cives, quia per hoc reipublicae consulitur[4]."

[1] Which runs: "Rempublicam ut pupillam extra ordinem juvari moris est."

[2] "Praeterea lex debet extendi per identitatem rationis, non enim est aliud mens legis quam ratio....Sed eadem est ratio in qualibet civitate quae est in republica Romanorum, quia per alios reguntur, sicut minores reguntur per tutores et curatores etc."

[3] *Comment. on Infort.* Part I. (D. XXIV. 3. 49), p. 80, § 5.

[4] *Comment. on Dig. Nov.* Part II. (D. XLIX. 15. 21, § In civilibus),

(2) We have purposely abstained from quoting one of the most important passages on this question in the commentaries of Bartolus, because, while we have been able to produce quite sufficient evidence to illustrate his position, it was better to reserve this particular passage until we came to the question of the Fiscus. Bartolus distinguishes in this passage[1] between the Fiscus and the Respublica. The Fiscus or Camera Imperialis is "quidquid ad commodum pecuniarium Imperii pertinet"; other things, "quae ad jurisdictiones et honores Imperii, et non ad commodum pecuniarium et bursale pertinent, continentur nomine reipublicae et non fisci." The Fiscus is thus defined as essentially Imperial; so is the Respublica. But the Respublica we have already seen conceded to the Civitates. Bartolus now considers the relations between the Fiscus and the Respublica; and, amplifying his treatment of the latter, he gives the term four meanings. First the Respublica may stand for "the whole universal Empire." Secondly it may stand for the "respublica Romanorum." Thirdly for the Respublica of any Civitas. Lastly for the Respublica of any Municipium[2].

p. 636. Cf. *Comment. on Codex*, Part I. (C. II. 7. 2), p. 208: "Nota ex hac lege, et tene menti, quod advocatus, qui habet aliquod officium in civitate, non potest ire extra civitatem. Secundo nota quod potest esse advocatus, praeterquam contra rempublicam. Ex quo habes, quod qui salarium habet ex republica, non debet esse advocatus contra rempublicam. Et sic facit quod doctores hujus civitatis salariati non possunt esse advocati contra rempublicam hujus civitatis." Cf. also *Comment. on Dig. Nov.* Part II. (D. L. 9. 4), pp. 670–1, §§ 18–9.

[1] *Comment. on Codex*, Tres libri (C. X. 1, sup. rubric.), p. 1, §§ 3–7.

[2] In the *Commentary on the Authenticum* it would at first sight seem as if Bartolus for once does not extend the term Respublica to the Civitates. He says, discussing again the relations of Fiscus and

According to the first meaning of Respublica, the Fiscus is to the Respublica as species to genus—"posito fisco, ponitur respublica, sicut posito homine, ponitur animal, non econtra." That is to say, the Fiscus is contained in the universal Respublica, is a specific branch of the general administration of the Empire. But if Respublica be taken as meaning the "respublica Romanorum"—then, in so far as *once* the "respublica Romanorum" itself had "regimen universale," this connection between the two terms holds good; but if we take the "respublica Romanorum" as something separate from the universal Roman Empire—"ut in jurisdictione quam habebat (i.e. the respublica Romanorum in a limited sense) infra centesimum lapidem...et in aliis juribus quae infra territorium suum habet"—then there is no connection between Respublica and Fiscus. Finally, if Respublica be taken "pro republica alterius civitatis vel municipii, sine dubio non est idem cum fisco."

So far then, though the Respublica has been granted both to Civitates and Municipia, the Fiscus is being

Respublica: "Nota quod respublica accipitur pro toto universali Imperio. Aliquando accipitur pro republica Romanorum seu fisci. Aliquando accipitur pro civitate Romana." He then cites laws for and against the Republic and Fiscus being considered "idem," but does not decide. If, however, we continue the passage, we see that here too Bartolus is really extending the Respublica to any Civitas. "Secundo ex hac glossa nota," he says, "quod lex finalis C. de SS. Eccl. (C. I. tit. 2) non habet locum in municipio seu castro; quod apparet, quia ista glossa ex casu quo respublica ponitur pro municipio allegat glossam legis 'Sed et hi,' § penult. D. de publ. (D. xxxix. 4. 13). Sed quando ponitur pro civitate, allegat glossam legis finalis C. de SS. Eccl. Intellige ergo legem illam in civitate tantum, et quod ille lex non habet locum in municipio tenet glossa expresse in lege 'Sed et hi.'...In contrarium quod illa lex habeat locum, posset forte esse verum, cum illud sit beneficium Principis etc." *Comment. on Authent.* Collatio I. (De Haeredibus et Falcidia, sup. rubric.), pp. 1–2, §§ 2–3.

retained as a something essentially connected with the "whole universal Empire." But it is clear that in the actual state of Italy, where the Imperial authority was almost annihilated, and where the Civitates, whether still free or under a tyrant, did actually form independent States, it was of the utmost importance that the term Fiscus, and the rights connected with it, should be made applicable to each of these independent authorities. This Bartolus does by recurring to the ever-present distinction between Civitates which do, and those which do not, acknowledge a superior. "Nota glossam," he says in the *Commentary on the Digest*[1], "quae dicit quod bona vacantia non applicantur alteri civitati, sed fisco. Et verum dicit in civitatibus quae recognoscunt superiorem. Sed in his quae non recognoscunt superiorem, de jure vel de facto, ut civitates Tusciae, est ipsamet civitas fiscus. Vocatur enim populus liber....Et ideo in Marchia, et in aliis provinciis Ecclesiae, omnia quae dicuntur de fisco, intelliguntur de Ecclesia. In illis vero civitatibus, quae non recognoscunt aliquem in dominum, quae dicuntur de fisco, intelliguntur de suo communi." Again, "Adverte, ista glossa dicit quod civitates non possunt habere bonorum possessionem nisi ex testamento; quia quando bona sunt vacantia, debentur fisco, non civitati....Et hoc puto verum in civitatibus quae Principem recognoscunt. Sed si civitas Principem non recognoscit, tunc ipsa est camera sui ipsius, et sic sibi bona vacantia quaerentur, et ita de facto observatur[2]." We see, then, that Bartolus

[1] *Comment. on Dig. Vet.* Part I. (D. v. 3. 22, § Ait Senatus), p. 540.

[2] *Comment. on Infort.* Part II. (D. xxxvii. 1. 3, § A municipibus), p. 472, § 2.

provides a solution on his wonted basis of fact. The Church and the Civitates do not, in fact, recognise the Emperor as superior. Therefore, where the Law Books speak of the Fiscus, in the "territory of the Church" the Church itself must be read for Fiscus, in each independent Civitas the Civitas itself must be considered the Fiscus. The Fiscus is not, indeed, in the relation of species to genus, as regards the Church or Civitas, as it is to the "whole universal Empire"; but where a power, such as the Church or a Civitas, withdraws itself from the "whole universal Empire," by not recognising the Emperor as superior, that power must be its own Fiscus[1].

(3) If we except the cities within the territory of the Church, all Civitates are de jure a part of the Empire[2], and de jure the Emperor is their superior[3].

[1] Cf. *Comment. on Codex*, Tres libri (C. x. 10. 1), p. 18, § 7: "Quaero utrum pro delictis civitas possit accipere bona? Glossa dicit quod non....Secus puto in civitatibus quae de jure vel de facto hodie non recognoscunt superiorem, et sic populus est liber, ut notatur in L. Hostes D. de Capt. et postl. (D. XLIX. 15. 24) quod ipsamet civitas sit fiscus, et sic possit capere bona vacantia, et etiam ex delicto, sicut fiscus." Also *Comment. on Dig. Nov.* Part II. (D. XLIX. 14. 2), p. 619, § 2: "In eo quod dicit (i.e. the Gloss), quod civitatibus non deferuntur bona vacantia...dicit veritatem de jure communi. Sed debetis scire, quod quaedam sunt civitates quae non recognoscunt superiorem, et sic populus liber est, et sic ipsemet sibi fiscus...et tunc bona vacantia acquiruntur sibi, et fisco." Also *Comment. on Codex*, Part I. (C. I. 1. 1), p. 19, § 50.

[2] Vide e.g. *Comment. on Infort.* Part II. (D. XXXVI. 1. 26), p. 433: "Civitatibus, quae non sunt hostes Imperii, potest fideicommissum relinqui, et agere poterunt per suos syndicos....Innuit quod quaedam civitates non sunt sub Imperio....Solutio: Intelligo, sub Imperio omnes sunt de jure, de facto non. Sunt tamen quaedam, quae etiam sub Imperio de jure non sunt, ut civitates donatae Ecclesiae. Tenet enim Ecclesia quod talis donatio valuit."

[3] Just now, indeed, in the question of the Fiscus, we saw that

Their independence is de facto, and so far Bartolus acknowledges that to these cities, as in fact independent, may be ascribed the rights connected with the terms Respublica and Fiscus, which de jure do not belong to them. But more still was needed to establish their complete independence.

"Quaero unde hoc est," asks Bartolus[1], "quod video, quod omnes rectores civitatis et castrorum hodie per Italiam exercent ea quae sunt meri vel mixti imperii[2]." In answer, he says that there are three kinds of "universitates." "Una est larga, quae facit provinciam et haec de jure communi habet merum et mixtum imperium....Secunda universitas est minus larga, quae constituit civitatem, et huic de jure communi cohaerent jurisdictiones tantum, usque ad certam quantitatem et in levioribus criminibus, sed merum et mixtum imperium non habent magnum...." Bartolus then makes certain

Bartolus mentions cities which "de jure vel de facto" do not recognise a superior. Presumably those who de jure do not recognise a superior, must be freed by concession, such as Perugia—vide above, p. 78. In general Bartolus consistently maintains that de jure the Emperor is superior of all the Italian cities.

[1] Vide *Comment. on Dig. Nov.* Part I. (D. XXXIX. 2. 1), p. 69, § 3.

[2] Cf. *Consilium*, I. 189, p. 119, § 1: "Nos habemus triplicem universitatem habitationum et praediorum: unam largam quae facit provinciam, et haec universitas habet jurisdictionem et mer. et mixt. imperium de jure communi....Secunda universitas minus larga quae constituit civitatem, et huic universitati cohaeret jurisdictio tantum usque ad certam quantitatem in levioribus criminibus, sed merum et mixtum imp. non habet...Fallit in quibusdam civitatibus in quibus est hoc specialiter concessum a jure, ut Romae...et in aliis civitatibus quae hoc habent ex consuetudine vel privilegio....Ex his causis jurisdictio dicitur cohaerere loco seu territorio. Tertia universitas est minima ut castrum, villa, vicus...et huic universitati nulla cohaeret jurisdictio, sed alterius civitatis jurisdictioni subesse dicitur," etc.

exceptions—some cities, as for example Rome, have Merum et Mixtum Imperium "de jure communi," others by privilege or prescription, others merely de facto. "Est tertia universitas minima," he continues, "ut castrum, villa et similia: et ista, si quidem subsunt alicui civitati vel alteri castro magno, nullam jurisdictionem habent, sed civitas, cui subsunt, habet jurisdictionem in eis"; he goes on to say that they too may, by special privilege or in special circumstances, have limited Jurisdictio and even Merum et Mixtum Imperium.

With this we may compare a passage to which we have referred above[1]. The division of the world is said to be "de jure gentium." Bartolus distinguishes two kinds of division—that of the Provincia or Regnum on the one hand, where men dwell together "in aedificiis

[1] Vide *Comment. on Const.* Qui Sint Rebelles (ad verb. Lombardiae), p. 285, §§ 2–6: "Sed pro hujus declaratione sciendum est quod divisio orbis terrarum de jure gentium est....Et haec divisio fuit eorum qui habitant simul in aedificiis in unum collatis, et sic communiter habemus tria nomina, scilicet civitas, castrum et villa....Quaedam divisio est eorum qui habitant simul, sed aedificiis separatis, et haec appellatur provincia vel regnum, vel sunt alia nomina universalia significantia separationem linguarum, ut in Italia, Alemania, Francia, Graecia, et similia...de quorum quolibet videamus. Villa in Francia idem est quod civitas. Nos autem dicimus villas aedificia sine muris vel fossis, quae villae seu vici nullam habent jurisdictionem de jure communi, sed subsunt alicui civitati....Castrum dicitur quasi casa alta seu fortis et munita muris seu vallo...et similiter non consueverunt habere jurisdictionem de jure communi, sed sunt sicut vici....Habent tamen quosdam magistratus, qui illic ponuntur a civitatibus quibus subsunt....Civitas vero secundum usum nostrum appellatur illa quae habet episcopum; ante tamen quam essent episcopi erant civitates. Et civitati competit potestas eligendi sibi de jure communi defensores, qui habeant jurisdictionem, non autem merum imperium vel mixtum.... Fallit in urbe Romana...et in aliis quae habent ex privilegio vel ex consuetudine...."

separatis," and that of the Civitas, Castrum or Villa, where men dwell together "in aedificiis in unum collatis." According to the Italian usage of the terms, the Villa and the Castrum are dependent upon some Civitas and, "de jure communi," have no Jurisdictio nor magistrates appointed by themselves. "Secundum usum nostrum" the Civitas is a city with a bishopric, but Bartolus points out that there were cities before there were bishops. The really distinguishing mark of a Civitas is that it has the right, "de jure communi," to elect its own "defensores" who have Jurisdictio, but not Merum et Mixtum Imperium. "Et quia secundum canones episcopi debent ordinari in dictis locis, ubi sunt dicti officiales...ideo insurrexit consuetudo quod locus habens episcopum sit civitas, tamen vero sine episcopo dicitur civitas eo quod habet officiales praedictos et jurisdictionem. Et sic patet quod licet ex causa una civitas privetur episcopo, non tamen per hoc desinit esse civitas." He then goes on to consider whether the Castra, "quae sunt per Italiam et habent dictas jurisdictiones," are to be called Civitates. If they were once Civitates, but no longer have a bishopric, "proprie" they are still Civitates. In other cases, either this Jurisdictio was granted to them, "ut civitati aut ut castro aut simpliciter dicendo tali terrae vel tali comitatui. Primo casu erit civitas, nam civitatem facit Princeps eo ipso quod sibi scribit ut civitati[1]...Nam dicendo quod sit civitas, videtur sibi concedere omnia

[1] Cf. Selden, *Table Talk* (p. 23): "What makes a city? Whether a Bishoprick or any of that nature? 'Tis according to the first charter which made them a corporation. If they are incorporated by name of Civitas, they are a City, if by the name of Burgum, then they are a Burrough."

privilegia civitatis....Secundo casu non erit civitas, sed castrum habens privilegia civitatis....Tertio casu erit civitas, quia large interpretatio facienda est in concessione hujus beneficii."

Thus it is not, properly or historically, the bishopric that makes the Civitas, though it may be "in usu communi[1]." The distinguishing mark between the Provincia and the Civitas is the right to exercise Merum et Mixtum Imperium. There may be Civitates enjoying the right, but they are not the normal cases. Normally the Civitas has the right to choose its own "defensores," who are not, like the Praesides Provinciarum, "majores judices," and therefore have only a limited Jurisdictio. In the same way there may be Castra with this limited Jurisdictio or even with Merum et Mixtum Imperium: they too are exceptional. Normally the Castrum, like many of the small Civitates, is dependent on some Civitas. "Isti enim," says Bartolus in his *Tract. de Regimine Civitatis*[2], explaining why he omits to discuss these "parvi populi," "vel alteri civitati subsunt...vel alteri civitati vel regi confoederantur aliquo foedere, ita quod alterius majestatem venerentur...ut videmus in civitatibus[3] et castris quae sub protectione civitatis

[1] Cf. *Comment. on Infort.* Part I. (D. XXVII. 1. 6, § Est autem), p. 199: "Olim nescio qualiter vocabant antiqui civitatem. Sed hodie secundum constitutionem civitas illa dicitur quae habet episcopum et adhuc non vidi illam constitutionem." *Comment. on Infort.* Part II. (D. XXX. 1. 76, § Vicis), p. 54: "In usu vero communi dignitas episcopalis quae est in loco facit civitatem. Et ita videtur sentire Federicus Imperator in constitutione illa de pace Constantiae."

[2] P. 420, § 26.

[3] Such in Bartolus' own day were Assisi, Spoleto, Gubbio, etc., all of which were actually Civitates. The two latter he himself mentions as dependent on Perugia in *Comment. on Dig. Nov.* Part I. (D. XLIII. 18. 1, § Si tibi fundum), p. 466, § 5.

hujus Perusinae sunt. Sicut enim corpus humanum debile et parvum non potest per se regi sine auxilio tutoris, et curatoris, ita isti populi parvi per se nullo modo regi possunt, nisi alteris submittantur vel alteri adhaereant." We too may follow Bartolus in omitting these small dependent cities. It is not they, but the flourishing, independent city-states of Italy which offered the problems, in the solution of which Bartolus was to play so great a part. But it is now necessary to inquire more closely into the meaning of these terms, Jurisdictio and Merum et Mixtum Imperium.

It must be clear, to begin with, that the medieval lawyers are using the terms Jurisdictio and Imperium in a manner that a mere reference to Roman law, whether Justinian or ante-Justinian, will not explain. Their use of the terms is of course based on such definitions as that given in D. II. 1. 3[1], but such definitions are not sufficient to explain the medieval use of these terms. To understand that we must turn back for a little into the history of communal independence in Italy.

The turning-point in that history was the Investiture struggle. Up to that point the power of the king of Lombardy, or Italy, over the north-Italian towns, had found its safeguard, first in the authority of the counts, and later, when the counties began to be split up, in the authority of the bishops and lay nobles, to whom

[1] Which runs: "Imperium aut merum aut mixtum est. Merum est imperium habere gladii potestatem ad animadvertendum facinorosos homines, quod etiam potestas appellatur. Mixtum est imperium, cui etiam jurisdictio inest, quod in danda bonorum possessione consistit. Jurisdictio est etiam judicis dandi licentia."

the rights of the counts were gradually transferred. We must try to avoid, in the space of these few pages, any of the most controversial points in the early history of the Italian towns. Of all things, perhaps, it is most needful to remember the golden rule of medieval history, that generalisations on the history of medieval cities are only permissible on the understanding that they *are* generalisations, and that each individual city has its individual history with details of its own, by which it conforms, either more or less, to the generalised standard. With this in mind we need not be afraid of overestimating the importance of the part played by the bishops in the history of the Italian cities. The movement by which they stepped into the place of the counts was not universal, but it was general. It was not a single step, but a gradual extension of privileges. It was not the only path that led to communal independence, but, if not the most important, it was one of the most important[1].

"In the tenth and eleventh centuries," says Mr Fisher, "when the Emperors paid but flying visits to Italy, the Italian bishops were the mainstay of German influence south of the Alps[2]." These bishops were in very great numbers Germans[3]; they were appointed by the

[1] Vide Pertile, *Storia del diritto italiano*, vol. II. Part I. p. 19: "La signoria vescovile non fu dunque causa unica e diretta della libertà communale, ma la agevolò e favorì; non causa universale, perchè in molte città il vescovo non ebbe dominazione temporale." Vide also Bethmann-Hollweg, *Der Civilprozess des Gemeinen Rechts*, vol. V. Abtheilung 2, pp. 199–209. He too notes, like Pertile, that there is not "eine allgemeine Massregel," in the transference of the Comitatus to the bishop.

[2] Fisher, *The Medieval Empire*, vol. II. p. 230. Vide also p. 149.

[3] Ibid. p. 230: "From 950-1060, a period of imperfect records,

Emperors; and by the eleventh century, when the process of transferring to them the authority of the counts was completed, they stood, we must remember, in direct feudal relations to the king-emperor. Then came the great reform movement. The policy of ruling Italy by Germans reached its height in the direct appointment by Henry III of three German Popes. Yet from this very act sprang the forces which were to destroy the German influence in Italy. The Papacy once purified, the party of reform was ready to purify the whole Church. The Cluniac movement of reform; the beginnings of Italian nationalism; theocratic theories, some of which were as old as the ninth century and the papacy of Nicholas I,—all these causes combined to produce the Investiture struggle after the early death of Henry III.

In that struggle the Lombard bishops were for the most part staunch supporters of the Emperor, while the Papacy naturally threw itself into alliance with the popular party of reformers, who were in opposition to their bishops. The struggle ended with the Concordat of Worms. Theoretically the Concordat did not affect the feudal relations between the bishops and the Emperor[1]. But in fact it broke the connection between them; since, though the Emperor might still invest the bishop with the insignia of his delegated temporal authority, the election of the bishops passed out of his

we can prove the presence of 47 German bishops in Italian sees, and the number should probably be more than doubled."

[1] Vide the text of the Concordat, consisting of the "Privilegium Imperatoris" and "Privilegium Pontificis" in *Monumenta Germaniae Historica, Constitutiones et Acta Publica Imperatorum et Regum*, vol. I. pp. 159-61.

hands[1]. And, secondly, the opposition of the populace, fanned by the Papacy and the whole reform movement, had shaken the internal authority of the bishops' government. "The Gregorian movement," says Mr Fisher, "shook the Imperial control over the bishops; the communal movement destroyed their powers[2]."

We repeat again that communal independence did not come into existence only through the destruction of the connection between the Emperor and the bishops, but to a very great extent it did. At least, that communal independence existed as a fact after the Investiture struggle is indisputable. For our purpose, then, which is concerned rather with this independence as completed, than with its origins, we pass straight on to the next struggle—that between the Hohenstaufen and the cities themselves, which was again involved with the struggle between the Empire and the Papacy.

Before we pass on, however, we must observe one change of great importance. The term Comitatus, used to designate the jurisdiction of the counts, and of the bishops and others, who succeeded them, passed with independence to the Civitates themselves. We

[1] Vide "Privilegium Pontificis," p. 161. The bishops and abbots of the "Teutonicum regnum" were indeed to be elected "in praesentia tua," but it was the power of influencing the election of *Italian* bishops which was lost, and with it the control over Italy. The "electus" was to receive the "regalia per sceptrum" from the Emperor—"et quae ex his jure tibi debet, faciat." But the investiture of the spiritual office was wholly resigned—vide the "Privilegium Imperatoris": "Ego Henricus etc....dimitto Deo et sanctis Dei apostolis, Petro et Paulo, sanctaeque catholicae Ecclesiae omnem investituram per anulum et baculum, et concedo in omnibus ecclesiis, quae in regno vel imperio meo sunt, canonicam fieri electionem et liberam consecrationem" (p. 159).

[2] Fisher, loc. cit.

hear of the Comitatus of the Civitas[1]. But now, from the eleventh century onwards, with the almost general disappearance of the counts and their successors, and still more under the influence of the great revival in Roman Law, a new term appeared, derived from Roman Law—Jurisdictio. Later appeared another term of Roman Law—the subject of our present inquiry—Merum et Mixtum Imperium, with special reference, says Ficker, to criminal jurisdiction[2].

Now the significance of this lies in the fact that we have here the Comitatus, which is a feudal term, implying feudal relations and rights, supplanted by terms of Roman Law. The revival of Roman Law was a part, the most important part, of a general antiquarian revival, which set men's eyes and hearts fixed back on the old Roman Empire. But though the feudal king of Germany or Italy might be merged into the Princeps of Roman Law, Feudal Law could not be swallowed up by Roman Law. Roman Law had to accept feudalism. It incorporated the Libri Feudorum in the Corpus Juris as a tenth Collation in the Authenticum. And while it translated many of the terms of feudalism into terms of Roman Law, the Roman meaning of these terms was partly lost in the feudal meaning of the terms which they translated[3].

In the struggle for independence between Frederick I and the cities yet another term became prominent—the

[1] Vide Savigny, op. cit. vol. III. pp. 127-8 and the quotation from Otto of Freisingen in note b, p. 108. Ficker, *Forschungen zur Reiches- und Rechtsgeschichte Italiens*, vol. I. p. 238.

[2] Vide Ficker, op. cit. vol. I. p. 247.

[3] Cf. Gierke, *Deutsche Genossenschaftsrecht*, vol. III. p. 200.

Regalia. Here again we are at the meeting of feudalism and Roman Law.

The term Regalia was common in the eleventh century, and, for long after, the question of the rights contained in it was the subject of interminable dispute. In 1158, at the Diet of Roncaglia, Frederick I issued his Constitutio de Regalibus[1], which was incorporated in the Libri Feudorum. It was over the rights here claimed that the struggle between Frederick and the Italian cities, which fills his reign, and which continued under his successors, was fought out.

In drawing up this list of Regalia Frederick had relied on the Roman lawyers of Bologna; and Placentin, one of the Glossators, and after him many modern historians, notably Sismondi, have accused them of sacrificing the freedom of Italy to the absolutist principles of Roman Law[2]. But, as Savigny was the first to point out, the greater number of the Regalia are in part contrary to, in part foreign to, the law of

[1] It may be well to give this definition of the Regalia. Vide *Monumenta Germaniae Historica*, vol. cit. pp. 244–5. It runs thus: "Regalia sunt hec: Arimannie, vie publice, flumina navigabilia, et ex quibus fiunt navigabilia, portus, ripatica, vectigalia que vulgo dicuntur tholonea, monete, mulctarum penarumque compendia, bona vacantia, et que indignis legibus auferuntur, nisi que spetialiter quibusdam conceduntur, et bona contrahentium incestas nuptias, et dampnatorum et proscriptorum secundum quod in novis constitutionibus cavetur, angariarum et parangariarum et plaustrorum et navium prestationes, et extraordinaria collatio ad felicissimam regalis numinis expeditionem, potestas constituendorum magistratuum ad iustitiam expediendam, argentarie, et palatia in civitatibus consuetis, piscationum redditus et salinarum, et bona committentium crimen maiestatis, et dimidium thesauri inventi in loco cesaris, non data opera, vel in loco religioso; si data opera, totum ad eum pertinet."

[2] Vide Savigny, vol. IV. pp. 171–8.

Justinian[1]. The Regalia are the feudal rights of the Lombard king—and as such, said Savigny, indubitably Frederick had a legal right to them. It was the new Hohenstaufen conception of the Emperor as Princeps of the Law Books, and the new life of Roman Law, which obscured the really feudal nature of these rights both to contemporaries and to future ages. To succeeding ages in particular Frederick appeared at Roncaglia as Emperor; the king of Italy was lost in the Imperator Romanorum. Consequently the rights, which he claimed, must also appear as rights due to the Princeps of Roman Law. The greater number of those rights were won back for the cities by the peace of Constance.

[1] Savigny, ibid., asks (p. 174)—"Ist es denn aber in der That römisches Recht, was jener Bestimmung der Regalien zu Grunde liegt? Für die meisten und wichtigsten Punkte lässt sich geradezu das Gegentheil behaupten." Vide also Blondel, *Étude sur les Droits Régaliens et la Constitution de Roncaglia* (in Mélanges Paul Fabre, pp. 236–57), for a detailed study of the question. Of the Constitutio de Regalibus he says: "Ce document est surtout propre à montrer l'importance respective des anciennes conceptions germaniques en matière de souveraineté et des principes du droit romain, dont les juristes qui entouraient à ce moment Frédéric Ier, étaient imbus" (p. 236). Blondel quotes the list of Regalian rights, as given in the Constitutio itself and other contemporary documents (pp. 245–7). He believes the influence of the Bolognese jurists on the Emperor has been overestimated: "Placentin lui-même se contente de leur reprocher un abus du droit romain, au sens que le droit romain, d'après lui, n'a pas été suivi, et j'estime en effet, qu'on peut retrouver dans les dispositions de la diète de Roncaglia des principes germaniques dissimulés sous des apparences romaines, mais qui ont plus d'importance au fond que le droit romain proprement dit" (p. 248). And cf. again p. 251: "S'il est certain que Frédéric chercha à tirer le meilleur parti possible des principes du droit romain, il n'est pas douteux que la plupart des droits, qui sont revendiqués par lui comme droits régaliens, ne sont pas d'origine romaine." Vide also Pomtow, *Ueber den Einfluss der altrömischen Vorstellungen vom Staat auf die Politik Kaiser Friederichs I und die Anschauungen seiner Zeit*, pp. 40–52.

But the struggle continued; and when the Roman character of the Empire was conceived still more emphatically by Frederick II, the true origin of these rights was but the more liable to be obscured.

This digression has necessarily been somewhat long, and we must now, therefore, pass on to Bartolus himself. When we come to his commentaries, we find that the term Regalia occupies but a very small place in his discussions on the independence of the Civitas. On the other hand the peace of Constance is quite often mentioned by Bartolus; but nearly always in the question whether thereby the cities can exercise Merum et Mixtum Imperium[1]. The conclusion is clear. We see that the independence, for which the cities fought in the struggle over the Regalia, is conceived by Bartolus as preeminently bound up with the right to exercise Merum et Mixtum Imperium[2]. Consequently these terms must be interpreted by us, not merely in the light of their original meaning in Roman Law, but also bearing in mind their connection with the rise of communal independence and the struggles which followed between the cities and the Emperor.

"Regularly" or "de jure communi," we have seen, the Civitas, as a "universitas minus larga," does not have Merum et Mixtum Imperium, but only a limited

[1] The terms Merum et Mixtum Imperium never occur in the peace of Constance. Vide the text of the peace in *Monumenta Germaniae Historica*, vol. cit. pp. 411–8.

[2] On one occasion at least Bartolus seems to include Merum et Mixtum Imperium among the Regalia. Vide *Comment. on Dig. Nov.* Part II. (D. XLIX. 14. 2), p. 619: "Quaedam sunt civitates quae, licet recognoscant superiorem, tamen habent merum et mixtum imperium ex principis concessione et habent alia regalia, ut sunt quae ponuntur in Feudis, tit. Quae sint regalia...."

Jurisdictio[1]. On the other hand, we have seen that some Civitates are recognised as exercising Merum et Mixtum Imperium, whether by concession[2], prescription or usurpation. "Scitis," he says[3], "quod civitates Italiae communiter non habent merum imperium, sed usurpaverunt. Dico tamen si civitas vellet se defendere et merum et mixtum imperium exercere, quod habet necesse allegare concessionem Principis. Item longissimum tempus, quo dicta civitas merum imperium exercuit, isto casu posito quod non probaretur de concessione Principis. Tamen si probaret se exercuisse merum imperium,

[1] It is important to keep in mind that Jurisdictio is a double term. There is first "jurisdictio in genere" of which "imperium" and "jurisdictio simplex" are both species. "Imperium" is further subdivided into "merum imperium" and "mixtum imperium." Finally "merum imperium," "mixtum imperium" and "jurisdictio simplex" are all subdivided into six grades. I have attempted to explain this in greater detail in Appendix C, below. It is of course only "jurisdictio simplex" which the "rectores civitatum" have de jure. Cf. with the passages already quoted *Comment. on Codex*, Part II. (C. VI. 33. 3, § Sin autem), p. 96, § 13: "Quaero quis sit competens judex. Dicit gl. quod competens judex inspicitur circa dua. Primo circa jurisdictionem; quia est necesse quod sit talis judex qui habeat merum imperium; non enim potest hoc expediri per magistratum municipalem"; *Comment. on Authenticum* (Collatio II. De Incestis Nuptiis, § Pro Incestis), p. 37; *Comment. on Codex*, Part I. (C. I. 4. 16, Authentic. Praesides), p. 80: "Defensores civitatum de jure communi non habent nec merum nec mixtum imperium nisi in causis pecuniariis usque ad centum aureos," where one would have thought that "causae pecuniariae usque ad centum aureos" would have fallen under the heading of "jurisdictio minima," the last grade of "jurisdictio simplex"—vide Appendix C, below.

[2] Especially as contained in the peace of Constance. Vide, e.g. *Comment. on Codex*, Tres libri (C. XI. 29, supr. rubric.), p. 87: "Glossa dicit quod sunt quaedam civitates in Lombardia, quae habent merum et mixtum imperium ex constitutione Federici de pace Constantiae."

[3] Vide *Comment. on Codex*, Part I. (C. II. 3. 28), Antiqua Lectura, p. 160, § 5.

valet." Bartolus then refers to a law of the Digest (D. II. 1. 3). But before we turn to his commentary on that law, we must consider one or two points in the foregoing passage. Bartolus begins by saying that, if the Civitates exercise Merum et Mixtum Imperium, they do so by usurpation. If they wish to prove a title to justify so doing, they must prove a concession from the Emperor. Failing that they must prove prescription and "longissimum tempus." Yet, he concludes, all the same if they prove that they *have* exercised it, it is valid; which is but to say, if they prove that they have usurped it, it is valid. This seems a rather lame conclusion. But in truth it is a fine example of Bartolus' aim and method, of his absolute adherence to fact. He saw that it was neither possible nor desirable to deny the Italian cities this right. Hence, however contrary it be to the letter of the law, it must be accepted. If concession or prescription can be proved, so much the better; if not, usurpation must be accepted as a valid title to the right, and put on a level with concession and prescription. Let us consider some more examples.

Bartolus referred us to D. II. 1. 3. In his commentary on that law he asks[1]—"Quibus judicibus competat merum imperium? Respondeo, quandoque aliquis praeest alicui universitati, quae facit provinciam: tunc habet merum imperium de jure communi... Quandoque quis praeest alicui universitati, quae facit non provinciam, sed civitatem: et tunc de jure communi regulariter non habet merum imperium neque mixtum. Fallit in civitate Romana...fallit etiam in

[1] *Comment. on Dig. Vet.* Part I. p. 164, § 7.

multis aliis civitatibus quae habent immunitatem ex concessione facta per Principem, ut in extravag. de pace Constantiae. Item fallit in multis aliis, quae habent hoc ex praescriptione vel consuetudine, ut videbitis. Quae praescriptio, qualiter procedat, dicemus (in lege More[1]) infra, et ideo hic non curo dicere qualiter prescribatur." Here we have, to begin with, the distinction between the Provincia and the Civitas. The government of the Civitas does not have Merum Imperium—if it has, it must be based on concession or prescription. Bartolus defers discussing prescription until he comes to a later law—D. II. 1. 5—and before we pass on to his commentary on that law it may be well to give one or two more examples of concession, noticing especially, first how frequently the concession is referred to the peace of Constance, secondly how frequently it is bracketed, as a title to the right to exercise Merum et Mixtum Imperium, with usurpation.

Thus "defensores civitatum de jure communi non habent nec merum nec mixtum imperium, nisi in causis pecuniariis usque ad centum aureos. Hodie vero sunt quaedam civitates in Lombardia, et etiam in Tuscia, quae habent ex privilegio ab Imperio, quaedam ex illa constitutione de pace Constantiae, quaedam ex usurpatione[2]."

Secondly, we should refer again to a passage which is especially interesting, in that Bartolus mentions the

[1] D. II. 1. 5.

[2] Vide above, p. 135, where the first sentence has already been quoted. Cf. *Comment. on Dig. Vet.* Part I. (D. IV. 4. 17, § Nunc videndum), p. 438: "Sunt multae civitates quae habent immunitatem et merum et mixtum imperium ex constitutione Federici Imperatoris, aliae ex usurpatione."

Regalia along with Merum et Mixtum Imperium. "Quaedam sunt civitates, quae licet recognoscant superiorem, tamen habent merum et mixtum imperium ex Principis concessione, et habent alia regalia (ut sunt quae ponuntur in Feudis, tit. Quae sint regalia)[1]." We see then that the exercise of Merum et Mixtum Imperium does not necessarily imply that those who exercise it do not recognise the Emperor as superior. On the other hand, we have seen that Bartolus again and again does refer to such Civitates, as not recognising a superior. This recognition of a superior, however, Bartolus only mentions, we now see, in the case of those who exercise Merum et Mixtum Imperium by concession. The very acceptance of a right by concession acknowledges a superiority in the conceder; we may compare Bartolus' argument that the kings of France or of England, if they withdraw themselves from the Empire by concession, on that very account acknowledge themselves to be a part of the Populus Romanus.

As to prescription, Bartolus, in a passage given above, deferred discussing it until he came to a later law—D. II. 1. 5. There, however, he again puts off the subject. "Quaerit glossa—quis dat ordinariam jurisdictionem? Respondet, lex, Princeps, consuetudo, populus, universitas et similia...Hoc quod dicit de consuetudine, intelligas de consuetudine illius populi, qui posset illam jurisdictionem dare expresse statuendo. Si enim intelligeres de praescriptione, scilicet an praescriberet jurisdictionem, ista esset longa quaestio...et

[1] *Comment. on Dig. Nov.* Part II. (D. XLIX. 14. 2), p. 619.

ponit eam Cynus...et Gulielmus...Alias tibi dicam, non potui modo cogitare, quia profunda quaestio est[1]."

In another passage, quoted above, we have seen that Bartolus practically accepts prescription as a title to a de facto exercise of Merum et Mixtum Imperium. The cities of Italy, he said, "communiter" do not have Merum Imperium, but have usurped it. If they wish however to defend their exercise of it, they must prove concession; failing that prescription—"longissimum tempus, quo dicta civitas merum imperium exercuit"—though he adds that if they prove merely that they *have* exercised it—"valet." Elsewhere we have seen it put on a level with concession[2], and we may therefore say that Bartolus accepts prescription, but not without some doubts.

Both his general acceptance and his doubts come out in an important reservation, which he makes more than once, that the Civitates cannot prescribe Merum et Mixtum Imperium during a vacancy of the Empire. Thus, in a most important passage in the *Commentary*

[1] *Comment. on Dig. Vet.* Part I. (D. II. 1. 5), p. 169, § 9.

[2] Vide above, p. 137. This is the first of the passages in which Bartolus deferred discussing the question. One may compare *Comment. on Authenticum*, Collatio III. (De Defensoribus Civitatum, § Jusjurandum), p. 40, § 5, where he says: "Nota ergo ex hac glossa quod merum et mixtum imperium potest consuetudine praescribi." He cites several texts from the Law Books, adding however that Azo holds that "civitates, quae habent privilegia, habent usurpationem, non consuetudinem, quod dicit per consuetudinem non potest mero et mixto Imperio praescribi." He refers to what he will say on a law of the Tres libri (C. XII. 60. 8), vide p. 146, § 2, where however we merely find: "Secundo nota quod consuetudo dat jurisdictionem ordinariam, sicut lex," after maintaining that a statute cannot take away jurisdiction, which is given by Consuetudo, though it can that given by Lex.

on the Codex[1], he says that if a Civitas is held by a tyrant, and another city occupies "de territorio illius vel de jurisdictione illius," the "patientia illius tyranni, qui est in possessione vi aut clam, non inducit jus praescribendi illius jurisdictionis," because, as Bartolus has explained, if "aliquis possidet vi aut clam vel precario, contra eum non possumus praescribere, quia nullum jus habet in re, et ejus scientia non constituit me in quasi possessione: merito non praescribo." Therefore the Civitates cannot prescribe Merum et Mixtum Imperium during a vacancy of the Empire. "Et ideo etiam videtur quod civitates quae usae sunt mero et mixto imperio, vacante Imperio, non praescribunt jurisdictionem, nec sunt possessione nec fuerunt: quia possessio illius jurisdictionis non est aliud quam patientia et scientia Principis, contra quem praescribitur. Sed ubi non est scientia, non dicitur patientia, merito non dicitur quasi possessio. Ista dico inducendo in argumentum, non determinando."

Although Bartolus says here that he is merely adducing this conclusion as an argument, presumably to prove what he has maintained in the case of the tyrant, he points to the same conclusion elsewhere. In one case[2] it almost leads him to say that no city in Italy has prescribed Merum et Mixtum Imperium. After saying that "quasi possessionem servitutis non possum habere nisi te sciente[3]," he continues: "Et ideo

[1] *Comment. on Codex*, Part I. (C. III. 34. 1), p. 365, §§ 6–10.

[2] *Comment. on Dig. Nov.* Part I. (D. XXXIX. 3. 1, § Denique ait), p. 126.

[3] "...Quasi possessionem servitutis non possum habere nisi te sciente, quia quasi possessio servitutis non est, nisi domini patientia...

forte dicerem quod in Italia nulla civitas est, quae praescripserit merum vel mixtum imperium: quia in incorporalibus requiritur quasi possessio, sciente adversario. Sed Imperator jam est longum tempus quod non fuit[1]." He goes on to ask whether in such circumstances the "scientia Papae" is sufficient, but does not answer the question—"cogitabitis." Nor does he answer whether "in marchia, vel duchia sufficitne scientia ducis vel marchionis, ad praescribendum merum vel mixtum imperium. Cogitabitis. Nam Cynus...ubi tractat materiam meri vel mixti imperii nihil de hoc dicit: nec etiam Gulielmus." We may supplement this by another passage from the same *Commentary on the Digestum Novum*[2]. Bartolus is discussing whether

et ideo est necesse quod dominus sciat. Sed possessionem tui fundi possum habere, te ignorante."

[1] Presumably this must have been written or spoken before the conclusion of the schism between Lewis of Bavaria and Charles of Bohemia. Bartolus would not of course have acknowledged Lewis, whom the Church had excommunicated, though we noticed his significant silence thereon. Otherwise he must mean that it is a long time since there has been an Emperor in Italy who could have "scientia." The first interpretation seems more obvious, and is confirmed by the mention of the "imperium schismaticum" in the next passage to be quoted.

[2] *Comment. on Dig. Nov.* Part I. (D. XLI. 3. 5), p. 295, §§ 22–6. The whole passage is worth quoting, if only for the very interesting reference to the great plague of 1348: "Quaero an ista usucapio vel praescriptio aliquo casu dormiat. Certe de praescriptione dormienti non habemus bene expressum de jure civili, nisi in praescriptione triginta annorum...tamen de jure canonico videtur quod talis praescriptio dormiat tempore hostilitatis et exercitus, si tantus esset exercitus, quod jura in civitate non reddantur....Verum tamen Innocent. dicit quod illud est verum etiam de jure civili; nihil tamen allegat. Quod potest esse verum....Habemus hodie casum expressum in illa constitutione extravaganti Federici Imperatoris, de pace Constantiae, § Possessiones....Idem forte dicendum esset ex eadem equitate, quod

"usucapio vel praescriptio aliquo casu dormiat." He finds various cases in which it does—"et ideo possemus forte dicere, quod vacante Imperio non currit (i.e. prescription) contra Imperium, licet Ecclesia in administratione succedat....Et sic civitates non praescripserunt mixtum et merum imperium. Item non currit praescriptio tempore schismatis...quod est argumentum pro Imperio schismatico, quod contra ipsum non currat praescriptio. Praedicta omnia quae dixi respiciunt praescriptionem incoeptam. Quae autem impediant praescriptionem inchoari, hoc non examino."

We may say, then, that Bartolus, with a little hesitation only as regards prescription, fully recognises the exercise by the Civitates of Merum et Mixtum Imperium. It was now necessary to go one step further. Merum et Mixtum Imperium is a right of the "praeses provinciae" and the "majores judices"—senators, praetors and praetorian prefects, "qui aequiparantur regibus, qui sunt hodie per mundum[1]." Therefore the Civitas, which actually exercises this right, must be considered a Provincia, its "defensores" must become "majores judices[2]." In the *Commentary on the Tres*

tempore mortalitatis instantis de anno Domini 1348, prout scitis, erat tanta pestilentia, quod jura non reddebantur in civitatibus, et moriebantur infiniti homines, quod tempore illo usucapio dormiebat...et fuit illa hostilitas Dei fortior quam hostilitas hominum. Item reperio quod dormit praescriptio contra Ecclesiam vacantem...et licet Ecclesia habeat oeconomum, tamen vacare dicitur, ut hic. Et ideo possemus forte dicere, etc."—as above.

[1] *Comment. on Dig. Vet.* Part I. (D. I. 1. 9), p. 28, § 8. He refers here to D. I. 11. 1: "ut plene solet dici"—but has nothing on this topic in his own commentary on that law.

[2] Vide *Comment. on Codex*, Tres libri (C. x. 8. 1), p. 17, § 4: "Rectores civitatum habent hodie vim majorum judicum." Vide

libri[1], we have a discussion on the nature of a Civitas. "De jure antiquo," says Bartolus, a distinction was made between "maximae," "magnae" and "parvae civitates." "Maximae civitates" were cities having other cities, exercising Merum Imperium, under them; they were "civitates metropolitanae." "Magnae civitates" were those cities under them, which exercised Merum Imperium. "Parvae civitates" enjoyed only Jurisdictio —"solam jurisdictionem, quae datur defensoribus civitatum." All these Civitates, which "suberant uni praesidi aut uni metropolitano," formed a province. But nowadays, Bartolus adds, "quaelibet civitas, habens distinctum territorium, quae superiorem non recognoscit, potest dici provincia, ut notat glossa[2]."

Thus we arrive, by a circuitous route, at the equality of the Provincia and Civitas, from which the Aristotelian started as almost axiomatic. But it still remained for

also *Comment. on Constit.* Qui Sint Rebelles (ad verb. Lombardiae), p. 286, § 8: "Quandoque sit appellatio provinciae eo respectu quod sit sub una jurisdictione; et tunc contingit quod quaelibet civitas habeat separatam jurisdictionem, nec est unus praeses cui subest, quaelibet civitas habetur pro provincia." Cf. also *Comment. on Codex*, Part II. (C. VII. 33. 12), p. 167: "Nota glossam super verbo 'id est in provincia': in provinciis vero quae adhuc reguntur hodie per praesìdem, habet locum haec lex. In locis vero, in quibus civitas habet sua regimina, habet locum quod dicit hic notabilis glossa, quam vide."

[1] *Comment. on Codex*, Tres libri (C. XI. 21. 1), p. 83, §§ 1–5.

[2] Cf. *Comment. on Constit.* Qui Sint Rebelles (ad verb. Lombardiae), p. 286, § 7, where the distinction is between "maximae," "majores" and "minores civitates." There is a difficulty in the passage above in explaining why the "magnae civitates," which were under the "maxima civitas" or "metropolis," and therefore themselves were "de jure antiquo" *not* provinciae, should have enjoyed Merum Imperium which "regularly" the Civitas does not enjoy. In this passage however only the "maximae civitates" have Merum et Mixtum Imperium; the "majores civitates" only Mixtum Imperium; the "minores" Jurisdictio Simplex.

the lawyer to go one step further and to raise his Civitas to the level of the Empire itself: that step we have yet to consider. But before we pass on, let us sum up the thought of Bartolus on the very important topic with which we have been occupied, and then briefly touch on the fourth point of inquiry, which we proposed to consider, namely the right of the Civitas to legislate. We may sum up the foregoing pages thus. The right to exercise Merum et Mixtum Imperium is recognised. This is done in two ways. Either the city, with its "distinct territory," is considered a Provincia, in which case its officials are "majores judices" and rightly exercise Merum et Mixtum Imperium; or the right depends on concession —for example, the cities which were a party to the peace of Constance enjoy the right by that peace. Failing concession, prescription must be pleaded, which, except during the vacancy of the Empire, seems valid. Finally, in some cases the exercise of Merum et Mixtum Imperium, although mere usurpation, is recognised. This is all typical of the methods of Bartolus. He starts from the fact that the cities *do* exercise Merum et Mixtum Imperium—and then proceeds to find what right he can to account for the fact. If he fails, he finally returns to the fact; acknowledges that it is mere usurpation—but allows it.

(4) The first of the six grades of Merum Imperium is the "potestas condere legem," and this is said to belong only to the Princeps and Senate[1]. But we have also seen that, when Bartolus came to discuss the legislative right of the Senate and of the Populus

[1] Vide the diagram in Appendix C, below.

Romanus, he decided that that right no longer existed, though he seemed not disinclined to allow a universal validity to the customs of the Populus Romanus. We remarked, when we were considering this topic, that we ought not to dismiss this discussion as purely academic. Twice at least the question had entered into the actual facts of medieval history. On the other hand, we need not hesitate to say that the whole question was but part of an antiquated political theory, which allowed the rights of sovereignty "properly" only to Rome itself. That theory Bartolus has given up. The important thing now was, not to decide whether the Senate or Populus Romanus had, or had not, any longer the right to make laws of a universal validity, but to investigate the problems presented by the local and varying customs and statutes of the Italian cities, their validity and their relation to the "jus commune" and to each other.

These communal customs and statutes date in great number from the thirteenth century, and were the natural outcome of communal prosperity and independence[1]. The customs were the "legal rules deduced from the practical life of the people, which the legislators had not done more than collect from the mouth of the people and reduce to writing[2]." The statutes, on the other hand, were legislative declarations, sometimes directed to modify the popular customs, but more often, says Pertile, to regulate the political conditions of the commune[3]; though originally they had

[1] Vide Pertile, *Storia del diritto italiano*, vol. II. Part 2, pp. 118–52.

[2] Ibid. p. 120.

[3] Ibid. p. 121.

been nothing more than the oath taken by the communal officers, directions as to their duties and the rules which they were to follow[1]. Usually these two sources of municipal law—customs and statutes—were, at the time of codification, united into one body; but this practice was not universal[2].

The Glossators had, not perhaps without some difficulty, found a place for these statutes and customs within their political theories[3]. The right to legislate could be based on texts in the Law Books which define "jus civile," in contrast to "jus gentium," as "jus quod quisque populus ipse sibi constituit[4]." Statutes and customs are both brought under the rubric of "jus municipale," the one being law "redactum in scriptis" and made by express consent, the other unwritten and made by tacit consent[5]. The right to legislate, so far as concerns its own internal arrangements, is recognised as belonging to any "collegium approbatum[6]"—and in

[1] Pertile, op. cit. p. 135. Thus, originally, they began with the word "juro"; in the thirteenth century the change to "statuimus" marks the change in their character from an oath taken by its officers to the legislative enactment of the commune itself.

[2] Ibid. pp. 119–20.

[3] Vide Gierke, *Deutsche Genossenschaftsrecht*, vol. III. pp. 215–7.

[4] Ibid. p. 215, note 85. Gierke quotes from the Glossa Magna, which on the words "jus civile" says—"Statuta terrarum, quae jura municipalia dicuntur."

[5] Vide the *Comment. on Dig. Nov.* Part I. (D. XXXIX. 4. 16), p. 159, § 20, though we shall see (below, p. 399) that the Repetitio is probably by Signorolus de Homodeis, not by Bartolus: a statute is "jus quod proprium unusquisque populus sibi constituit et in scriptis redigit... Per hoc separatur a consuetudine. Nam jus municipale est duplex, redactum in scriptis et non redactum."

[6] Vide Bartolus, *Comment. on Dig. Vet.* Part I. (D. I. 1. 9), p. 27, § 6: "Quaero utrum collegia possint facere statuta: videtur dicendum, quod collegia licita et approbata in his in quibus habent jurisdictionem,

fact the statutes of many corporations, other than the cities, have come down to us[1]. Hence, if it is said that only the Emperor can make law, that refers to "general laws." Laws and Senatusconsulta—by "laws" meaning here Imperial laws—cannot suffice, says Bartolus, for all purposes—"quod nota propter statuta quae quotidie fiunt in civitate ista[2].

The law, in fact, on which Bartolus commented, was, we must always remember, in no sense the pure Roman Law of Justinian's Law Books. There is much besides—the Canon Law, the post-Justinian additions to the Corpus Juris, such as the constitutions of the two Fredericks and the two books De Feudis, and lastly the statutes and customs of the Italian cities. These last differ from the Corpus Juris, both in its Justinian and post-Justinian contents, and from the Canon Law, in that they are not authoritative, because not of general application, not authoritative, that is to say, universally. But a random glance at any page of Bartolus would show the large part played by both statute and custom, not merely as illustrations, but in the actual elaboration of a law which, while Roman in basis, was to be practically effectual for the Italy of his day.

The right to legislate was not denied; what was disputable was the limits within which the legislation of the Civitas was valid. This is a large question and

et quo ad ea quae ad ipsos collegiatos pertinent, possunt facere statuta." So *Comment. on Codex*, Part I. (C. IV. 18. 2), p. 405: "Negotiatores possunt facere statuta inter se."

[1] Vide Pertile, op. cit. vol. II. Part 2, pp. 142–7.

[2] *Comment. on Authentic.* Collatio VI. (Quibus modis naturales efficiuntur legitimi, § Recte), p. 79, § 1.

one that only in part comes within the scope of the history of political thought. But to make our present survey as complete as possible, we ought to consider this topic in one or two of its more important aspects.

In the first place the scope of the statutes is merely local. "Civitas non potest facere statuta de his qui suae jurisdictionis non sunt[1]." The statute is "quaedam conventio civium[2]," and will ordinarily bind only those citizens. In certain cases it will bind foreigners residing within the territory of the legislating Civitas. With this, however, we have not to deal. The whole question of the "collisio statutorum" leads us away from politics to the early history of private International Law. For our purpose we may say that the statute is a law of purely local validity, binding, in general, only the citizens whose law it is. But we may remark, before we proceed to another point more properly political, that probably on no topic has Bartolus received so much praise from modern authorities as for his systematic treatment of the "collisio statutorum[3]."

[1] *Comment. on Codex*, Part I. (C. III. 13. 2), p. 326.

[2] *Comment. on Infort.* Part I. (D. XXVIII. 1. 3), p. 257, § 4.

[3] Vide esp. Meili, *Bartolus als Haupt der Ersten Schule des Internationalen Strafrechts*. Vide p. 5: "Bartolus (a Saxoferrato) ist derjenige italienische Jurist der mittelalterlicher Jurisprudenz, welche die Materie der collisio statutorum originell, exakt und mit Geist behandelt hat, und man darf ohne Übertreibung sagen, dass er ein kleines System des Internationalen Privat- und Strafrechts aufgestellt hat." Cf. p. 9. "Was die italienische Theorie der strafrechtlichen collisio statutorum und besonders auch die von Bartolus in meinen Augen ganz besonders charakterisiert, ist ihre Grosszügigkeit, die nun so bemerkenswerter erscheint, als die juristischen Vorgänge sich im Kleinen abspielten. Die Theorie ist aber auch geradezu umfassend; denn sie beleuchtet die meisten Fragen, welche auch die Neuzeit beschäftigen." Also noteworthy is it that

On the other hand the collision of the statutes with the "jus commune" concerns us more closely, and we may see what rules Bartolus lays down for such cases of conflict[1].

We have seen above that statutes, no less than laws, are subject to the higher laws—the "jus divinum," "jus naturale" and "jus gentium." Further statutes, which as regards "spiritualia" are contrary to the Canons, are of course invalid; and we may note that statutes contrary to the liberties of the Church

Dr Meili denies that Bartolus is the real author of the division of statutes into Real, Personal and Mixed, which he refers to Argentraeus (ob. 1590). Vide pp. 6–8 and p. 48. "Das sehr zweifelhafte Verdienst dieser Klassification kommt einzig und allein dem französischen Juristen Argentraeus zu" (p. 7). Sir W. Rattigan, in his article on Bartolus (No. 3 "Great Jurists of the World" in the *Journal of the Society of Comparative Legislation*, 1903), also gives great praise to Bartolus on this topic. Vide pp. 236–8.

[1] Numerous examples of such conflict are given by Bartolus in the course of his Commentaries. We may give some examples. *Comment. on Infort.* Part I. (D. XXVI. 10. 3, § Tutores), p. 194: "Et sic nota quod de jure communi non debet quis poni in carcere pro debito, nisi quando non habet bona sufficientia pro debito, quando satis placet....Statuta et consuetudines Tusciae statuerunt aliter." *Comment. on Codex*, Part II. (C. VIII. 14. 1), p. 274: "...licet Veneti servent contrarium." *Comment. on Dig. Nov.* Part I. (D. XLIII. 8. 2, § Tractatum), p. 433: "Nota quod isti pontes qui fiunt per viam de jure non possunt fieri: tamen in Italia in quibusdam terris est statutum quod possint fieri et in quibusdam est consuetudo." *Comment. on Dig. Nov.* Part II. (D. XLVIII. 8. 1, § Divus), p. 490: "...Domini, quidquid ipsi dicant, veritas est ipsa, per Italiam maleficia puniuntur secundum statuta, non secundum leges." *Comment. on Codex*, Part II. (C. VI. 38. 2), p. 110, § 2: "Tamen in civitate ista est ista consuetudo in vinea: quando vendita vinea, cedunt ea quae sunt instrumenta vineae, quod de jure communi non est." Cf. for some other interesting examples, *Comment. on Codex*, Part I. (C. II. 59. 2), p. 95, § 1; *Comment. on Infort.* Part II. (D. XXXIV. 2. 1, § Cui certum), p. 268.

are similarly invalid[1], even where Imperial laws seem valid[2].

Now let us consider the general rules to be observed between the conflicting "jura municipalia" and the "jus commune."

In his commentary on the law Omnes Populi, Bartolus asks[3] whether "super his, quae disposita vel

[1] Vide *Comment. on Codex*, Part I. (C. I. 2. 12, Auth. Cassa et Irrita), p. 42, §§ 3 and 5. Such statutes are those "contra privilegia concessa ecclesiis seu ecclesiasticis personis per Principem seu Papam." Cf. *Comment. on Codex*, Part I. (C. II. 3. 30), p. 164, § 6, and *Consilium* I. 187, p. 117. However in *Comment. on Codex*, Part I. (C. I. 1. 1), p. 13, § 29, Bartolus distinguishes as follows: "Aut statuta sunt directo super ecclesiis vel rebus ecclesiasticis: et non valent, quia non pertinent ad jurisdictionem concedentis....Aut statuta sunt facta simpliciter: et tunc aut redundant contra ea quae sunt concessa ecclesiis vel clericis in privilegium et non valent...aut contra ea quae competunt ecclesiis vel clericis, non in privilegium, sed ut cuilibet: et tunc ligant clericos et sunt servanda in foro episcopali, dum tamen sint honesta."

[2] Vide *Comment. on Codex*, Tres libri (C. X. 19. 8), p. 31: "Lex Imperialis, quae prohibet emere, comprehendit etiam Ecclesiam.... Statutum vero civitatis hoc non posset, quia esset contra libertatem ecclesiarum." On some other topics too the field of legislation open to the Statutes seems restricted by a definite prohibition as "ultra vires"—thus vide *Comment. on Codex*, Part I. (C. I. 2. 17), p. 67, § 19: "Licet lex Imperialis et communis possit ad pendentes lites extendi," yet "statuta" and "reformationes civitatum" not.

[3] Vide *Comment. on Dig. Vet.* Part I. (D. I. 1. 9), p. 33, § 26: "Quandoque lex resistit statuto, prohibendo ne fiat, et tunc non valet statutum. Nam ideo valet statutum, quia Princeps permisit ...secus ergo si prohibeat....Quandoque lex non resistit statuto: et tunc quaedam glossa videtur dare talem doctrinam: aut contra talem legem aut jus potest venire per pactum, et poterit per statutum. Aut non per pactum, et tunc nec per statutum....Aliae glossae videntur dicere contrarium, quod talis aequiparatio pacti ad statutum non sit bonum....Pro quibus glossis concordandis, dic quod quandoque prohibitum est fieri per pactum, quia contra bonos mores, et tunc procedit argumentum: quia tunc nec per statutum....Ratio, quia lex et statutum debent esse sancta et honesta....Ergo si continent aliquid inhonestum, non valent. Aut est prohibitum fieri per pactum alia ratione, puta

prohibita sunt a jure civili communi, possint fieri statuta aliter statuendo?" Bartolus answers that a statute cannot contradict the "jus commune" by ordaining that which the "jus commune" forbids; but it can ordain that which is not expressly forbidden, provided that it accords with "boni mores" and public utility, and is within the limits of the jurisdiction which the people can exercise.

Similarly with custom. Either, says Bartolus[1], a custom is contrary to, or goes beyond, law. If it goes beyond law, "constat eam debere servari." If, however, it is contrary to law, we must distinguish one case from another. Custom contrary to Divine or Natural Law, or to the Law of Nations, is not to be observed. If it is contrary to Civil Law—that is to

publicae utilitatis, vel alterius juris subtilitatis...tunc tale argumentum procedit. Ita loquuntur aliae glossae....Et istis casibus non dicit statutum contra legem, licet disponat aliter quam lex....Praedicta vera, quando fit statutum de his quae ad populi jurisdictionem spectant. Si vero fierent in causis majoribus, quae sibi solus Princeps reservavit, ut in venia aetatis concedenda...et in similibus, tunc statutum non valet, quia non est ad populi jurisdictionem."

[1] Vide *Comment. on Codex*, Part II. (C. VIII. 53. 2), p. 333, § 45: "Concludo quod aut consuetudo est contra legem aut praeter legem. In secundo casu constat eam debere servari....Primo casu consuetudo est contra jus naturale, et non debet servari....Aut contra legem divinam, et idem facit....Aut contra jus gentium, et idem....Aut est contra jus civile. Et tunc aut est expresse reprobata per legem, et non valet.... Aut non, et tunc aut est inducta per consensum erroneum contra legem, et tunc non valet...aut ex certa scientia; et tunc aut precedit legem; et tunc quidam distinguunt quod aut apparet ex tenore dictae legis ejus latorem sensisse vel scivisse consuetudinem localem, et tollit ipsam; aut non, et tunc non, sed illa lex succumbit....Ego autem sic dico... quod aut dicta consuetudo est contra legem et lex sequens contraria illi consuetudini tollit eam...aut praeter legem, et tunc non; sed lex succumbit illi. Aut consuetudo est generalis, et vincit legem generalem...aut est specialis et localis, et vincit eam specialiter in eo loco."

say, a general custom contrary to the "jus commune" and a particular custom contrary to the "jus civile particulare," i.e. a statute—then, if it is expressly disapproved by the law, it is not to be kept. If it is not expressly disapproved, then we must distinguish again whether it is "inducta per consensum erroneum contra legem," in which case it is invalid; or whether it is induced "ex certa scientia," in which case, if the custom precedes the law, Bartolus, rejecting the opinion of some, who distinguish between cases where the legislator knew of the existence of the custom or did not, maintains that its validity depends again on whether it is "contra" or "praeter legem." If "contra," the law, coming after the custom, revokes the custom; if "praeter," the law is swallowed up in the custom. The general rule therefore, as regards both custom and statute, is that they are both essentially inferior to the "jus commune"; but just as the "jus commune" or a statute can amplify the higher Laws of God, Nature or Nations, so custom and statute can amplify, not contradict, the "jus commune[1]."

In this way the field of legislation left open to statute and custom was very large[2]. Bartolus has

[1] Cf. in this connection the question of the interpretation of statutes. Vide especially *Comment. on Dig. Vet.* Part I. (D. I. 1. 9), pp. 41–6, §§ 53–65. It was on this question that Raynerius of Forlì combated both Bartolus and Signorolus de Homodeis (vide below, p. 399).

[2] We may note here that, where in criminal matters a statute imposes a different penalty from the Jus Commune, the new penalty of the statute does not revoke the old penalty of the Jus Commune. Vide *Comment. on Codex*, Part II. (C. IX. 19. 3), p. 349: "Et per hoc dico quod si statutum pro homicidio imponat poenam pecuniariam, non propterea tollitur poena legis Corneliae. Tamen," he adds, "si quis condemnetur vigore statuti, quod imponit poenam pecuniariam,

said that a statute can ordain that which is not expressly forbidden by the "jus commune," provided that it is "de his quae ad populi jurisdictionem spectant." Certain topics the Emperor has reserved to himself—various "causae majores." We must consider this restriction more closely.

Bartolus, we have seen, allows the right to make statutes to any approved and licit corporation "in his in quibus habent jurisdictionem, et quo ad ea quae ad ipsos collegiatos pertinent." Now as regards the cities, we must remember that they vary in the extent of jurisdiction which they exercise—from the Castrum or Villa, which has no jurisdiction, and the ordinary Civitas with a limited jurisdiction, "de jure communi," to the Civitas, who owns no superior and has "merum et mixtum imperium." With regard to the right of these three classes of cities to legislate Bartolus makes an important distinction[1]. The Civitas with no jurisdiction can make a statute "pertinens ad administrationem rerum ipsius populi"—provided the statute does not fall under the heading of "ambitiosa decreta"—on its own authority and without the intervention of the superior; but a statute "pertinens ad causarum decisionem" it can only make by authority of the superior—otherwise the statute is invalid. Similarly the Civitas with a limited jurisdiction can only make statutes "in his in quibus habent administrationem, seu jurisdictionem...in aliis non sine superioris auctoritate." It is thus only the Civitas, which has "all

tollitur condemnatio, quae resultat ex lege, quia senatus voluit ne quis ob idem crimen in duabus legibus fiat reus."

[1] Vide *Comment. on Dig. Vet.* Part I. (D. I. 1. 9), pp. 27–9, §§ 3–14.

jurisdiction" and owns no superior—the Civitas that is a "populus liber"—which can make statutes "prout sibi placet[1]." Of these it may be said that they have the same power "in his quae sunt ex forma statuti," as the Princeps "in his quae sunt de jure communi[2]."

Now from this it was but a small step to say that such a Civitas was, within its own boundaries, the Princeps himself. We have already referred to this final step in the process of raising up the Civitas from its original dependence to an independent position, as a sovereign State. We have followed that process step by step, and if the final step is not a large one, it is none the less one of the greatest importance. We must realise that it is not a solution offered once or twice by Bartolus, but one consistently and systematically adopted. To show this, and to illustrate this step

[1] Cf. *Comment. on Codex*, Tres libri (C. x. 63. 5), p. 64: "...Quilibet populus potest sibi facere statutum....Solutio: dicit Gul. quod illud est verum in his quae privatam utilitatem respiciunt. In his vero quae respiciunt publicam utilitatem principaliter, non possunt. Sed ego dico aliter in L. Omnes Populi (D. i. 1. 9). Nam quidam est populus liber, qui habet omnem jurisdictionem, et tunc potest facere legem et statutum prout sibi placet...ubi ponitur exemplum in populo Romano. Quidam sunt populi qui non habent jurisdictionem de jure communi, ut civitates quae non habent merum imperium; item provincia tota, quae licet habeat merum imperium, tamen a praeside appellatur ad superiorem; et tunc eorum statuta non valent, nisi confirmentur a superioribus, ut hic. Et ita fit in istis civitatibus marchiae et ducatus, nam non admittuntur eorum statuta, nisi approbata per superiorem."

[2] *Comment. on Codex*, Part II. (C. IX. 51. 13), p. 356, § 12: "Si infamia esset irrogata de jure communi, fateor quod statutum non possit restituere...Sed si infamia esset irrogata ex forma statuti, non de jure communi, tunc puto quod per statuta possit fama restitui. Quam enim potestatem habet Princeps in his quae sunt de jure communi, eandem videtur habere populus in his quae sunt ex forma statuti."

generally, we cannot do better than to collect a number of examples; these we may most conveniently arrange under the different divisions of the commentaries from which they are taken.

(1) From the *Commentary on the Digest*:—

Dig. Vet. Part I. (D. II. 1. 1): Bartolus is discussing the "aequiparatio" of "jurisdictio" to "dominium." "Et ista aequiparatio de jurisdictione ad dominium probatur sic: Princeps habet omnem jurisdictionem... et ex hoc dicitur dominus totius mundi...sicut quilibet judex dicitur princeps civitatis, vel territorii, cui praeest. ...Et recte potest dici dominus totius illius territorii universaliter considerati[1]."

Dig. Vet. Part I. (D. III. 1. 1, § De Qua Re): "Nota quod ad famam solus Princeps et senatus potest restituere et eodem modo Papa et collegium cardinalium. ...Sed quaero an populus per statutum possit quem restituere famae. Hic videtur casus quod non. Quod est verum in infamia, quae irrogatur ex forma alicujus statuti, quae per aliud statutum contrarium posset tolli....Idem de aliis regibus et principibus qui recognoscunt Imperatorem in dominum. Sed si esset rex, princeps vel populus, qui Imperatorem in dominum non recognosceret, tunc quo ad seipsos restitutio famae valeret, quia talis appellatur populus liber...et apud eosmet dicitur esse imperium sui ipsius[2]."

Dig. Vet. Part I. (D. IV. 4. 3): After saying that "per statuta civitatum non possit concedi minoribus administratio bonorum suorum, quia hoc Princeps reservavit sibi," Bartolus continues—"Civitates tamen quae Principem non recognoscunt in dominum, et sic

[1] p. 160, §§ 15–6. [2] p. 322.

earum populus liber est...possent hoc forte statuere; quia ipsamet civitas sibi princeps est[1]."

Dig. Nov. Part I. (D. XLII. 1. 57): "Sed quid si una civitas vellet dare jurisdictionem uni pupillo vel infanti, ut eam exerceat per curatorem vel tutorem? Respondeo: faciat de hoc primo statutum....Si enim civitas non posset dispensare, illa lex non habet dubium. Quod sine dubio obtinet in civitatibus, quae non recognoscunt dominum in temporalibus; quia tunc populus liber est et utitur omni jurisdictione Imperiali[2]."

Dig. Nov. Part I. (D. XLIII. 6. 2): "Istae duae leges sunt contra homines hujus civitatis, qui habent domos suos supra muros civitatis, quod non licet sine permissione Principis, ut hic videtis. Tamen ipsi habent permissionem a populo et communi hujus civitatis, et dicunt quod est populus nemini subditus: ideo hic populus est princeps in hac civitate, ideo potest permittere[3]."

Dig. Nov. Part II. (D. XLVIII. 1. 7): "Quaero quis possit super infamia dispensare? Respondeo, textus dicit, quod solus Princeps vel senatus....Idem dicimus de Papa in terris Ecclesiae: quia potest cum infamibus dispensare. Idem in collegio cardinalium, vacante pastore: secus in regibus et principibus....Quaero utrum civitas una possit infamiam irrogare, vel super infamia dispensare? Videtur quod non: quia civitas una non potest facere statutum super his, quae non sunt suae jurisdictionis....Sed causa infamiae non est de jurisdictione civitatis, cum sit reservata Principi.... Solutio: dicerem cum quaelibet civitas Italiae hodie, et praecipue in Tuscia, dominum non recognoscat, in se ipsa habet liberum populum, et habet merum imperium

[1] p. 430. [2] p. 378, § 14. [3] p. 431.

in se ipsa, et tantam potestatem habet in populo, quantam Imperator in universo[1]."

Dig. Nov. Part II. (D. XLVIII. 19. 4): "Nota hunc textum, quod relegato seu misso in exilium non potest dare judex licentiam veniendi, vel quod revertatur: sed solus Princeps potest, et non alius. Et quod hic dicit, ex aliqua causa, intelligatis quia causa justa est voluntas Principis. Et idem intelligo in istis civitatibus Italiae, quia ipsae sunt principes sibi ipsis; quia possunt exuli dare licentiam revertendi[2]."

Dig. Nov. Part II. (D. XLIX. 1. 1, § Si quis in appellatione): "Pone, quod est civitas, quae non recognoscit superiorem, et quae eligit ipsa sibi rectorem, nec habet alium officialem: quis erit judex appellationis? Respondeo: ipse populus, seu ordo, qui ipsum officialem facit: quia solus reperitur superior ipsi populo, et sibi princeps est....Et hoc colligitur ex lege 2—'Exactis deinde regibus consules constituti sunt duo'—supra, De orig. juris (D. I. 2. 2), ubi populus Romanus liber faciebat officiales, et ab eis erat jus appellandi, nisi expresse esset inhibitum[3]."

[1] p. 423, §§ 13-14.

[2] p. 552, § 4. Bartolus goes on to extend the power of granting "licentiam veniendi"—"Idem puto de omnibus civitatibus, quae habent licentiam condendi statuta in istis negotiis magnis. Nam ipsae possunt facere leges, ut exules revertantur: tunc habebunt licentiam revertendi auctoritate legis et auctoritate Principis, qui sibi (i.e. the civitatibus) concessit, quod possint facere leges et statuta.... Item dico quod quilibet judex potest dare licentiam revertendi exuli ex causa justa, ut puta, si est accusatus de maleficiis, propter quod praesentia accusati requiritur."

[3] p. 580, § 10. In the next paragraph, he continues: "Quaero, in aliqua civitate est collegium, quod facit sibi rectorem, cui dat jurisdictionem....Quis erit proximus superior, ad quem appellabitur? Respondeo ille, qui est judex ipsius universitatis, ut rector civitatis...

Dig. Nov. Part II. (D. L. 9. 4): "Quaero, posito quod decuriones ipsi non possint donare, ut dictum est: an populus totus possit donare? Puto quod sic; quod apparet, quia potest de donando legem facere...quod sine dubio procedit in illis civitatibus, quae de facto in temporalibus non recognoscunt superiorem, et sic ipsi in se habent imperium[1]."

(2) From the *Commentary on the Code*:—

Codex, Tres libri (C. X. 46. 1): "Sed quaero, cum decuriones non possunt concedere immunitatem, quis poterit concedere? Dicit glossa quod Imperator, et idem puto quod consilium magnum et adunantia generalis, quae habet plenum imperium; quia forte est civitas, quae non recognoscit superiorem[2]."

Codex, Tres libri (C. XI. 32. 3): "Nota ex secunda parte, quod in utraque Roma requiritur auctoritas Imperialis in venditione. Et per hoc dico quod in civitatibus, quae in temporalibus non recognoscunt superiorem, ut est civitas Perusina, sic populus est liber ...quod venditio rerum immobilium possit fieri auctoritate ejus consilii, apud quod est omnis potestas. Illud enim vicem Imperatoris gerit in civitate illa[3]."

We may also quote one or two other passages, in which we find the same conception of the "populus liber," although we do not have it directly stated that they are Imperator or Princeps to themselves. Thus in

Praedicta vera, quando civitas propriam legem habebat, secundum quam aliud judicatur."

[1] p. 669, § 7. And vide more examples from the commentary on this same law, below, p. 184, n. 3.

[2] p. 54, § 2. He refers to the passage last quoted (i.e. on D. L. 9. 4).

p. 89, § 2.

the *Commentary on the Code*[1]: "Si quis facit contra preceptum legis, peccat mortaliter....Qui non obedierit Principi morte morietur. Et alibi dicit Paulus (ad Romanos XIII) 'Omnis anima subdita sit Principi'... Cum ergo superior populus vel princeps hoc praecipiat, si quis facit contra legem, peccat mortaliter." Now though Bartolus does not say in so many words that this "superior populus" is "sibi princeps," yet it is bracketed by him with *the* Princeps, to disobey whom is, on S. Paul's authority, a mortal sin.

Again—"Quaero hic primo, quis possit collectam imponere. Respondeo, aut imponitur propter necessitatem civitatis, et possunt ipsi civitates imponere.... Aut imponitur ob publicam utilitatem, et non potest imponi sine expressa licentia Principis....Unde si quaedam civitas vellet imponere collectam, ut donaret Principi, non posset de jure, sed de facto sic. Praedicta vera sunt in civitate, quae recognoscit superiorem; sed si essent civitates liberae, et non recognoscentes superiorem, possent imponere quomodo sibi placeret[2]."

Again, on the first law of the fifth title of the Code, Book III—"Ne quis in sua causa judicet vel sibi jus dicat"—Bartolus says[3]: "Rubrica summat legem. Hoc

[1] *Comment. on Codex*, Part I. (C. II. 28. 1, Authent. Sacramenta), p. 265, § 15.

[2] *Comment. on Codex*, Tres libri (C. X. 62. 1), p. 61, § 24. Cf. a passage in the *Comment. on Codex*, Part II. (C. VI. 33. 3), p. 94: "Ad evidentiam primae partis (i.e. of this law) debes scire, quod sicut hodie Florentini et alii Italici, quando sunt guerrae, ipsi imponunt magnas gabellas, ita fecit divus Adrianus qui statuit, ut quandocunque haeres scriptus mitteretur in possessione, solveret vicesimam partem haereditatis fisco, quod idem est ac si diceret—Solvat duodecim denarios pro libra."

[3] *Comment. on Codex*, Part I. (C. III. 5. 1), p. 315, § 1.

intellige verum, nisi in judicibus, qui non recognoscunt superiorem. Tunc enim ipsimet judicant causas suas. ...Et ita videmus de facto in civitatibus quae non recognoscunt superiorem." And for a final example we may note how on the words of the Digest (D. XLII. 1. 45)—"De amplianda vel minuenda poena damnatorum post sententiam dictam sine principali auctoritate nihil est statuendum"—Bartolus says[1]: "Et quod hic dicit, sine jussu principis, idem puto hodie in civitatibus quae non recognoscunt superiorem. Nam populus hujus civitatis potest minuere poenam."

We have introduced this last—and we may call it crowning—step in the political theories of Bartolus, while considering the legislative power of the Civitas. As "sibi princeps" the Civitas will now be able to legislate by statute on all topics which the Emperor has reserved to himself. But this is only one of the effects of this step. In general it means that the Civitas is now an independent sovereign State. The theory of the Civilians had begun by seeing but one State, namely the Empire. Bartolus, we must always remember, has not yet given up the de jure lordship of the Emperor; but he has now recognised that where, whether de jure or de facto, there is an independent political body, that body must be recognised as sovereign and endowed, within its particular boundaries, with all the marks and privileges of the one universal Empire.

But there is one important reservation to be made here, before we leave this topic. The Civitas is now "sibi princeps" and can legislate "prout sibi placet," so

[1] *Comment. on Dig. Nov.* Part I. (D. XLII. 1. 45, § De Amplianda), Bale ed. p. 373, § 1.

long as its legislation does not run counter to the higher laws of God, Nature and Nations, to the "jus commune," to the Canon Law, at least in spiritual matters, and to the liberties and privileges of the Church; while we have seen that statutes can amplify these higher laws, though they cannot contradict them. But though, putting aside these reservations, the independent Civitas can legislate at will, its laws are still "statuta"; the limits, within which they are valid, are wider than in the case of cities without, or with a limited, jurisdiction, but the laws of all alike are nothing more than statutes, not what we should call sovereign law. Dr Gierke[1] has pointed out the great importance of the distinction between the statute "pertinens ad causarum decisionem" and the statute "pertinens ad administrationem rerum ipsius populi." But Bartolus himself does not carry through this distinction to a separation of the sovereign legislation of an independent Civitas from the legislation of a mere corporation. All Bartolus himself says is that the Civitas with full jurisdiction can make statutes of the first class "per se," while the Civitas without full jurisdiction can do so only by authority of the superior. The right to legislate is thus not the result of independence, not an act of sovereign power. The right to legislate belongs to all corporations—political and non-political alike; the greater or less degree of independence enjoyed by the Civitas only widens the scope within which legislation is valid without the authority of a superior.

We shall be concerned in later pages of this essay to

[1] Vide *Deutsche Genossenschaftsrecht*, vol. III. pp. 387–8.

estimate more fully both the origin and the significance of this final step by which the Civitas becomes a State. So far we have seen the State come into existence; we have now to treat of the State as existing. It is still necessary, however, to make one preliminary inquiry. We have repeatedly remarked that the political thought of Bartolus is eminently practical, that his theories at once reflect and interpret the actual Italian conditions of his time. But it might well be asked whether his thought, however praiseworthy, has not after all been out of touch with these conditions. It may be said that, while the whole trend of his thought has so far been to free these Civitates from an Empire which was a shadow, in reality they were fast falling under the power of tyrants, indeed were for the most part already fallen. We must therefore see how Bartolus handles this subject of tyranny.

It is certainly true that all northern and central Italy was fallen, or falling, beneath the power of tyrants; tyranny is as much the characteristic of the Italian communes in the fourteenth century, as the rise of the "popolo" and the struggles of the factions are characteristic of the thirteenth. The towns that remained free were a mere handful, and even in these the still violent strife of the factions threatened sooner or later to bring in the tyrant. Even Florence had had its first taste of tyranny under the Duke of Athens.

Bartolus fully realises this. "Hodie Italia est tota plena tyrannis[1]," he cries out; and he joins his grief for the state of Rome itself, which, with the Popes at Avignon, was a nest of petty, and therefore all the more

[1] *Tractatus de Regimine Civitatis*, p. 421, § 29.

noxious, tyrants, to that of all Italian literature from Dante to S. Catherine. "Est septimus modus regiminis," he says in his *Tract. de Regimine Civitatis*[1], "qui est in civitate Romana, nunc pessimus"—the regimen of many tyrants, not one of whom is strong enough to prevail against the rest; so monstrous that Aristotle has no name for it; yet allowed by God, to show the frailty of mundane glory—"Civitas enim Romana, caput morum, caput politiarum, ad tantam monstrositatem circa sui regimen venit, quod verius dici potest quod non est regimen, nec regiminis formam habet[2]." And "Deus scit quando supervenit justus dominus[3]."

And so to face this terrible problem Bartolus composed a special treatise[4]. He adopts a definition of S. Gregory, "quae pro lege servanda est," by which "proprie tyrannus is dicitur, qui communi reipublicae

[1] *Tractatus de Regimine Civitatis*, p. 418, § 5: "Est septimus modus regiminis, qui est in civitate Romana, nunc pessimus. Ibi sunt multi tyranni per diversas regiones adeo fortes, quod unus contra alium non praevalet. Est enim regimen commune totius civitatis adeo debile, quod contra nullum ipsorum tyrannorum potest, nec contra quem adhaerentem ipsis tyrannis, nisi quatenus ipsi patiuntur; quod regimen Aristoteles non posuit; est enim res monstruosa. Quid enim, si quis videret unum corpus habens unum caput commune debile, et multa alia capita communia fortiora illo, et invicem sibi adversantia? Certe monstrum esset. Appelletur hoc regimen monstruosum. Hoc enim divina permissione factum est, ut ostendat quod omnis gloria mundi caduca est."

[2] Cf. Lucas de Penna, *Comment. on Codex*, Tres libri (C. XI. 12. 1), p. 403: "Haec civitas (Rome) multa sortita est nomina...quorum pauca in effectu vera sunt hodie. Item dicitur gloriosissima....Item augustissima....Item caput omnium civitatum....Sed, ut praedixi, ex praedictis nominibus hodie pauca vel nulla conveniunt; potius ei congruit illud Esaiae (C. 1)—'Quomodo facta est meretrix civitas fidelis, plena judicii.'"

[3] Vide below, p. 171, n. 2.

[4] *Tract. de Tyrannia*, pp. 321–7.

non jure principatur[1]," and so there may be a tyrant in the "communi reipublica Romanorum," or in a single province, or in a city, or in a household[2], or lastly a man may be a tyrant of himself[3]. But here, as ever, the real interest of Bartolus is in the Civitas[4]; and so, following S. Gregory's definition—"tyrannus civitatis est qui in civitate non jure principatur[5]." Here Bartolus draws certain distinctions. There is the "tyrannus manifestus" and the "tyrannus velatus et tacitus"; the "tyrannus ex parte exercitii," and the "tyrannus ex defectu tituli"; finally the "tyrannus velatus" is sometimes tyrant "propter titulum," sometimes "propter defectum tituli[6]."

First as to the "tyrannus manifestus ex defectu tituli." Such a tyrant may arrive at power in various ways. He may make himself rector of a city which has no "jus eligendi[7]," or, in a city which has that right, he may force the citizens to elect him, and then he too is a tyrant "ex defectu tituli," since the jurisdiction, thus transferred through fear, is not valid[8]. Bartolus then asks a question of cardinal importance—whether what is done by such tyrants "ex defectu tituli" or during the time of their tyranny is valid. As to the acts of the tyrants themselves—"ea quae

[1] § 2. [2] This is discussed at length in § 11. [3] § 5.

[4] We may pass over §§ 8–11. The rest deal with the Civitas—34 out of 45 paragraphs.

[5] § 12. [6] Ibid. [7] § 13.

[8] § 14. In § 15 he describes the many ways in which this can be brought about. E.g., "si exercitus fiat contra civitatem sine consensu superiorum....Si cum gente forensi pugnando expugnavit civitatem." If "cum hominibus ejusdem civitatis facto rumore et seditione se faciat eligi in dominum," then, as elected "per metum," his title is invalid, and he is still "tyrannus manifestus ex defectu tituli."

fiunt per ipsos tyrannos tamquam jurisdictiones habentes"—they are "ipso jure nulla[1]." Equally null are the acts of officials appointed by the tyrants. Whether the acts of officials, not directly appointed by the tyrant, but by the city itself, "patiente tyranno," are also invalid, is more doubtful. There is much to be said on both sides[2]. Against their validity may be urged that during a tyranny no official can be said to be freely elected. Further, a decretal is cited as laying down that "tempore schismatis non potest agi vel prescriptio currere. Sed tempore tyranni potest dici tempus schismatis. Scindit enim tyrannus et separat communionem universalis Imperii." On the other hand "insurgeret iniquitas," if it were held that, where a tyranny lasts a long time, "omnia celebrata et acta in eorum curiis" were null. Finally Bartolus distinguishes those acts which the people does itself, and would have done even had there been no tyrant—"ut decisiones quarundarum causarum contrariarum quas quilibet tyrannus patitur ire sub regulis justitiae"—from those which would not have been done, had there been no tyrant: the former are valid, the latter not[3]. Then as regards contracts[4]. If the Civitas itself gives or grants anything to the tyrant, the contract is "ipso jure" null. So, contracts between the tyrant and individual subjects are null. As to contracts between the tyrant and non-subjects, if they are to the detriment of the Civitas, they are null; if they are in its favour, then also they are probably null, though Hostiensis decides the contrary. Lastly there are

[1] § 16. [2] § 17. [3] §§ 18–9. [4] §§ 20–2.

certain acts which do not come under the head of contracts; here again we have similar distinctions[1].

Then we come to the tyrant "ex parte exercitii," and since he has a just title, he is "less properly" called a tyrant[2]. Still tyrant he is. Bartolus gives ten examples from Plutarch[3] of the tyrannical acts of such tyrants, the most important of which, as proof of tyranny, are, according to Bartolus[4], the sixth, keeping the city divided, and the seventh, pauperizing his subjects. Then as to the validity of his acts[5]. A process instituted by him against a rebel is null, since no one need appear before a judge notoriously hostile; other processes are valid, so long as his subjects tolerate him. If, however, a process is instituted by which the tyrant himself is to be deprived by his superior, and, if the sentence is such that he is declared "ipso jure" deprived of his jurisdiction, "vel dicitur servus vel infamis," then acts of the tyrant done after the process was begun are null; but if he

[1] Vide §§ 23–5. Bartolus asks whether in such a case—i.e. when "non contrahit tyrannus, sed distrahit per se vel suos officiales"—"solutionem eorum quae reipublicae debebantur recipiendo, an sint liberati solventes," and draws various distinctions on the lines laid down for contracts. § 26 however must be noted in detail: "Quandoque tales tyranni non contrahunt, nec distrahunt, et patiuntur bona et jura civitatis deperire et praescribi: tunc puto quod contra civitatem non praescribatur....Dico etiam, quod si aliqua jurisdictione competenti ipsi civitati tyrannus uteretur, non autem a civitate, sed ab altero recognosceret: quod quantum ad se, videtur uti nomine alieno: sed quantum ad civitatem, videtur uti nomine suo si per illum usum civitas retinet jus suum."

[2] § 27.

[3] §§ 28–30.

[4] § 30: "Omnia ergo praedicta sunt signa ad probandum tyrannidem: sed principaliter illa duo, scilicet servare civitatem in divisione et depauperare subditos, et eos affigere in personis et rebus."

[5] §§ 35–7.

is deprived by the sentence itself (not "ipso jure"), then "interim gesta per eum valent, quia interim dignitatem retinet." And so with contracts etc.[1]: they are valid so long as they are made while he still retains his dignity—unless they are to the detriment of the city, as, for example, if he forces the people to grant him "plus jurisdictionis."

Lastly, as to the "tyrannus tacitus et velatus"—"ut est ille qui sub quodam velamine non juste principatur in civitate[2]." Such veiled tyranny can be brought about in two ways:—(1) when anyone has conceded to him jurisdiction for a certain time, and after that time has it confirmed[3]; and (2) when the tyrant has himself appointed to some quite minor post, as vexillifer or gonfalonier or captain of mercenaries, and governs despotically under cover of that office[4]. As regards the first, "de jure communi" the procuring of such jurisdiction is illegal; but in the case of an independent Civitas—"si poneres quod tanta esset potestas dicti populi quod posset contra dictam legem dispensare"—it must be considered whether the tyrant has so strengthened himself during his first period of power, that the confirmation of it may be said to be forced from the citizens through fear. He

[1] § 37: "...Si aliquis est in nobili potestate et habet justum titulum, licet respectu exercitii sit tyrannus, tamen habet beneficium ...donec in dignitate toleratur...secus si esset defectus tituli....Item dico quod postquam talis habens titulum devenit ad tyrannidem per modum exercitii, si aliquid sibi plus jurisdictionis concedi fecerit a populo, non valeret, quasi populus per metum faceret....Item omnis contractus, quem faceret de ipsam civitatem submittendo, vel obligando eam, non valeret; non enim loco domini est, cum ipsam civitatem spoliat sua libertate."

[2] § 38—end. [3] § 38. [4] § 41.

then falls under the heading of tyrants "ex defectu tituli," elected "per metum[1]." In the second type of veiled tyranny, proof that this "regimen" is tyranny is difficult, though public fame will suffice[2]. The answer to the question whether acts done during this sort of tyranny are valid, is the same as in the question of acts done by officials elected by the people themselves during a tyranny, which we have examined above[3]. If, however, it is only a fraction of the people who are abused by this tyranny, while in general the city is well governed, then the tyrant is not a tyrant "simpliciter loquendo," since by his government "communis utilitas attenditur, quod directo est oppositum tyranni" —though as regards "extrinsecos" and "inimicos," he may still be considered a tyrant[4]. For any government, in which only the public good is sought, is a rarity; complete absence of self-interest is not to be expected in human princes[5]. "Illud tamen dicimus bonum regimen et non tyrannicum in quo plus praevalet communis utilitas et publica quam propria regentium; illud vero tyrannicum in quo propria utilitas attenditur. Et istud dicit Egidius in III° libro De regimine principum (cap. XI.) et istud est precipue attendendum quando tractatur de probando an aliquis sit tyrannus[6]." Bartolus finally adds a third species

[1] §§ 39–40.

[2] § 41: "Sed hoc qualiter poterit probari, cum talis sit velatus tyrannus, et per se non facit, in palatiis raro intrant, sed suis scriptis et nunciis regimina obediunt? Respondeo dura probatio est....Item quod ille talis, qui habet illum titulum est potentior homo, qui sit in civitate, et est publica fama quod facit praedicta fieri, satis puto probatam tyrannidem."

[3] § 42. [4] Ibid. [5] § 43. [6] § 44.

of veiled tyranny—when the tyrant has no title, but yet "omnia procedunt secundum velle suum." As regards the "probatio" of this species of tyranny and the validity of acts done under it, the answer is the same as in the case of previous species[1].

In order to complete our analysis of this treatise, a few points still remaining may be touched upon. We notice that throughout Bartolus is providing both for the Civitas that does, and for the Civitas that does not, recognise a superior. In certain cases this difference has been followed by different consequences. In the same way the tyrant himself may have a superior, and this is very likely to be the case with tyrants "ex parte exercitii," such as dukes and counts. These the superior must depose[2].

Secondly we have to note the exceedingly interesting way in which every conclusion drawn by Bartolus is supported by the authority of the Law Books or the Canons. Bartolus does not attack tyranny on general or ethical, but on strictly legal, grounds. Nothing shows this better than the various penalties to which Bartolus holds the tyrant amenable. Tyrants "ex defectu tituli" are amenable to the Lex Julia Majestatis[3]; while tyrants "ex parte exercitii" fall under the Lex Julia de Vi Publica, the Lex Julia de Ambitu and many other laws; perhaps even "in poenam capitalem." And without doubt "si existans in tali tyrannide quoquo modo publice vel occulte machinatur contra Principem vel ejus officialem, ipso jure sunt rebelles Imperii, et dignitatem pendunt: secundum legem novam Theodosii Imperatoris[4]."

[1] § 45. [2] § 31. [3] § 32. [4] § 33.

There was however one way in which the tyrant might obtain a lawful title for his government, an expedient frequently resorted to both by the Popes and by the Emperors of this period in their dealings with tyrants. The tyrant might be made an Imperial or Papal vicar; nothing could better illustrate the practical aim of this treatise than Bartolus' handling of this point[1]. We cannot think, says Bartolus, that the Pope or the Emperor would acknowledge the obvious tyrant and legalise his tyranny without good cause; and so he approves it on the grounds of expediency—just as a sailor throws overboard the less valuable, that he may save the more precious, goods.

[1] § 34. Bartolus' words are well worth quoting: "Quid dicimus de his, quae videmus fecisse summum Pontificem et Imperatorem et legatos (the Pope was of course still at Avignon)? Nam quosdam quos clare cognoscebant esse tyrannos, quos per tyrannidem detinebant, et eos episcopos, scilicet sedis apostolicae, vel Imperii constituebant vicarios; ut fecit Clemens VI in civitate Bononiensi de domino Thaddaeo de Populis et ejus filiis. Hoc idem fecit Carolus Imperator cum tyrannis in Lombardia. Hoc idem dominus legatus cum multis tyrannis fecit in Marchia Anconitana. Respondeo, praesumendum est quod tanti domini hoc sine magna causa non faciunt. Et potest esse duplex causa. Prima, propter aliqua magna et ardua, quae eis expedire incumbat. Sicut enim diligens nauta projicit viliora, ut salvet pretiosiora...sic etiam dominus justus cum uno tyranno pertransit, et eum vicarium facit, ut ea quae sunt magna et ardua, reformare posset. Secunda ratio posset esse charitas et dilectio eorum, qui sunt sub tyranno. Sicut enim videmus naturaliter physicos facere, quando una infirmitas non potest sine magno periculo personae curari, tunc ipsi procurant sustentare naturam, ne infirmitas procedat ulterius, ex quo sequitur quod natura semet ipsam adjuvat; ita quandoque rectus Princeps facit, videns quod quandoque unus tyrannus non potest deponi sine magno exterminio eorum qui sunt sub tyranno, propter bona eorum ipsum tyrannum facit vicarium, ut ex hoc ille tyrannus minus timeat, minus populum gravet; et interim casus occurrit, per quem, suadente justitia, sine populi detrimento deponetur tyrannus etc."

And often it is for the good of the tyrant's subjects; since to depose him at once might mean the extermination of many of them; therefore the tyrant is made vicar, "ut ex hoc ille tyrannus minus timeat, minus populum gravet," until later, in the course of events, the tyrant may be deposed without danger to his subjects; for if after receiving the title he acts tyrannically, he is still a tyrant "ex parte exercitii."

And so we see that Bartolus has in no sense shut his eyes to the fact of tyranny. He has not been constructing a merely academic theory of the independence of the Civitas, while in fact that Civitas, in the majority of cases, was falling or had fallen into dependence. On the contrary he has treated both the Civitas and the tyrant from a distinctly practical point of view. Tyranny, he says again elsewhere[1], is the worst of all forms of government, and no proof of this is needed. It is something not normal in the life of the Civitas, something monstrous, that must be taken into consideration, so long as it lasts, but must not be accepted as final. The independence of the Civitas must therefore be established, because the tyranny will pass—though God knows when[2]. Just for this reason, therefore, it was important to decide how far the acts of tyrants, while

[1] *De Reg. Civitatis*, p. 421, § 27: "Tyrannus autem est pessimus; hoc autem est ita manifestum, quod demonstratione non eget."

[2] Cf. *Comment. on Codex*, Part I. (C. I. 2. 15), p. 65: "Nota quod omnia facta tempore tyrannidis, superveniente justo domino, debent cassari et irritari, quod nota. Sed Deus scit quando supervenit justus dominus." We have seen however that *all* the acts are not to be considered invalid. With this should be compared an interesting passage in the *Comment. on Dig. Nov.* Part II. (D. L. 13. 1, § Divus), p. 680, § 15; which brings out how Bartolus looks on tyranny as an episode, liable to appear anywhere, as a not normal

the tyranny lasts, are valid. When Bartolus tells us that tyrants fall under the Lex Julia Majestatis or the Lex Julia de Vi Publica, it may indeed seem that he is merely playing with Roman texts in a fanciful and very unpractical manner. But such reasoning would strike the fourteenth century very differently. The medieval mind needed authority, and it was no small victory for freedom, when a great lawyer gave out as authoritative that the tyrant was amenable to these laws. This however is but a small part of the treatise. As a whole it is a thorough and highly meritorious attempt to examine the nature of tyranny, to find a standard for judging the validity of its acts, and, above all, to provide that both the passing away of tyranny, and the tyranny itself, while it lasted, should be attended with as few difficulties as possible.

change in the "status" of the Civitas: "Quaero, aliquis est electus potestas hujus civitatis. Post acceptum officium, antequam vadat, civitas mutat statum et ibi insurgit quidam tyrannus, vel aliqua secta, ita quod exercitium justitiae non remanet liberum potestati, an debeat habere salarium. Respon. sic integrum. Videtur enim stare per ipsam civitatem vel per casum fortuitum in ipsa civitate contingentem, ut supra dictum est (i.e. in the commentary on this paragraph). Juste enim timet qui non vult accedere sub ipso tyranno.... Item secundum mores nostrae civitatis turpe et verecundum est accedere ad illum locum, ubi quis non possit justitiam libere exercere: ideo videtur non posse accedere, cum honeste non possit....Et eadem ratione dico quod si durante officio insurgit tyrannus in civitate, vel aliqua secta, vel aliquid fit ex quo rector non potest remanere sine verecundia, quod potest reverti et debet habere totum salarium, Ita fuit observatum Bononiae in persona domini Jacobi de Gabrielibus, quando venit legatus. Et idem fuit observatum Pisis. Istud an possit remanere sine verecundia, vel non, debet intelligi secundum mores civitatis nostrae....Unde illud quod reputaretur verecundum apud bonos et graves homines, illud deberet timeri."

But it may be objected that Bartolus is here fundamentally wrong. Tyranny, it may be said, was not a mere passing phenomenon; the day of the free city in Italy was over; and the tyrant was there to stay, and to lead straight on to Macchiavelli's "Principe." That is all undoubtedly true. But we stand on this side of the Renaissance, and can realise the truth. Bartolus lived in the fourteenth century, when tyranny was still spasmodic, rising and falling in the play of factions, supplanting free government, and being itself supplanted either by another free government or by a new tyranny; while the bands of mercenaries, which in the next century were to be at once the mainstay and the ruin of the tyrants, were a still newer phenomenon, the great importance of which only began with the Italian expeditions of John of Bohemia[1].

With all reason, then, according to the actual conditions of his time, Bartolus does not accept tyranny as more than an episode. If the city owns a superior, the tyrant usurps both the rights of the Civitas and of the superior, and is, if possible, to be deposed; where that is impossible, it may often be expedient to legalise the tyranny in the form of a vicariate. If the city owns no superior, it is the people itself whose rights are usurped.

We shall therefore for the rest of our analysis follow Bartolus in leaving out of account the fact that actually

[1] Problems connected with the mercenaries occur quite frequently in Bartolus; e.g. in the *Tract. Repraesalium*, Quaest. v. 5, p. 334, § 12, he says that mercenaries are considered citizens of the place where they are earning their hire. And in the *Tract. de Tyrannia*, § 41, one of the methods of the "tyrannus velatus" is to get himself appointed "capitaneum stipendiariorum vel gentis armigerae."

the majority of Civitates were under the power of tyrants, viewing tyranny as a non-normal episode in the life of the Civitas, which leaves the rights of the Civitas itself unimpaired. What remains to be considered we may now divide under two heads. So far we have the independent Civitas, and considered in its relations to the Empire, we have seen it recognised as "sibi princeps." Now, continuing, we shall consider it from the point of view of (i) its internal government; (ii) its external relations with other political bodies.

(i) The treatise *De Regimine Civitatis*[1] might be called the one piece of writing by Bartolus, in which the purely theoretical political interest is predominant, though even here he gives, as the reason for composing the treatise, that such considerations are necessary to the jurist; and though, as was natural, he depends, as regards the theoretical divisions of polities, on Egidius Romanus and the Aristotelians, he is continually giving, in his usual manner, practical examples from the history of his time and from his own experiences.

Nothing could better illustrate the character of the political thought of Bartolus than the opening paragraph of this treatise. "Quia haec est ultima pars Tyberis, et sic in urbe Romana, quae caput est mundi: ideo circa modum regendi civitatem aliqua videamus." His first inquiry is—"Quot modis regitur civitas?" "Ex legibus nostris colliguntur tres modi regendi boni et tres ejus contrarii. Aliquos modos apertius declarat Aristoteles (3 Politia) et ibi eos modos suis nominibus nominat. Nos vero et de illis nominibus mentionem

[1] pp. 417–21.

faciemus, et nomina secundum praesens tempus congruentius inseremus. In urbe quidem Romana, expulsis regibus, tres modi fuerunt regendi." We notice how in all this the traditions of the Roman lawyers are meeting the new Aristotelianism. According to the former, the material for investigation is "leges nostrae" —Justinian's Law Books; and as a result the Civitas, whose government is under discussion, will be *the* Civitas—Rome. According to the latter, the material for investigation is the Civitas in general, the πόλις. And thus from the fusion of these two lines of thought, we get the curious method pursued in the opening paragraphs of this treatise. Taking the history of Rome, after the expulsion of the kings, he divides it into three periods, each of which corresponds to one of the Aristotelian divisions—Πολιτεία, Aristocracy and Monarchy, or their bad forms of Democracy, Oligarchy and Tyranny. Finally to each of these Bartolus applies "nomina secundum praesens tempus congruentius."

There are thus six "modi regiminis," three good and three bad[1]. The seventh, unknown to Aristotle, that of the numberless petty Roman tyrants of his day, Bartolus holds no "regimen," but a monstrosity[2].

Then comes the question, which is the best form of government? It is an investigation, says Bartolus, very necessary to the jurist[3]. The question is investigated by Aristotle, but "clarius" by Egidius Romanus, "qui fuit magnus philosophus et in theologia magister"; hence Bartolus will follow him, and not Aristotle, whose words "juristis, quibus loquor, non saperent[4]."

According to Egidius, then, "regimen ad populum"

[1] § 4. [2] § 5. [3] § 6. See above, pp. 19–20. [4] § 7.

is good, if it fulfils its end; aristocracy is better; but monarchy is best[1].

Bartolus next proceeds to set forth at length the reasons advanced by Egidius, the dialectical "oppositions" advanced against these reasons by Egidius himself, and his final reply to these objections[2]. To these Bartolus appends some considerations of his own[3], and then comes to the most remarkable and original part of his treatise. He makes a triple division of cities or peoples[4]—the city or "gens magna in primo gradu magnitudinis," the city or "gens major in secundo gradu magnitudinis," and the city or "gens maxima in tertio gradu magnitudinis"; each of these grades is made to correspond with the three divisions of Roman history.

The city or "gens magna in primo gradu magnitudinis" should not be governed either by a monarchy or by an aristocracy[5]. When the Civitas Romana was "in primo gradu magnitudinis," it expelled its kings. It cannot support the expenses of monarchy, and the monarchy itself tends to become a tyranny. Neither is aristocracy good. Either the "multitudo populi de illorum paucorum regimine indignabitur," as happened, says Bartolus, at Siena[6], or civil discords ensue, "ut saepe vidimus in civitate Pisarum[7]." No, the best

[1] § 7. [2] §§ 8–9. [3] §§ 10–4. [4] § 15. [5] § 16.

[6] § 16: "Fuit enim (at Siena) annis fere octoginta quidam ordo hominum divitum, regentium civitatem bene et prudenter: tamen quia populi multitudo indignabatur, oportebat eos praestare cum magna fortia militari. Qui ordo depositus est in adventu Caroli IV illustrissimi Imperatoris tunc regnantis. Ipsius Principis factum comprobat, quod talis regendi modus in talibus civitatibus non est bonus."

[7] Ibid.: "Aliud inconveniens potest sequi: quia illa pauca (sic),

form of government for such cities is "regimen ad populum." Proof is to be found in the flourishing state of Rome when it was so governed[1], and in the flourishing state of Perugia to-day—"quae isto jure regitur in pace, et unitate crescit, floret"—where its rulers are elected "secundum vices" and remain under the supervision of the electors[2]. And often, says Bartolus, the event proves that what was done by the popular Council, though disapproved by the wise, was rightly done[3]. This regimen is "magis Dei quam hominum," and Bartolus heard the Emperor Charles IV commend it[4]. Finally he makes two important reservations. First that "regimen ad populum" means, not that the government is managed directly by the people, but that the "jurisdictio" is with them—"istud autem regimen est sic dictum, quando jurisdictio est apud populum seu multitudinem, non autem quod tota multitudo simul aucta regat, sed regimen aliquibus per tempus committit secundum vices et secundum circulum[5]." The second reservation is that when he says that the "regimen" is in the multitude, he means "exceptis vilissimis"; similarly too powerful magnates may also be excluded[6]. Bartolus takes every precaution in restraining his Democracy. "In dictis civitatibus, si honores et munera secundum gradus debitos

ut naturaliter evenit, poterint inter se dividi: ex quo civitatibus occurrunt rumores, seditiones, incendia et civilia proelia: ut saepe vidimus in civitate Pisarum."

[1] Ibid. [2] § 17.

[3] Ibid.: "Et saepe visum est per consilium hominum communium deliberari quaedam, quae a sapientibus et prudentibus malefacta visa sunt: eventus vero manifestavit esse prudentissima facta."

[4] § 18. At Pisa 1355. [5] Ibid. [6] § 19.

distribuuntur, bonum est regimen et ad superiorem spectat reformatio[1]."

We now come to the "major gens" or "populus in secundo gradu magnitudinis[2]." For these government "per paucos" is best. So Rome, when she had increased to the second grade of greatness, was governed by her senators. As modern examples Bartolus gives Venice and Florence, explaining that their rulers may be said to be "pauci" with respect to the size of these cities, though compared with other cities they are "multi." It is better that they should not be too few, as thus they remain more united. This is the best "regimen" for the city in the second grade of greatness—but, says Bartolus, there is no hard and fast rule. If a "gens" or "populus" is accustomed to some other "regimen," then that other "regimen" is preferable, and should be preserved[3].

Thirdly we have the "gens" or "populus maximus in tertio gradu magnitudinis[4]." This last grade hardly refers to the Civitas[5], but if there does exist so great a city, it will be best governed by monarchy. So in the case of Rome—"aucto multum Imperio Romano, et captis multis provinciis, deventum fuit ad unum, scilicet

[1] § 19. [2] § 20.

[3] § 21: "Praedicta vera nisi de antiquo regendi modo civitatis aliud appareat. Potest enim esse quod una gens vel populus ita assuefacti sunt certo modo regendi, quod eis quasi in naturam conversum est, et aliter vivere nescirent: tunc antiquus modus regiminis servandus est."

[4] §§ 22–5.

[5] "Hoc autem (i.e. the tertius gradus magnitudinis) fere posset contingere in civitate una per se; sed si esset civitas, quae multum aliis civitatibus et provinciis dominaretur, huic genti bonum est regi per unum." § 22.

ad Principem." In favour of monarchy are also all the arguments of Egidius, which Bartolus has already examined. Besides, in so great a multitude there will necessarily be many good men to advise and help the king to govern justly—"et sic de facto communiter videmus, quod tanto melius gens vel populus regitur, quanto sub majori vel potentiore rege regitur." Monarchy includes both the Empire and particular kingdoms, duchies, counties, etc.[1]. All kings are elected mediately or immediately by God; but "reges particulares sunt magis ex constitutione hominum": therefore, unlike the Empire, their kingdoms go by succession. It is only with regard to these particular kingdoms that we can accept the statement of Egidius that succession is preferable to election; for the Empire must go by election, which is a more divine method than succession[2]. Bartolus then, in a passage which we have already noticed, considers the translation of the Empire from the Romans to the Germans. The "populi parvi" he does not discuss. They are either subject to, or allied with, some greater power, and therefore not independent[3].

Finally Bartolus considers the three bad "modi regiminis[4]." Of these tyranny is the worst, for through

[1] § 3: "Tertius regendi modus est per unum...et istud secundum Aristotelem appellatur regnum. Nos vero, si iste est dominus universalis, appellamus Imperium...si vero particularis, aliquando appellatur regnum, aliquando ducatus, marchia vel comitatus....Ducatus vero communi nomine appellamus regimen domini naturalis: et hoc, si dictus dominus in communem et bonum finem tendit. Si vero tendit in malum finem et in proprium commodum, secundum Aristotelem appellatur tyrannis. Sic etiam secundum leges et mores appellatur."

[2] §§ 23 and 24.

[3] § 26. [4] § 27–9.

it, more than any other, "ab intentione communis boni receditur"[1]—except for that seventh and monstrous regimen, "quod est nunc in urbe Romana," to which Bartolus here returns. And he ends with a salutary warning to the cities. "Item advertendum est, quod regimen plurium malorum vel regimen populi perversi non diu durat, sed de facili in tyrannidem unius deducitur. Hoc enim de facto saepius vidimus. Hoc etiam permissione divina est, cum scriptum sit: 'Qui regnare facit hypocritem propter peccata populi' (Job xxxiv. cap.), et quia hodie Italia est tota plena tyrannis."

From our analysis of this treatise it is clear that Bartolus, while unwilling to lay down any general statement that this or that mode of government is absolutely the best, is of opinion that, for the majority of the Italian cities at least, government by the people *is* best. His view of the comparative value of any form of government is certainly significant, it may be even original. But for the ordinary Civitas, with which we are here concerned, "regimen ad populum" is the best; while we saw that Bartolus was careful to point out that this does not mean that the people itself directly conducts the government, but that it commits the government to its officials "secundum vices et secundum circulum."

[1] "Omnes philosophi dicunt quod tyrannis est pessimus principatus; tenet enim ultimum gradum malitiae." In the government of many, even if bad, some part of it may tend to the common good: "sed si unus est tyrannus, etiam totum recedit a communi bono. Praeterea sicut virtus unita in bonum est melior, ita unita in deterius est deterior. Tyrannus autem est pessimus. Hoc autem est ita manifestum quod demonstratione non eget." (§ 27.)

The sovereign power resides with the people as a whole, collected in their Adunantia Generalis, Arenga or Parlamentum; the government resides in the Concilium which they elect and which is then their representative. Discussing the election of syndics and officials[1], Bartolus says that this belongs to the Concilium—there is no need for the Adunantia to make the elections, since the Concilium, once elected by the people in its Adunantia, "repraesentat totum populum[2]." Similarly statutes passed by the Concilium are "jus civile," no less than statutes passed by the whole people in its Adunantia, since the Concilium "repraesentat totum populum[3]."

Bartolus identifies this Concilium with the "ordo decurionum[4]," as the "ordo per quem regitur civitas";

[1] *Comment. on Codex*, Tres libri (C. x. 31. 2), p. 37, § 8: "Item nota quod de jure communi ad concilium civitatis spectat facere electiones officialium et syndicorum....Et sic non erit opus arenga vel adunantia generali. Arenga tamen seu parlamentum illud, ubi non est aliquis superior, habet ab initio concilium eligere....Istud concilium sic electum postea repraesentat totum populum." Cf. *Comment. on Infort.* Part II. (D. xxxvi. 1. 26), p. 433: "Quaero qualiter constituatur syndicus a civitate. Glossa notabiliter dicit, vel fiat per adunantiam generalem totius populi, vel per concilium seu ordinem per quam regitur civitas. Vel forte aliquis qui est syndicus ex lege vel ex consuetudine sicut est hic: nam unus ex judicibus capitanei, eo ipso quod est judex illius tribunalis, est syndicus civitatis."

[2] The phrase occurs repeatedly. Cf. *Comment. on Dig. Vet.* Part II. (D. XII. 1. 27), p. 51, § 2: "...Ipsa civitas seu concilium, quod totam civitatem repraesentat." So cf. *Comment. on Dig. Vet.* Part I. (D. I. 1. 9), p. 29, § 16. Cf. also *Comment. on Dig. Vet.* Part I. (D. I. 3. 31), p. 60, § 10.

[3] *Comment. on Dig. Vet.* Part I. (D. I. 1. 9), p. 29, § 16. The same rules apply to the procedure of making statutes whether by the Populus itself or the Concilium, which represents the whole Populus.

[4] Vide e.g. *Comment. on Codex*, Part I. (C. IV. 32. 5), p. 483:

and a theory which, "while professedly taken from the Roman law of the Decuriones, is really drawn from the constitutions of the medieval Italian city[1]," was elaborated in such a way as to restrict the competence of these representatives of the people strictly within the limits of the powers conferred upon them by the represented people. The governing officials—whether they be called Decuriones, Priores, Antiani—have a certain "arbitrium[2]," within which they act as the representatives of the people, and beyond which they can only act by express command of the people.

In the elaboration of this theory, Bartolus, according to Dr Gierke, took a leading part; we can therefore not do better, in order to give a clear example of his democratic handling of the internal government of the Civitas, than to analyse his theory of the relations of the government to the whole people, as developed by him in his commentary on the law of the Digest relating to the "ambitiosa decreta" of the Decuriones.

"Advertatis quia concilium civitatis aequiparatur ordini decurionum: conciliarii decurionibus."

[1] Vide Gierke, *Deutsche Genossenschaftsrecht*, vol. III. pp. 394-5.

[2] Vide e.g. *Comment. on Dig. Nov.* Part II. (D. L. 1. 3), p. 647, § 8: "...Si priores habent arbitrium super publica utilitate communis, quod ipsi non possunt statuere nisi de his quae pertinent ad publicam utilitatem principaliter." Ibid.: "Nota...quod ad decuriones pertinet dare tutores, quod intelligo quando eis specialiter esset permissum, alias non possent." Vide also how Bartolus interprets the words of the law against the "ambitiosa decreta" of the Decuriones—"Sed etsi salarium alicui decuriones decreverint, decretum id nonnumquam ullius erit momenti: ut puta si ob liberalem artem fuerit constitutum vel ob medicinam: ob has enim causas licet constitui salaria" (D. L. 9. 4). In *Comment. on Dig. Nov.* Part II. (D. L. 6. 2), p. 664, he asks who can grant immunity from financial burdens. He answers,

It may be well to give the actual words of the law[1]: "Ambitiosa decreta decurionum rescindi debent, sive aliquem debitorem dimiserint sive largiti sint. Proinde, ut solent, sive decreverint de publico alicujus vel praedia vel aedes vel certam quantitatem praestari, nihil valebit hujusmodi decretum. Sed etsi salarium alicui decuriones decreverint, decretum id nonnumquam ullius erit momenti: ut puta si ob liberalem artem fuerit constitutum vel ob medicinam: ob has enim causas licet constitui salaria." There could be no better example than the commentary of Bartolus on this law of the way in which the Postglossators handle the texts of their Law Books.

"Habeo istam legem pro difficili," says Bartolus in beginning his commentary[2]. He starts from the nullity of these "ambitiosa decreta," but his preliminary discussions need not at present detain us[3]. Then he asks an important question—by whom are such "decreta" to be rescinded? The answer is, by the superior, where there is one; where there is no superior, by the "concilium majus civitatis[4]." Again, granted

"doctoribus et medicis potest concedi per decuriones, hoc est per ordinem civitatis, aliis vero non posset concedi per illos et sic requireretur adunantia generalis."

[1] D. L. 9. 4.

[2] *Comment. on Dig. Nov.* Part II. (D. L. 9. 4), pp. 669–73.

[3] Vide §§ 1–5. A short analysis of this law will be found in Gierke, op. cit., vol. III. p. 295, note 176. I have thought it better, however, here, as usual, to give Bartolus' own words, and by analyzing this passage in detail, to give at once a succinct view of his democratic conception of the relation of the government to the people.

[4] § 6: "Respondeo, rescindantur a superiore, si est, ut puta a praeside; vel si non est praeses, puto quod poterunt rescindi per concilium majus civitatis...et fiet hoc ad petitionem cujuslibet de populo, condictione ex hac lege vel officio judicis."

that the Decuriones cannot donate, can the whole people? Yes, says Bartolus, since the people can pass a law to that end, at any rate in cities which are "sibi principes[1]."

From this Bartolus passes on to consider the limits within which the Decuriones may exercise their "arbitria." "Et consueverunt quandoque habere arbitrium super bono et pacifico statu civitatis; quandoque super abundantia habenda in civitate, quandoque super custodia civitatis, quandoque consueverunt habere arbitrium ut pecunia veniat in communi, et super multis aliis, quae factorum varietas introduxit[2]." From which Bartolus deduces that, by virtue of such "arbitrium," their authority is confined within the following limits[3]:—They cannot reinstate exiles, unless the right

[1] § 7: "Posito quod decuriones ipsi non possint donare, ut dictum est: an populus totus possit donare? Puto quod sic, quod apparet: quia potest de donando legem facere...quod sine dubio procedit in illis civitatibus quae de facto in temporalibus non recognoscunt superiorem, et sic ipsi in se habent imperium."

[2] § 8.

[3] Vide §§ 8–16: "Sciendum est ergo quod ex virtute dicti arbitrii vel alicujus eorum non possunt rebannire exbannitos, nisi hoc sibi expresse permiserit populus, qui in civitate sua dicitur princeps.... Item non possunt aliquam sententiam condemnatoriam tollere....Item non possunt executionem alicujus sententiae suspendere ultra tempus trium mensium....Et sic apparet quod decuriones, qui quandoque suspendunt executionem sententiae in tempora prolixiora, non juridice faciunt; totus autem populus, qui in poenis a se impositis loco Principis habetur, possit hoc facere....Item non possunt ex virtute dicti arbitrii vel alicujus eorum mutare ordines et regimina civitatum....Nam arbitrium quod habent super bono et pacifico statu civitatis, intelligitur de praesenti....Praedicta vere nisi esset eis specialiter permissum. Item immobilia civitatum non possunt alienare, nisi specialiter hoc eis permittatur....Item ex vigore dicti arbitrii non possunt statuere aliquid, quod sit contra statuta et ordinem factum a toto populo, a quo ipsi auctoritatem habent, nisi

is specially granted to them by the people. They cannot revoke a condemnatory sentence, nor suspend the execution of any sentence beyond three months, though the whole people can do so. They cannot alter the "ordines et regimina civitatum," for their "arbitrium super bono et pacifico statu civitatis" only applies "de praesenti"; hence to make such alteration, special permission is necessary. They cannot pass any statute contrary to a statute or order of the whole

de novo supervenisset causa, vel causa antiqua, quae esset de novo manifestata, quam tempore legis conditae populus ignorabat....Item ex virtute dicti arbitrii, vel alicujus eorum, non possunt facere statutum, per quod jus proprium jam quaesitum alicui auferatur; licet enim totus populus posset....Et ideo ex virtute talis arbitrii non possunt (i.e. the decuriones) debitores aliquorum liberare vel similia facere. Sed juxta praedicta quaero, an debitoribus possint dilationem concedere ex virtute alicujus arbitrii praedictorum. Respondeo, non puto ultra tempus trium mensium vel ultra illud quod alias debitores habeant....Sed an possint judicibus civitatum auctoritatem tollere vel interdicere jurisdictionem super petitione dictorum debitorum, respondeo—si quidem judices praedicti non habent jurisdictionem ab ordine illo (i.e. the decuriones), sed magis a majori concilio, ipsi (i.e. the decuriones) non possunt jurisdictionem illam auferre. Si vero habent ab ordine illo, tunc auferre possent, cum ipse ordo remaneret judex....Item an virtute alicujus arbitrii de praedictis possit novas gabellas et vectigalia imponere? Et intelligo praedictam quaestionem, posito pro constanti quod civitas ipsa seu populus possit, prout de facto videmus facere, licet de jure non possit....Respondeo: si quidem in illa civitate vectigalia et gabellae non sunt solitae imponi, ordo eas imponere non potuit, nisi specialiter sit eis permissum. Hic enim est casus, qui reservatus est populo, qui in sua civitate imperium habet, seu obtinet vicem Principis, sicut reservatur Principi universali....Si vero civitas consuevit tempore necessitatis imponere gabellas, tunc imponere poterunt. Hoc enim potest venire in illo arbitrio, quod de more populi est....Item an possit ex virtute alicujus arbitrii de praedictis institui nova guerra. Respondeo: potest pro defensione civium et suorum jurium. Alias autem pro recuperatione rerum perditarum ex intervallo, ut pro invadendo res alterius, non possent sine auctoritate populi vel majoris concilii."

people, from whom they hold their authority, unless new circumstances have arisen, which were not present when the people originally passed their statute. Nor can the Decuriones take away by statute "jus proprium jam quaesitum alicui"; they cannot by statute liberate debtors, nor can they grant a "dilationem" to debtors beyond three months or whatever may be the customary period. Nor can they interpose between the Judices of the city and debtors, on petition of the latter, unless these Judices receive their jurisdiction from the order of Decuriones itself; since then, indirectly, the order is Judex. But if the Judices hold their jurisdiction from the "concilium majus," then the Decuriones cannot interfere. As to the right to impose "novas gabellas et vectigalia," if we grant that the people itself can de jure impose these taxes, as de facto they do, then whether the Decuriones can do so depends on custom. If they do not by custom, then they can only do so by special permission; otherwise the right is reserved to the "populus sibi princeps." War may be waged by the Decuriones only in defence of the citizens and their rights; offensive war requires the authority of the whole people or the "concilium majus."

Bartolus now propounds five general rules[1]:—

(1) "Quod habentes arbitrium super aliquo possunt omnia facere quae principaliter spectant ad id super quo habent arbitrium."

(2) "Quod possunt statuere et facere omnia antecedentia propter quae ad illud perveniri potest."

(3) "Quod possunt statuere et facere omnia consequentia sine quibus illud commode explicari non potest."

[1] Vide § 17.

(4) "Quod non possunt aliquid facere vel statuere super eo, quod non spectat ad id super quo eis est concessum arbitrium."

(5) "Quod non possunt aliquid facere vel statuere super eo, quod est accessorium alterius, quod non spectat ad id, super quo eis est concessum arbitrium."

Bartolus now reduces these five general rules "ad practicam," giving examples of each, from which we may select the following:—

(1) "Arbitrium super bono et pacifico statu civitatis" is given to the priors of Perugia. Therefore in virtue of such "arbitrium" they can compel "homines habentes insimul inimicitias" to keep the peace[1]. This "arbitrium super bono et pacifico statu civitatis" is very wide, Bartolus remarks, including "arbitrium" over "almost everything." However, we saw above that it only applies "de praesenti."

(2) Those who have "arbitrium super abundantia" can decree that rustics need not attend personally in the city as witnesses for more than one day, and can serve "ad custodiam civitatis" through a substitute, that so agriculture may not be impeded[2].

[1] "Datum est prioribus hujus civitatis arbitrium super bono et pacifico statu civitatis. Certe hujus vigore poterunt homines habentes insimul inimicitias cogere ad pacem....Scias ergo quod illud arbitrium super bono et pacifico statu est multum latum; comprehendit enim arbitrium super abundantia, super custodia, quasi super omnibus." Vide §§ 18, 19.

[2] "Habentes arbitrium super abundantia volunt facere statutum quod rustici non possunt detineri in civitate pro testimonio ultra unam diem, vel quod rustici non cogantur personaliter venire ad custodiam civitatis, sed possunt servire per substitutum, adjecta causa, ut cultura agrorum non impediatur, et habeatur abundantia in civitate." Vide §§ 20–2.

(3) "Ex hoc sequitur quod possunt terminos certos imponere ad implendum quod statuunt et mandant etc.[1]"

(4) "Haec regula est clarissima," says Bartolus, and he gives no example[2].

(5) If those, who have "arbitrium ut pecunia veniat in civitate," decree a new offence and affix a penalty to it, "ut si quis opposuerit aliquam exceptionem, et non probaverit, puniatur in tantum," the decree is not valid, since the punishment is always "accessoria ad delictum[3]."

It is unnecessary for our purpose to carry the analysis further.

The importance of this very democratic conception of the internal government of the Civitas is obviously greatest for the independent city, that is "sibi princeps." Yet we must realise that Bartolus himself does not advance it as a theory applicable *merely* to the independent city. "Regimen ad populum" is, he considers, the best form of government for the city, "in primo gradu magnitudinis," and whether the city has a superior or not, is accidental. We saw above that Bartolus allowed any city, even one with no jurisdiction, to make statutes pertaining "ad administrationem rerum ipsius populi," without the authority of the superior, provided that they were not "ambitiosa decreta." So here, if there is a superior,

[1] Vide §§ 23–5. [2] Vide § 26.

[3] "Habent arbitrium ut pecunia veniat in communi: ideo statuerunt aliquid esse delictum, cum prius non erat, et poenam imposuerunt ut si quis opposuerit aliquam exceptionem, et non probaverit, puniatur in tantum. Certe hoc non valet; nam poena semper et omni respectu est accessoria ad delictum." Vide § 26.

it is he who will rescind the "ambitiosa decreta"; where there is no superior, the people will do so itself, since the people is "sibi princeps," is, if one can say so, its own superior.

The whole trend of the political theories of Bartolus was in the direction of a separation of sovereign and non-sovereign bodies, but it is the goal, never the starting-point, of his theories. Just as the Civitas, whether independent or dependent, has, as a corporation, the right to legislate, while independence only widens the range within which its legislation is valid without the consent of a superior, so this democratic theory of the internal government of the city is not based upon the independence of the city, but upon the conception of the government, as a representation of the Universitas—and a representation rather of the whole people, of "omnes ut universi," than of a juristic "person," distinct from the sum of the individuals who compose it[1].

In this connexion we must not pass over the treatise by Bartolus, *De Guelphis et Gebellinis*. It exhibits to the full his continual care for the actual problems

[1] Vide Gierke, *Deutsche Genossenschaftsrecht*, vol. III. p. 394, which must be considered in connection with what he has said, pp. 362–8, as to the Postglossators' conception of the personality of the corporation. Vide especially p. 366: "Das Resultat war dass man die Idee der Fiktion festhielt, aber bezüglich des Inhalts dieser Fiktion unsicher und willkürlich zwischen zwei einander widersprechenden Auffassungen schwankte, von denen man je nach Bedürfniss die eine oder die andere herauskehrte. Denn bald setzte man als Inhalt der Fiktion die Erzeugung eines künstlichen Individuum über und neben einer Summe hiervon unberührenden Individuen, bald fand man in ihr nur die Behandlung eine in Wahrheit vielheitlichen Gesammtheit als einer juristischen Einheit."

of his day. No thinker was ever less doctrinaire. For, granted that the Populus was the origin of all power, was the State itself, the fact remained that in nearly every State the people was divided into two hostile parties, often each with a recognised organization of its own. It is this which gives point to the remark that, though the Concilium can come together unsummoned, its acts will only be valid so long as they are not to the prejudice of anyone not present[1]. Now in the Italian cities of the Middle Ages we may be pretty sure that there usually were "aliqui absentes." One party was usually triumphant at the complete expense of the other, triumphant in a sense that excluded the other party from all share in the public life of the city. With this in view Bartolus lays down[2] that, in the passing of statutes, two "partes" must be summoned to the Adunantia or the Concilium, which represents the whole people, and that the decision rests with the majority. But what if one "pars" has expelled the other? If the one "pars" is absent voluntarily, then "remanet tota potestas in praesentes." But if they have been expelled, then either they had, or had not, the "jus condendi statuta," that is to say, they were "de concilio" or not; in the case of a democracy, such as Bartolus considers best for the average city, of course they would be. If however they were not, and

[1] Vide *Comment. on Codex*, Tres libri (C. x. 31. 2), p. 37, § 3: "Quaero quid si non apparet concilium convocatum? Respondeo si quidem essent omnes praesentes, valeret concilium quando non est qui laeditur ex hoc convocati non sunt. Sed si aliqui essent absentes, tunc non valeret concilium; potuissent enim praesentia eorum absentium trahere alios in suam sententiam."

[2] *Comment. on Dig. Vet.* (D. i. 1. 9), pp. 29–30, §§ 16, 17.

therefore had no share in the "jus condendi statuta," their absence is immaterial. In the contrary case, when they were "de concilio," we have to consider if they were expelled "ex justa causa." If they were, again their absence is immaterial—"quia cum non obediant civitati suae, perdunt omnia jura propria civitatis," among which is the "jus condendi statuta." If they were not expelled "ex justa causa," then, though perhaps the statutes made by the one "pars" will bind that "pars," they cannot prejudice those who have been unjustly expelled[1].

Coming to the treatise[2] itself, Bartolus records the state of affairs at Todi, where, we remember, he had been Assessor. In Todi the government was divided equally between the two parties. Near Rome —"infra centesimum lapidem ab urbe Romana"—he realised that "ea quae literaliter scripta sunt de flumine et alveo, allegorice et moraliter dici possunt de his quae in civitate Tudentina praecipue frequentantur. Nam tota nostra vita flumen seu aqua fluminis est....Alveus vero super quem istae aquae decurrunt sunt illa ad quae affectiones habemus....In illa vero civitate Tudentina reperi duas affectiones; quidam enim vocantur Guelphi, quidam Gebellini; et ibidem in quolibet officio publico debebant esse tot de una affectione, quot de alia[3]." The origin of these "affectiones" was the "magna discordia orta...inter Romanam Ecclesiam et Federicum, qui vocatus est Barbarossa, tunc Romanorum Imperatorem." In Germany

[1] "Licet statuta facta per remanentes, serventur forte quantum ad eas...tamen in praejudicium expulsorum non possunt."

[2] pp. 414–17. [3] Proem.

certain relatives of Frederick were named "domini de Gebello," and so, when the discord divided Italy, those siding with the Emperor were called "Gebellini, quasi adhaerentes illo domino de Gebello. Alii vero adhaeserunt Ecclesiae et vocati sunt Guelphi, quasi zelatores fidei[1]."

Nowadays, however, these terms are applied quite apart from affection to the Empire or to the Church[2]; and the rest of the treatise is occupied with considering various problems arising from the existence of these two parties, illustrated, as is usual with Bartolus, by examples drawn from the city-life of Italy. Most important is the discussion as to the lawfulness of these factions, and whether it becomes an honourable man to belong to them. Shortly, they are lawful, so far as they tend to the "bonum publicum[3]"; but it does not become an honourable man to assume the name of either faction "nisi ex magna causa[4]."

[1] § 1. Bartolus continues by giving a fanciful "figura" of either party; of the Ghibellines from the Book of Kings—"ubi fuit conflictus et occisus in monte gebello, qui interpretatur locus fortitudinis"; of the Guelphs from Genesis—"Guelpha interpretatur os loquens, ita Guelphi interpretantur confidentes orationibus et in divinis, etc."

[2] § 2: "Videmus enim quam plures, qui Guelphi vocantur, esse rebelles Ecclesiae et alios quam plures, qui Gebellini vocantur, esse rebelles Imperii: sed sicut contingit in provinciis et in civitatibus, in quibus sunt divisiones et partialitates, necesse est ut dictae partes aliquo nomine vocentur; ideo dicta nomina imponuntur tamquam magis communia etc."

[3] §§ 6–10.

[4] §§ 9–10: "Dico ergo quod assumere dicta nomina, licet significent divisionem et partialitatem, tamen si fiat ad justum et debitum finem, licitum est. Nam et Paulus Apostolus, sciens quod una pars esset Saduceorum, altera Phariseorum, exclamavit in concilio, Viri, fratres, ego Phariseus sum, filius Phariseorum. Multos tamen vidi Perusii cum contra tyrannos facerent seditionem, licet sancto et justo

Further, we have discussions of problems which necessarily arose with regard to the proof of adhesion to either faction. Thus, a man is a Guelph by birth, but becomes podestà or rector of a Ghibelline city—is he Guelph or Ghibelline[1]? This was not merely an abstract legal riddle; it was a very concrete communal problem. For example—"statutum est Pisis quod nullus Guelphus ad officium aliquod remittatur[2]." Now suppose a Pisan becomes rector of the Guelph city of Perugia. Bartolus' answer is typically practical: he is a Guelph in Perugia, a Ghibelline in Pisa—"cum respectu diversorum potest quis esse diversarum affectionum[3]." We take this as a sample, but the whole treatise illustrates the best qualities in the mind of Bartolus—its grasp of fact and its great good sense[4].

Finally, we may well quote here one other passage[5]. "Valet," says Bartolus, "quod relinquitur parti

zelo moverentur; quia praedicta nomina divisionem et scissuram important, puto quod honesto viro non deceat aliquod dictorum nominum assumere, nisi ex magna causa."

[1] Vide § 16. [2] § 14.

[3] § 16: "Sed si poneres unum Pisanum esse rectorem in civitate Perusii, cujus status Guelphus est, tamen non adversatur, sed amicatur civitati Pisarum: tunc licet ille talis sit Guelphus Perusii; non tamen per hoc dicitur Guelphus Pisis, nec statuto comprehenditur; cum respectu diversorum potest quis esse diversarum affectionum." Bartolus considers the practice obtaining in some cities of having a book, in which the "affectio" of all the citizens is inscribed, "odiosum et contra equitatem."

[4] Vide also §§ 8–9, where he maintains that, though "partialitas" which aims at altering the form of government is unlawful, yet in the case of a tyranny it is lawful. For in this case it is "ad utilitatem publicam." "Pro hoc induco Thomam de Aquino...ubi sic ait, regnum tyrannicum non est justum." But such "partialitas" must not lead to a new tyranny or to a great injury to the state.

[5] Vide *Comment. on Infort.* Part II. (D. xxx. 1. 10), p. 27.

civitatis hoc dicit. Lambertus de Ramponibus dicebat per istum textum quod pars expulsa de civitate potest facere syndicum....Cynus dicebat contrarium, quia collegium est reprobatum eo ipso quod non est approbatum. ...Credo dom. Lambert. dicere verum quod posset facere syndicum. Arguit pro hoc supra...ubi pars expulsa fecit leges, quae approbatae fuerunt. Arguit pro hoc, quia cuilibet est permissum facere collegium ad suam justitiam consequendam....Unde si faciunt syndicum ad compromittendum cum intrinsecis, ut pacem possint facere, valet. Et ita de facto observatur. Quaero, quid si legatur uni parti civitatis, ut sectae? Respondeo illud non valet, quia collegium est improbatum, quoniam per sectas illas in damnum reipublicae contenditur....In quibusdam tamen civitatibus eorum statutis talia collegia approbantur, ut in civitate ista, ubi sunt capitanei partis Guelphae. Quaero; una pars est expulsa de civitate, pars quae remanet intus submittit civitatem alteri, et etiam pars quae est extra, quaelibet separatim: an valeat? Arguendo dico videri quod non, quia debent conveniri insimul....Et hoc videtur sensisse Bonifacius Papa in quibusdam literis ad perpetuam rei memoriam concessis civibus Tudentinis, ubi jam ille casus occurrit."

We see that the parties are considered as "collegia." This is important in two ways. In the first place, once recognise them as "collegia approbata," and as such you recognise their legality and internal independence—their right to have their own officers and to legislate for themselves[1] (inter se). Such recognition was

[1] Vide *Comment. on Dig. Vet.* Part I. (D. I. 1. 9), p. 27, § 6: "Collegia licita et approbata" can make statutes "in his in quibus

essential in the actual state of Italian politics. But secondly, if they are "collegia approbata," they must be formed "ad suam justitiam consequendam." If they are merely sects "ad damnum reipublicae," they are not licit. And so we see that, while the factions are recognised, they are recognised only so far as is consistent with the good of the whole State. The two parties are corporations, but parts of that larger corporation, which includes the whole people; and thus even though both parties should agree separately to something detrimental to the interests of the whole State, as, for example, submitting it to another power, their act would not be valid. It would only be valid if done by the whole Universitas of the people, not by its two constituent parts separately, though in agreement. The factions are recognised[1], but the "bonum publicum" is the limit of their lawfulness.

(ii) We have now come to the last subject of inquiry in our attempt to reconstruct the political thought of Bartolus. We have traced the independence of the Civitas through various stages. We have noted, to begin with, the acknowledgment, which runs throughout his thought, that, right apart, the majority of Italian cities do not in fact obey the Emperor or

habent jurisdictionem et quo ad ea quae ad ipsos collegiatos pertinent." So a part or quarter of a city can make statutes, not "ad causarum decisionem," except with the consent of the whole people, but "ad modum expediendi ea quae incumbunt ipsi parti seu quarterio." Such a quarter is a "collegium approbatum," but "jurisdictio" resides only "in toto populo vel concilio quod populum repraesentat." (§ 7.)

[1] In *Comment. on Dig. Nov.* Part II. (D. XLVII. 22. 4), p. 407, § 10, all "sectae et colligationes sunt prohibitae quae non fiunt super his, quae habent simul tractare."

regard him as their superior. We have then seen the independence of these cities confirmed in four important points—the applicability of the term Respublica, the rights connected with the Fiscus, the exercise of Merum et Mixtum Imperium, and the right to make particular laws or statutes. Finally, we have seen such cities acknowledged to be, within their own limits, the Empire itself in miniature, to be "sibi principes." On the other hand, we must not forget the limitations to this independence. We have seen the Civitates, like the Regna and the clergy, retained within the Populus Romanus, and this was expressly done on the ground that they must, in spite of disobedience, acknowledge the Emperor as de jure "dominus omnium"—otherwise they would all be heretics. We can the better realise the possibility of this by remembering that the Empire is "universitas quaedam[1]." It is a "universitas," embracing the world, but individual parts are also "universitates." So a particular "universitas" may be internally independent, while still necessarily a part of the "world-universitas," its whole; and this internal independence itself, grounded upon concession, prescription or usurpation, can be accepted as a fact, without destroying the theoretical universality of the Empire. Now this reasoning may not be altogether and logically satisfactory; and the result is here and there an inconsistency, not so much perhaps in the thought, as in the diction, of Bartolus. Thus, as we have noticed, Bartolus will occasionally

[1] Vide above, p. 22: "Mundus est universitas quaedam; unde potest quis habere dictam universitatem, licet singulae res non sint suae."

talk of cities which are de jure not "sub imperio[1]." But that is exceptional, and it is of the utmost importance to realise that, generally and regularly, Bartolus is conceding independence rather of the Emperor, than of the Empire.

In truth the Empire, if not the Emperor, was still necessary. The conception of the "Civitas sibi princeps" provided for the internal independence of the State and made possible its acceptance of Roman Law without the conclusion that it was accepting the law of the Emperor. But this still left problems untouched. In the first place, though the city might be "sibi princeps," it could not make laws that had any force outside the limits of the city. The universal Emperor alone could make general laws; all other legislating powers could only make particular laws or statutes. The chance of the Emperor actually making new laws was, indeed, remote; but there can be no doubt that Bartolus, who commented on the two constitutions of Henry VII, in honour of Charles IV and his grandfather, would have had no hesitation in accepting laws from Charles IV, and placing them duly in the Corpus Juris; for though the Code was a closed book since Accursius, the Authenticum was always open[2]. That,

[1] Vide above, p. 122, notes 1 and 2.

[2] Vide *Comment. on Const.* Ad Reprimendum (sup. rubric.), p. 261: "Et advertendum est quod liber Authenticorum divisus est in novem collationes. Postea supervenerunt liber Feudorum quae decimam collationem vocamus. Postea supervenerunt istae constitutiones quas undecimam collationem appello, ipsasque glossare volui ego, Bartolus de Saxoferrato, civis Perusinus, ut multa utilia quae in eis sunt omnibus innotescerent, et etiam ad laudem divinae recordationis domini Henrici Imperatoris, ipsarum constitutionum authoris, avi illustrissimi domini d. Caroli IV Imperatoris nunc regnantis, cui debito

however, was a remote possibility. The main problem was, granted the internally "imperial" authority of the city (as expressed in the phrase "sibi princeps"), and externally the non-recognition of the Emperor as superior, what was to take the place of the Emperor, as superior, in the inter-communal relations of one city with another? Here, therefore, came in the importance of the conception of the Empire as a "world-universitas," and the conception of the law of the Corpus Juris—Common and Imperial Law—as the general law of that whole "universitas." The Emperor might not be recognised, but the Empire remained. The cities, internally independent, were externally connected together into one all-embracing body. When the Emperor was no longer recognised as superior, his place was taken by Law.

Bartolus, we must repeat again, has not given up the de jure universal lordship of the Emperor over all those "gentes" who form the Populus Romanus, and therefore, whether that lordship be interpreted as a universal jurisdiction or a universal "regularitas," it follows that de jure there can be properly no *international* relationships within the Populus Romanus. If we now refer back to the distinction between the Populus Romanus and the Populi extranei, we see that Bartolus makes this distinction when considering the question of war[1]. Can the Civitates declare war upon each other? Can the Civitas have its "hostes" and

fidelitatis adstringor: quia me suorum consiliariorum et domesticorum numero aggregavit, et me meosque posteros quos legum doctores esse contingerat legitimationis et cessionis veniae aetatis aliisque privilegiis et gratiis decoravit."

[1] *Comment. on Dig. Nov.* Part II. (D. XLIX. 15. 24), pp. 637–9.

do the "jura captivitatis et postliminii" hold good in such wars?

Of course—the contrary would be very surprising in view of our previous inquiries—Bartolus fully allows these rights to the independent Civitas. "Nota quod ille qui praeparat exercitum sine jussu superioris, incidit in legem Juliam Majestatis. Sed hodie civitates Italiae possunt licite praeparare exercitum contra subditos et inimicos suos, cum dominum non recognoscant[1]." But, properly, public war is between the Populus Romanus and those of the Populi extranei with whom it is not in friendship or alliance—notably with the Turks and Saracens[2]—or else such as is waged by the Emperor on his rebellious subjects. In these wars the "jura captivitatis et postliminii" hold good beyond all question. "Puto," says Bartolus, "quod civitates Italiae, contra quas Imperator induxit bellum, ut contra civitatem Florentiae et similes, sunt vere hostes Imperii: et capti efficiuntur servi," etc.[3] It is only if we put aside all doubt that, where there is "contentio inter duas civitates, quae superiorem non recognoscunt, ut inter civitatem Florentiae et civitatem Pisanam," these cities are not rebels against the Empire—"pone ut tollem omnem dubitationem, quod quaelibet istarum sit hostes Imperii"—that we can allow the right of war between them[4].

[1] Vide *Comment. on Dig. Nov.* Part II. (D. XLVIII. 4. 3), p. 459.

[2] Bartolus distinguishes those, like the Tartars, "with whom we have peace," those, like the Indians, with whom we have no dealings, and those like the Turks and Saracens, with whom we have "guerram indictam." The "we" shows how vividly Bartolus conceives himself and his hearers, or readers, as members of the Populus Romanus.

[3] § 14.

[4] He adds that the right is not used "hodie" among Christians. Cf.

What this really amounts to is that Bartolus allows war between the de facto independent Civitates *within* the Populus Romanus, and this is further illustrated by his treatment of the "banniti." The "bannitus" is "transfuga et hostis" of the city from which he is banished, and, as such, loses his city and all his rights as a citizen—or rather all those which "faciunt pro se." But he does not cease to be a member of the Populus Romanus or Roman Empire, and retains all the "jura civitatis Romanae," just as the "bannitus" of the Empire itself retains the "jura gentium[1]."

Comment. on Dig. Nov. (D. XLVII. 22. 4), p. 409, §§ 10–11, where confederacies are allowed, though properly illegal, between independent cities and other powers. "...Omnia alia collegia et omnes aliae sectae et colligationes sunt prohibitae....Item istae ligae quae fiunt inter civitates et principes et barones non valent....Nec obstat L. Non dubito, infra, De cap. et postlimin., ubi dicitur quod civitates invicem foederantur et colligantur: quia istud est verum, quando civitates aliae non amicae, vel liberae, foederantur populo Romano habenti imperium: sed plures civitates, vel plures barones, qui essent sub uno rege, domino vel principe, non possunt invicem facere illam foederationem. Ista enim sunt sodalitía et collegia prohibita....Et ex istis colligitur, quod civitates Tusciae quae non recognoscunt de facto in temporalibus superiorem, possunt invicem simul foederari tanquam liberae. Sed plura castra vel villae, quae essent sub una civitate vel uno domino, hoc non possent, ut dictum est."

[1] Vide Quaestio I. § 20, p. 205: "Restat videre quae perdat talis exbannitus propter tale exbannitamentum: ad quod respondeo, vos debitis scire quod transfuga et hostis civitatis Romanae perdit civitatem Romanam et omnia jura civitatis Romanae; retinet tantum jura gentium...hoc verum, scilicet quod perdit jura civitatis Romanae, in quantum respicit suum commodum: sed in quantum respicit suum incommodum, ipsius jura civitatis Romanae eum ligant apud nos.... Et ita dico de tali exbannito; nam cum ipse sit transfuga et hostis illius civitatis unde exbannitus est...dico quod per exbannitamentum perdit illam suam civitatem et omnia jura propria civitatis illius, unde exbannitus est, prout faciunt pro se....Jura vero gentium et jura communia civitatis Romanae seu Romani imperii non perdit, nam

The basis upon which Bartolus rests his whole scheme of international relations is the unity of at least western Christendom in the Populus Romanus or Roman Empire, even though the effective superiority of the Emperor over the whole Empire is de facto wanting. The "jura civitatis Romanae" remain the "jura communia." We see at once that we are still far from the beginnings of modern International Law. Bartolus certainly leads up to Albericus Gentilis and Grotius, but his world is the Roman Empire, whereas the world of modern international law is a world of independent, sovereign States, "a society bound together by a natural law, which makes promises binding[1]." Now Bartolus has recognised, as we have seen, the existence of these higher laws above all merely human laws, including the "jus commune," and even allows the "bannitus Imperii" to retain the "jura gentium[2]." But Grotius[3] was quite correct when he said of the medieval civilians (the second class of the three into which he divides the "juris Romani scientiam profitentes")—that "juris divini et historiae veteris

non est transfuga totius Imperii, sed illius civitatis tantum." Cf. *Tract. Bannitorum*, § 10, p. 356, and *Comment. on Dig. Vet.* Part I. (D. IV. 5. 5, § Qui deficiunt), p. 454. In *Comment. on Infort.* Part I. (D. XXVIII. 1. 8, § Si, p. 260), the Bannitus from a Civitas loses the power of making a will according to the "jura" of his Civitas, not according to the Jus Commune.

[1] Vide Figgis, *From Gerson to Grotius*, p. 212.

[2] Not, however, in his *Tract. Bannitorum*, § 10, p. 356: "Debetis scire quod transfugae et hostes populi Romani ultra alias civitates perdunt civitatem Romanam et omnia jura gentium....Jura autem gentium, item jura communia civitatis Romanae sunt Imperii Romani." He allows it, however, in the other passages, to which we have referred above.

[3] *De Jure Belli et Pacis*, Prolegomena.

incuriosa (i.e. this class), omnes regum populorumque controversias definire voluit ex legibus Romanis, assumtis interdum canonibus." Bartolus may say that the "bannitus" cannot lose the right of self-defence, which is "de jure naturali[1]," or may say that reprisals are "de jure gentium[2]," but for him the really international law is still the Roman "jus commune." We have to remember that here, as elsewhere, Bartolus is writing with his eyes fixed on Italy. Had he carried his distinction between the Populus Romanus and the Populi extranei into other topics besides that of war, he would have had to base his thought upon a higher law than the "jus commune[3]." But his world is the Populus Romanus or Roman Empire. So long as the de jure unity of western Europe in the one Roman Empire was maintained, the medieval Italian lawyer, who lived in

[1] Vide *Comment. on Infort.* Part I. (D. XXIV. 3. 49), p. 81: "Quaero de una quaestione, quam disputavit Jac. Buttrigarius. Pone quod statuto cavetur quod bannitus non audiatur, nec in agendo, nec in defendendo....Sed videndum est an dictum statutum valeat, scilicet quod non audiatur nec in agendo, nec in defendendo. Certe non, quia leges debent esse justae, et defensio est juris naturalis, quod non potest tolli."

[2] Vide below, p. 206.

[3] Vide a very interesting passage in the *Comment. on Codex*, Part I. (C. I. 11. 6), p. 84, in which we see that Bartolus feels the need for a legal ground of war, even against the Populi extranei: "Ista est bona lex....Nota quod Judaeis vel Paganis nulla potest fieri violentia. Dices tu, qualiter Ecclesia indicit bellum contra Saracenos?" Because they keep "terram nostram," promised to the seed of Abraham, "et debita nobis, quia sumus filii Abrahae secundum Apostolum." But why, he asks, against the Turks, "qui non tenent terram nostram indicit Ecclesia bellum? Respondeo: quia non possumus aliter ire ad Saracenos. Cum ergo contendunt turbulentum et juri contrarium, quia non permittunt nos ire ad illos (i.e. the Saracens), ideo Ecclesia indicit eis bellum, alias non indiceret."

conditions where Roman Law was actually a common law above the conflicting statutes of Italian cities, naturally went to that common law for rules to guide international relations, which were at best de facto. De jure the Emperor was universal superior, above the conflicting interests of particular parties; when men had given up the de jure unity of Europe under a universal Empire, and moreover when they turned their attention from inter-communal to properly international problems, a wider and higher basis than the Roman "jus commune" had to be found for International Law.

To illustrate Bartolus' attitude we may now turn to one of his most interesting treatises—the *Tractatus Repraesaliarum*: its opening words express his attitude so exactly that we shall do well to quote them in full.

"Repraesaliarum materia," he says, "nec frequens nec quotidiana erat tempore quo in statu debito Romanum vigebat Imperium; ad ipsam nam, tanquam ad summum monarcham, habebatur regressus, et ideo hanc materiam legum doctores et antiqui juris interpretes minime pertractaverunt. Postea vero peccata nostra meruerunt quod Romanum Imperium prostratum jaceret per multa tempora, et reges et principes ac etiam civitates, maxime in Italia, saltem de facto in temporalibus dominum non agnoscerent, propter quod de injustitiis ad superiorem non potest haberi regressus, coeperunt repraesalia frequentari, et sic effecta est frequens et quotidiana materia. Ego itaque, Bartolus de Saxoferrato, civis Perusinus, minimus legum doctor, cum speculationibus ad jus civile spectantibus operam dans ad communem utilitatem et maxime universalis

studii Perusini super ista materia libellum composui[1]." We see how very clearly Bartolus realised that, the superiority of the Emperor being no longer recognised, and the Roman Empire lying prostrate, new problems had arisen which had to be faced, as new problems, because they were not present to the lawyers of former ages. Is it really true to say, in view of passages like this, that the civilians were ignorant "that the world had outgrown the Imperial conception[2]"?

Bartolus treats the subject of reprisals in a very wide sense, as being often equivalent to war; in fact "concedere repraesalias est indicere bellum[3]." Hence since "bellum justum non potest indicere nisi ille qui superiorem non habet," the grantor of the reprisals must be one who owns no superior; while he, against whom the reprisals are granted, must be de facto not amenable to the "superioris copia[4]." This is at the root of his whole treatment of the question—the "superioris copia" is wanting. "Imperator est modo in Alemannia et de jure est superior, tamen de facto in partibus istis ei non paretur[5]." The cities themselves must take his place. But then, remembering that

[1] *Tract. Repraesaliarum*, Proem. p. 327.

[2] Lane Poole, *Illustrations to the History of Medieval Pol. Thought*, p. 246.

[3] *Tract. Repraesaliarum*, Quaestio III. 2, § 3, p. 331. [4] Ibid.

[5] Ibid. Quaestio II. 5, § 12, p. 331. Bartolus gives other examples how the "copia superioris" may be wanting: "Pone, in Marchia est rector pro sancta matre Ecclesia, tamen de facto nil potest propter occupationem tyrannorum." He then proceeds to consider how far a tyrant himself may be considered superior. If he made himself tyrant, he is not to be considered superior. But if he was "electus ab habentibus potestatem facere," then, even though he was elected "per vim vel metum," if it is not notorious, "sed pro vero domino se gerit et sic reputatur communiter," he is to be considered superior.

Bartolus has a very democratic theory of the source of authority in these cities, we realise that it is the "sovereign" people, not the government, who will grant reprisals, unless the power of so doing is specially granted the government by statute[1].

Reprisals to be lawful require two necessary conditions—the authority of the superior, whoever the superior be, and a just cause[2]. Where the city is its own superior, its power is carefully restricted. "Par in parem non habet imperium et (quia) non potest extra territorium statuere quae sunt jurisdictionis alterius et non suae, ut dicunt jura vulgaria[3]." It can only

[1] Ibid. Quaestio III. 2, § 4, p. 331: "Si est aliqua civitas quae solum de facto non cognoscit superiorem et regitur per populum secundum suos ordines et statuta, quod potestas et rector illius civitatis non posset concedere repraesalias, nisi eis specialiter aliquo statuto esset permissum. Deberet ergo adiri pro repraesaliis ipse populus vel ordo, apud quem est omnis communis potestas, et hoc puto verum."

[2] Ibid. Quaestio I. 2, § 4: "Doctores omnes communiter in sententiam istam inclinant quod si quidem contra illum hominem vel populum, qui justitiam facere et debitum reddere negligit, potest haberi recursus ad superiorem, tunc repraesaliae sunt licitae duobus intervenientibus. Primo requiritur superioris auctoritas; non enim licet alicui sua auctoritate jus sibi dicere....Secundo quod superioris auctoritas interponat sibi ex justa causa."

[3] Ibid. Quaestio I. 3, §§ 8–10. Vide especially § 10: "Si vero statuta fiant in una civitate contra aliam terram liberam circa repraesalias concedendas, tunc advertendum quia in causis concedendarum repraesaliarum vertitur justitia facta seu justitia denegata a terra contra quam repraesaliae conceduntur; et circa hoc non possunt fieri. Non enim una civitas potest facere legem super alteram, quia par in parem non habet imperium, et quia non potest extra territorium suum statuere quae sunt jurisdictionis alterius et non suae, ut dicunt jura vulgaria. Secundo vertitur in causa si superioris copia haberi non potest; et circa hoc similiter non potest fieri statutum: puta, si statutum diceret quod repraesaliae concedantur, nec teneatur quis ire ad superiorem....Tertio vertitur in causa superioris auctoritatis,

legislate on its own part in the reprisals, on its own part as the superior who grants the reprisals, not as the superior to whom recourse is to be had for justice before reprisals be granted[1]. For reprisals are not to be granted lightly. They are an odious and extraordinary expedient[2]. Elsewhere Bartolus doubts whether the right to grant reprisals is really to be drawn from Civil or Canon Law, and not rather from Divine Law or the Law of Nations, according to which war is lawful. But then, according to the Law of Nations, "non erat actio neque istae formulae agendi, sed omnia expediebantur manu regia"; and so to-day, he adds, when reprisals "postulantur de jure communi," it is rather the "manus regia seu potestas regia," than the "officium judicis," which is required[3].

scilicet auctoritas ipsius civitatis concedentis repraesalias, et tunc circa hoc potest facere statutum, an in talibus casibus praedictis concedatur et quo ordine. Nam cum ista causa et ista instantia sit sua, potest circa hoc statuere, cum quaelibet civitas statuta facere circa ordinationem, quae in foro ejus agitur, possit." In §§ 8 and 9 he considers the case of statutes against subject towns or villages and cities "quae submittunt se protectioni civitatis certis pactis." Against the former the city can legislate as it will, but not against the latter, which are its equals. In §§ 11–14 he considers whether such statutes "circa repraesalias" passed against "subditos" can be enforced "extra territorium."

[1] *Tract. Repraesaliarum*, Quaestio II. 1. §§ 1–3, 2. § 8 and 3. § 9, pp. 329–30.

[2] Ibid. Quaestio II. 4, § 11, p. 330.

[3] Ibid. Quaestio III. 1. §§ 1–2, p. 331: "Ad primum quaeritur quo jure adeatur quis ut repraesalias concedat. Respondeo si quidem per statuta terrarum vel constitutiones dominorum aliquibus est concessa potestas, et tunc judex adhibetur conditione ex illo statuto vel constitutione, vel judicis officium implorabitur secundum quod ex illo statuto vel constitutione praecipitur....Qualiter autem circa hoc statutum factum est, probabiliter illud ignoro....Si vero quaerimus de jure communi, tunc advertendum quod de istis repraesaliis concedendis

That is to say, reprisals are not "de jure communi," for "de jure communi" there is a superior, to whom recourse may be had. None the less it is to the "jus commune," and in less degree to the Canons, that Bartolus turns, to establish the orderly working of reprisals between the Italian cities. Bartolus, of course, nowhere lays down an abstract rule that, the effective power of the Emperor being gone, all cases of conflict are to be settled by the "jus commune"; indeed the conditions which made those rules necessary are recognised as being rather de facto than de jure. But seeing that the superiority of the Emperor was de facto gone, he did actually turn to the Law Books and the Canons in order to find rules which might regulate the relations of the cities, one with the other—a work made necessary, as he says himself in the opening of this treatise, for no other reason than that the "copia superioris," now that the Roman Empire lay prostrate, was gone[1].

nulla juris civilis constitutione cautum est; et rationes et jura quae ad hoc cogunt sunt magis de jure divino et de jure gentium, quo bella licite permittuntur, quam de jure civili....Sed illo jure gentium non erat actio neque istae formulae agendi; sed omnia expediebantur manu regia....Unde dico quod etiam hodie, ubi ex causa repraesaliae postulantur de jure communi, non debetur intentari actio vel officium judicis implorari, sed magis debet requiri manus regia seu potestas regia secundum instituta juris divini et gentium, quod a jure civili non est immutandum." Cf. Quaestio I. 2. § 5: "...mihi videtur quod jus concedendi repraesalias non jure civili vel canonico sit inductum, sed magis jure divino...et gentium."

[1] In conclusion it is worth pointing out that the granting of reprisals is further limited by a long list of persons against whom they are not to be granted, inter alios the persons of women, clerics, scholars or their servants or parents visiting them, ambassadors and those going to fairs. Vide Quaestio VI. 6. In certain circumstances, however, exceptions are made.

CHAPTER III

THE PROBLEM OF THE EMPIRE

Bartolus, we may repeat, has himself given us no political system. His legal commentaries provide us with the disjecta membra of a system, but it is we who have had to construct it. We ourselves have had to choose and group the topics of our inquiry. In our choice of topics we have tried to be as complete, and therefore as unarbitrary, as possible; in the grouping of these topics we have purposely chosen the Empire as the centre of our inquiries. The present chapter must attempt to justify our choice.

Yet, to some extent, our justification has already been given in past pages of this essay. The Empire, as we have seen, was for the medieval civilian the starting-point of his political thought—the "fundamentum totius juris nostri." From the Law Books, literally interpreted, the Glossators derived a single universal State, the Roman Empire, which, by Justinian's day, had become conterminous with Christendom. Only beyond the hazy borders of the Christian-Roman world could other States exist. Then, when the Glossators were succeeded by the Postglossators, there took place

a change of method and of aim, but there was no break in the tradition. The Postglossators might be concerned rather to submit law to fact than, as the Glossators, fact to law—but for them, no less than for the Glossators, the Empire was still *the* State. If they finally succeeded in confirming the existence of *States*, it was only as a result of a long, difficult and somewhat reluctantly undertaken process.

The problem of accommodating theory to facts faced the political thinker and the publicist no less than the lawyer. So long as the Hohenstaufen Empire had been in existence, the theory of the universal Roman Empire, as still existing with all its pristine authority and claims, received at any rate some countenance from the political ideals and aims of the Hohenstaufen Emperors, if not from their actual power. The Roman Empire that had existed in western Europe since Charlemagne's day, though Roman in name and theoretically but the continuation of the old Roman Empire, had in fact been a German Empire, ruling Italy from Germany and, in great part, by Germans[1]. The Hohenstaufen attempted to make their Empire Roman in fact as well as in name. They have often been blamed for sacrificing Germany to Italy or the Empire[2] —and blamed unjustly. "Toto regni sui tempore nihil unquam duxit melius, nihil jucundius, quam ut imperium

[1] Vide Krammer, *Die Reichsgedänke des staufischen Kaiserhaus*, pp. 1 and ff.

[2] Vide e.g. Blondel, *Étude sur la politique de l'Empereur Frédéric, II. etc.* p. 376: "On a eu bien raison de dire qu'il est un empereur romain beaucoup plus qu'un empereur allemand et que sa politique vis-à-vis du pays de ses ancêtres ressemble à une politique d'abdication ou de mépris."

urbis Romae sua opera suoque labore pristina polleret et vigeret auctoritate," says Ragewin of Frederick I[1]. It is the keynote of the Hohenstaufen policy. Their policy, their whole political outlook was shaped by reminiscence of the old Empire; the German king was necessarily swallowed up in the Roman Emperor. Thus the theories of the civilians and the ideals of the Hohenstaufen met; and they met not because the medieval civilians were all Imperialists, but because the common foundation of the theories of the lawyer and of the ideals of the Emperor was to be found in Justinian's Corpus Juris[2].

Thus, when the Hohenstaufen fell, the future of the Empire, alike in theory and in fact, was a problem demanding instant solution. In Bartolus we have had the solution of this problem as offered by the greatest of the Postglossators—we note how the great Gloss of Accursius, which ends the period of the Glossators, roughly corresponds in point of time with the fall of the Hohenstaufen Empire. We are now to turn to other thinkers and compare their solutions with that of Bartolus.

The reality of this problem is apt to be obscured by the overshadowing position occupied by what was, no doubt, *the* political problem, alike of the early and of the later Middle Ages—the relations of the temporal and the spiritual powers. It has been maintained that "only one great question came into prominence in the thirteenth and fourteenth centuries and drew to itself

[1] Lib. IV. c. 86, p. 276; Pomtow, *Ueber dem Einfluss der altrömischen Vorstellungen vom Staat auf die Politik Kaiser Friedrichs I. etc.* pp. 1–3.

[2] Vide the very interesting dissertation of Pomtow, referred to in the preceding note, especially pp. 19–29, 53–61.

whatever power or interest men's minds had in the theoretical treatment of affairs of state[1]." Now that the controversy between the temporal and spiritual powers was not the only important controversy of these centuries, the following pages must attempt to show; we shall see that the problem of the Empire's future can exist independently of the controversy between the two powers, and that, in other cases, it affects in more ways than one the solutions offered in this great controversy itself. And even the past pages of this essay may perhaps pretend to throw doubt upon this statement. If it be true, how are we to account for the fact that Bartolus was able so openly to trifle with this very controversy, and devote his political thought, in all its most valuable aspects, wholly to topics in which the spiritual power does not enter? Obviously, only by supposing, either that Bartolus was quite out of touch with the contemporary thought of his time, or that, as a political thinker, he is negligible. We borrow words of Bartolus—*haec solutio non multum placet.*

In this chapter, therefore, we shall again have the Empire as the centre of our inquiries. Nor must we presume that the period, which lies before us, had any single or simple theory of the Empire; that, for example, taken as a whole, it had any axiomatic belief in the divine nature or the necessity of the Roman Empire. We shall find it much concerned to know what the Empire had been, what it was, and was to be; we shall find the theories of each individual thinker coloured by conditions of which account must be taken in each individual case—his nationality, the material on which

[1] Vide Pollock, *History of the Science of Politics*, pp. 33–4.

his thought is based and his intellectual environment generally.

But before we turn to the political literature of the new period, we must briefly consider the political conditions under which it opens. This we may most conveniently do under three heads. The struggle between the Hohenstaufen and the Papacy, each with its rival political theories, was in general a struggle for supremacy in Christendom. But in particular it was a struggle for supremacy in Italy. However wide the Papal claim to universal obedience might be, its special claim over Rome itself and central Italy was never forgotten. Marriage had brought the Hohenstaufen the possession of southern Italy; as Emperors they demanded the subjection of northern Italy. We must see, then, what problems the fall of the Hohenstaufen presented for solution: (1) in southern Italy, (2) in northern Italy, (3) in western Europe generally.

(1) The Norman power in southern Italy had been regarded since the Investiture struggle as the chief support of the Papacy in Italian politics. The kingdom of Sicily was considered a fief feudally dependent upon the Popes. The acquisition of this power by its most dangerous enemy—dangerous in particular from its claims over northern Italy and even over Rome itself—threatened the very existence of the Papacy, as a political power. Therefore the Papacy's first step, after the fall of the Hohenstaufen, was to provide itself, as of old, with a defender in south Italy. Such a defender was a pressing necessity while Frederick's descendants, and especially Manfred, were alive; for they were the heirs of Frederick, of his policy and his claims. And

such an ally was found, after fruitless negotiations with England, in Charles of Anjou, the brother of S. Lewis of France. The problem still remained to keep this ally obedient to the Pope, and yet powerful enough to protect him. The problem, in the old days of the Normans, had not always been easy to solve. It would be no easier now. The Normans had been a strong, but isolated, power. Charles was a French prince, and France, since the fall of the Hohenstaufen, was, beyond dispute, the strongest monarchy in Europe.

(2) It was by utilising the resolution of the majority of the north Italian cities not to submit to any real acknowledgment of the Imperial claims to their obedience, that the Papacy was able to secure its victory over the Hohenstaufen. Consequently its object must now be to keep southern and northern Italy apart, and to build up a strong Papal state between the two. This was not easily done. The hold of the Popes over Rome itself was by no means secure. Urban IV made serious efforts to prevent the election of Charles of Anjou as Senator. None the less he was compelled to give way, fearing that, if not Charles, Peter of Aragon, Manfred's son-in-law, would be elected. The history of Charles' Senatorship is very instructive. The Popes were driven to accept him, because only through him could they keep a hold on Rome and exclude their direct enemies. At the same time they saw well enough that the Senatorship, combined with the kingdom of Sicily, was on the high road to making Charles the real master of Italy[1].

[1] On this subject vide Gregorovius, *History of the City of Rome in the Middle Ages*, vol. v. Part 2, pp. 349–53, 368–71, 401–2, 423, 447–9, 483–502.

The death of Manfred relieved the Papacy from a pressing danger, but did not weaken the domination of Charles. Though he was now bound by an oath never to unite his Sicilian crown to that of Germany, or to the Empire, or to the "dominium" of Lombardy and Tuscany[1], he was none the less in 1268 appointed by the Pope Imperial vicar in Tuscany. The fall of Charles from his great position in Italy came from an unexpected quarter, some fourteen years later, with the Sicilian Vespers. But already the election of Rudolf of Habsburg to the Empire had considerably changed the political conditions of Europe.

(3) The end of the long Interregnum, which had lasted since Frederick II's death—or, in the eyes of his enemies, his deposition—came when Gregory X bade the electors proceed at once to the election of a suitable king of the Romans, with the threat that, did they not do so, he would himself nominate one. Gregory doubtless thought that he had found in Rudolf the solution of many problems. The great object of his reign was the re-opening of the Crusades, and to that end he wanted Europe at peace under its traditional leaders, an Emperor and a Pope. Gregory, unlike his two immediate predecessors, was an Italian. Up till now one has rarely had to consider the nationality of individual Popes. The German nationality of those Popes whom Henry III had given to the Church was, indeed, a factor not to be disregarded. Bonizo of Sutri, the partisan of Gregory VII, thought the election of the German Clement II a necessity, but contrary to

[1] Vide below, p. 218.

the Canons[1]. But Leo IX, the third of these German Popes, was a man, like most of his successors[2] until the middle of the thirteenth century, in whom nationality counted for little. Now it was very different. Nationality was dimly felt in the eleventh century; it was a great force in the last half of the thirteenth century. Now we have always to bear in mind the nationality, not only of the Popes, but of the cardinals. The college of cardinals was definitely divided into a French and a Roman or Italian party—a division that leads us straight on to the Avignon exile, the great Schism, the Conciliar Movement, and so even to the Reformation. For the moment it became one of the first objects of Charles of Anjou's policy to secure the election of French Popes.

After the death of Clement IV he was for some years unsuccessful: the first of these non-French Popes was Gregory X. But Charles of Anjou aimed not only at a French Pope. Just before the election of Rudolf he made a determined effort to induce Gregory to nominate as Emperor Philip III of France, his nephew[3]. The plan was not a random stroke of ambition. The French looked back to Charlemagne, the king of the Franks, as to their national hero. The strange silence of the French *chansons* on the Imperial coronation of

[1] Vide Bonizo, "Liber ad Amicum," Lib. v. (in Jaffé, *Monumenta Gregoriana*), p. 629.

[2] Hardegen, *Imperialpolitik König Heinrichs II. von England*, however, considers the English nationality of Adrian IV a matter of great importance.

[3] This attempt has been examined at length by Heller, *Deutschland und Frankreich in ihren politischen Beziehungen vom Ende des Interregnums bis zum Tode Rudolfs von Habsburg*, pp. 24–56.

Charlemagne has been noted[1]; and it has been maintained that the policy of the French kings, from long before Philip III, and down to the sixteenth century, was consciously and determinedly influenced by the thought that they represented the kingdom of Charlemagne and, as such, had a better right to the Empire than the German kings[2]. We shall have to return to this point again. For the moment it is sufficient to observe that the attempt to make Philip III Emperor is not an isolated phenomenon, but a sign that, to say the least, French pretensions to the Empire are a political possibility. Papal doctrine taught that the Papacy had transferred the Empire from the Greeks; a compliant Papacy could thus make possible another "translatio" to the French, who claimed to be the true descendants of the Franks[3].

Gregory X was not likely to agree to this proposal. Nor was it by any means certain that even a French Pope would be more compliant. Even Clement IV had been very jealous of Charles' exercising his Senatorship

[1] Vide Graf, *Roma nella Memoria e nelle Immaginazioni del Medio Evo*, vol. II. pp. 428-30. He notes however—"Giova tuttavia avvertire che nei poemi francesi Carlo Magno è detto indifferentemente re o imperatore."

[2] Vide Leroux, "La Royauté Française et le Saint Empire Romain" (in *Revue Historique*, vol. XLIX. 1892, pp. 241–88).

[3] We must keep in mind that the "translatio imperii" to the Germans will vary according to the outlook of the writer. If he looks on the Franci as "French," the "translatio" to the *Germans* will be looked upon as taking place under Otto; the "translatio" under Charlemagne was a "translatio" to the *Franci*. But we shall see that the Germans are by no means willing to see a Frenchman in Charlemagne. To them the "translatio imperii" to the Germans takes place under Charlemagne; for to them the Franks, the true Franks, *are* Germans.

in Rome. Would a French Pope be better pleased to see the nephew of Charles Emperor? One of the most striking characteristics of this period is that, despite the very different immediate aims of various Popes, all seem to keep before them, as their ultimate aim, the safeguarding of Papal supremacy; none are going back on the work of their predecessors.

Gregory X was certainly not meaning to go back on the work of Innocent III, Gregory IX or Innocent IV, when he effected the election of Rudolf. The Empire, that now revived, was not to be the Hohenstaufen Empire. In this lay the difficulty of the situation. Nominally the Empire was the same as it had ever been. The Interregnum was, after all, only a long vacancy, during which candidates for the Empire had been almost always in the field. There had been no formal surrender of Imperial claims. The question of the Empire's connection with Italy still remained open, and until that was settled, the position of the Papacy was never secure. In fact it was never settled, as is shown by the history of the next century, with Henry VII and Lewis of Bavaria. Not even with Charles IV was it formally settled. The cession by Rudolf of the Romagna was a step towards a settlement; but it was not carried out until after Gregory was dead; and, as is well known, Rudolf was never actually crowned Emperor[1].

[1] The cession of the Romagna was made to Nicholas III; the documents relating to it are in Theiner, *Codex Diplomaticus Dominii Temporalis S. Sedis*, vol. I. pp. 203–48. Vide also Rodenberg, "Zur Geschichte der Idee eines deutschen Erbreiches im 13 Jahrhundert" (in *Mittheilungen des Instituts für oesterreichische Geschichtsforschung*, vol. XVI. 1895), pp. 33–40, for some excellent pages on Gregory X's policy towards the Empire and his views on its connection with

The reality of the problem, which the future of the Empire presented, can be seen in the numerous projects during the last half of the thirteenth century, both before and after the election of Rudolf, which aimed at a complete and radical solution of these difficulties. All these plans have been examined with great learning and detail[1]. In some cases their existence is to be inferred rather than proved for certain; in other cases we have definite information. A brief survey of the most important of them will lead us on to the examination of the political literature of our period.

We have referred above to an oath exacted from Charles of Anjou by Urban IV and relating to the possible union of his Sicilian crown with any other. In this may be seen a foreshadowing of more definite projects. Charles promises that neither he nor his heirs will ever procure their election, or agree to their election, should it take place, as king or Emperor of the Romans, as king of Germany, or as "dominus" of Lombardy or Tuscany[2]. Now what is remarkable here

Italy. Speaking of his threat to the electors, that if they did not proceed to an election, he would himself nominate an Emperor, he says: "Gregor X ist der erste gewesen, welcher vor aller Welt den Satz ausgesprochen hat, dass der Papst das Wahlrecht den Kürfursten unter Umständen beseitigen und die päpstlichen Ernennung an die Stelle setzen könne" (p. 35). On the other hand Gregory was firmly convinced that the Empire was a part of the divine ordering of the world; vide below, p. 226, note 1.

[1] Vide Busson, "Die Idee des deutschen Erbreiches und die ersten Habsburger" (in *Sitzungsberichte der Philosophisch-Historischen Classe der kaiserl. Akademie der Wissenschaften* (Vienna), vol. LXXXVIII. 1878, pp. 635–725), and Rodenberg, the article referred to in the preceding note.

[2] Rodenberg, op. cit. p. 1 and ff. Charles promises "quod nunquam per se vel alios seu quocumque modo procurabunt, ut eligantur vel nominentur in regem vel imperatorem Romanorum vel regem

is the separation of the Regnum Romanorum from the Regnum Theotonie, and of both from the "dominium" of Lombardy and Tuscany. Nor, it seems, can this be due to the chance wording of the oath[1]; taken in conjunction with other examples, it shows that already Urban IV entertained the possibility of a German kingdom separate both from the Empire and from Italy.

Clement IV's relations with the two rivals, Richard and Alphonse, do not seem to have been so neutral as Urban's. It is at least a not impossible hypothesis[2] that Clement, who speaks of himself as intending so to dispose of this "dilatum diu negotium...ut per nos vel per successores nostros initio prestito finem possit accipere Deo gratum et necessarium toti mundo[3]," may have had in mind some arrangement by which Richard of Cornwall should obtain the German crown, but on conditions that would somehow have severed it from connection with Italy. Certainly Richard, whose strength lay chiefly in north Germany, was a far more acceptable candidate than Alphonse, who, owing to the geographical

Theotonie seu dominum Lombardie aut Tuscie vel majoris partis earundem Lombardie vel Tuscie; et si electionem vel nominationem ad imperium vel ad regnum Romanum seu ad regnum Theotonie aut ad dominium Lombardie vel Tuscie seu majoris partis earum de ipsis celebrari contigerit, nullum hujusmodi electioni vel nominationi assensum prestabunt."

[1] Rodenberg, op. cit. p. 3: "Diese Scheidung beruht nicht etwa auf Versehen oder Nachlässigkeit, denn sie ist weiter in dem Vertragsentwurfe consequent durchgeführt; wir begegnen ihr auch in der sonst vielfach abweichenden Urkunde, durch welche die bevollmächtigten Kardinäle 1265 Karl von Anjou das Königreich Sicilien übertrugen, und später erscheint sie wieder in dem Eide, den Karl 1276 Johann XXI leistete."

[2] Rodenberg, op. cit. pp. 19 and ff.

[3] Rodenberg, op. cit. p. 22.

position of his own kingdom, was mainly attracted to the Empire by its claims over Italy.

This, however, can be at best but probable conjecture. We come to certainty in a memorial of topics to be discussed at the Council of Lyons, drawn up by Humbert de Romanis[1]. The last proposition deals with the Empire. It is proposed that a vicar should be appointed for the vacant Empire "ad quem haberetur recursus propter guerras et casus varios emergentes"; and that the "rex Teutonie" should become an hereditary king, "and thenceforth be content with that kingdom" —as such he would be more feared and justice would be better done in Germany. In Italy there should be one or two kings "sub certis legibus et statutis," appointed with the consent of the cities and prelates. They should be hereditary kings, who in certain cases could be deposed by the Pope. Or there might be a king of Lombardy, who would also be Imperial vicar in Tuscany, during a vacancy of the Empire, and who would only recognise, as his overlord, an Emperor confirmed and crowned by the Pope. "Imperium enim," Humbert concludes, "quasi ad nihilum est redactum, et a pluribus, quotquot fuerunt electi ad imperium seu promoti, plura mala sub eodem dominio secuta sunt, et pax et unitas turbata et strages hominum facte et pauca bona secuta; et alia multa sunt, que realiter persuadent, ut queratur modus aliquis conveniens ad

[1] He was general of the Dominicans, though he had resigned before this date. He died in 1277, having refused the patriarchate of Jerusalem and a bishopric. There is an account of his life and writings in Feret, *La Faculté de Théologie de Paris et ses Docteurs les plus célèbres*, vol. II. pp. 495–503.

providendum circa hoc, si valeat inveniri[1]." We cannot suppose that a scheme like this had no dependence on Papal plans and policy[2]. And though the next year saw Rudolf's election, the project of Humbert de Romanis recurs again under Nicholas III, and in a form which provides us with further detail. Ptolemy of Lucca tells us in his *Historia Ecclesiastica* that Nicholas III treated with Rudolf "super novitatibus faciendis in Imperio[3]." The whole Empire was to be divided into four parts—a German kingdom for Rudolf

[1] The text is given by Rodenberg, op. cit. p. 31 (from Martène and Durand, *Amplissima Collectio Veterum Scriptorum*, vol. VII. col. 198): "Circa imperium vacans videtur constituendus vicarius ad quem haberetur recursus propter guerras et casus varios emergentes, vel addendo, quod statueretur cum pace comitatus (Rodenberg puts a ? after "comitatus"), quod rex Teutonie fieret non per electionem sed per successionem et esset deinceps contentus regno illo et magis timeretur et magis justitia in regno Teutonie servaretur. Item quod in Italia provideretur de rege uno vel duobus sub certis legibus et statutis, habito consensu communitatum et prelatorum, et per successionem regnarent in posterum, in certis casibus possent deponi per apostolicam sedem; aliquando enim Lumbardi regem habuerunt; vel quod rex in Lumbardia institutus esset vicarius imperii in Tuscia vacante imperio, et imperatori confirmato et coronato per apostolicam sedem, et non aliter, regnum recognosceret ut vassallus. Imperium enim etc."

[2] Rodenberg, op. cit. p. 32.

[3] *Historia Ecclesiastica*, Lib. XXIII. chap. 34 (in Muratori, *Rerum Italiarum Scriptores*, vol. XI. col. 1183): "Eodem anno Rodulphus suam filiam in uxorem Carolo Martello tradidit. Quo etiam tempore, ut tradunt Historiae, Nicholas III cum Rodulpho jam dicto tractat super novitatibus faciendis in Imperio, ut totum Imperium in quatuor dividatur partes, videlicet in regnum Alamanniae, quod debebat posteris Rodulphi perpetuari; in regnum Viennense, quod dabatur in dotem uxori Caroli Martelli filiae dicti Rodulphi. De Italia vero praeter regnum Siciliae duo regna fiebant; unum in Lombardia, aliud vero in Tuscia; sed quibus darentur, nondum erat expressum: sed suspicandi satis erat materia." And vide Busson, op. cit. p. 649 and ff., where he argues weightily for the reliability of Ptolemy's information.

and his heirs; a kingdom of Arles for Charles Martell (of Anjou) and his wife, Rudolf's daughter; and two Italian kingdoms of Tuscany and Lombardy. "Quibus darentur," says Ptolemy of these last, "nondum erat expressum; sed suspicandi satis erat materia." There is reason to believe that Nicholas intended them for his nephews, two of the Orsini[1].

None of these projects, we know, came to anything, but for us their importance is very great. It is, indeed, by no means clear, either in Ptolemy of Lucca's account of Nicholas III's plans or in the memorial of Humbert de Romanis, what precisely is to be the future of the Empire. Humbert de Romanis really seems to make three distinct proposals. First, that an imperial vicar should be appointed, to whom recourse might be had in the troubled state produced by the long Interregnum; we must remember that the memorial was drawn up before the election of Rudolf of Habsburg. Or secondly, that the German crown should become hereditary and that one or two hereditary kings—in certain cases to be deposed by the Papacy—should be set up in Italy: no doubt in Lombardy and Tuscany, since southern Italy did not enter into the question. Or thirdly, that the

[1] Busson, op. cit. App. 664–5, and a note by the same author—"Zu Nicolaus III Plan einer Theilung des Kaiserreiches" (in *Mittheilungen des Inst. für oesterreichische Geschichtsforschung*, vol. VII. 1886), pp. 156–9. Ptolemy of Lucca, op. cit. cap. 31, col. 1182, says of Nicholas—"nimis fuit amator suorum." It is worth noting that Dante, who placed Nicholas III in Hell among the simonists, makes him say:

> "E veramente fui figliuol dell' orsa,
> cupido sì, per avanzar gli orsatti,
> che su l' avere, e qui me misi in borsa."
>
> (*Inferno*, XIX. 70–2.)

single king of Lombardy—he has just recalled the fact that "aliquando Lumbardi regem habuerunt"—should be Imperial vicar in Tuscany during a vacancy of the Empire, and should only recognise his kingdom (i.e. Lombardy) as feudally dependent upon such Emperors as were confirmed and crowned by the Pope. We see, then, that in the first and third proposals the existence of the Empire is accepted, with—and this was doubtless of prime importance to Humbert—guarantees that its claims over Italy should not be prejudicial to the Papacy. In the first proposal the vicar appointed is apparently to be vicar for the whole Empire, but in the third he seems merely intended to regulate the affairs of northern Italy. But in the second proposal nothing is said of the Empire, and it seems an inevitable conclusion that here Humbert proposes nothing less than that the Empire should disappear and its place be taken by these three hereditary kingdoms[1]. It is to be noticed that he

[1] Rodenberg, op. cit. p. 32, thinks that Humbert means that the German king, as such, is to have no right to the Empire, but "es (i.e. the Empire) deswegen ganz zu beseitigen, kommt ihm nicht in den Sinn, und ein solche Gedanke wäre seiner Zeit wohl überhaupt unfasslich gewesen." This I cannot agree with; this chapter will attempt to show that such a thought was by now not at all impossible. Busson, op. cit. p. 651, seems to me far more correct when he says: "Das Kaiserthum, das früher neben dem Papstthum als zweite Grundsäule der Universitas Christiana gegolten, war seit dreissig und mehr Jahren erledigt—wir finden wiederholt bei Geschichtsschreiber Italiens zu Ende des 13 Jahrhunderts die Ueberzeugung ausgesprochen dass das Kaiserthum mit Friederich II definitiv sein Ende erreicht habe (he refers to Salimbene). Die alte Ordnung war vernichtet, ihre einfache Wiederherstellung durch die geänderten Verhältnisse erschwert, so dass wie von selbst der Gedanke sich nähe legen konnte die zerstörte alte Ordnung durch eine neue zu ersetzen."

talks of a Rex Teutonie, not of a Rex Romanorum, though this fact by itself is not decisive. It became a common device to talk of the king of Germany when one wished to avoid any hint of the Roman character of the Empire, and consequently its universality or connection with Italy. Now, in the third proposal the connection between the Empire and Italy is retained. The king of Lombardy is to recognise his kingdom as dependent upon the Emperor, when once the Emperor is confirmed and crowned, and he is only to be Imperial vicar in Tuscany, while the Empire is vacant. Therefore it is quite clear that in the third proposal Humbert conceives of the Empire as still elective—indeed how else could he propose that the king of Lombardy should recognise his kingdom as dependent only on a *confirmed* Emperor? In the second proposal, on the contrary, there is no mention of any connection between the hereditary German kingdom, *with which the German king is to be content*, and the two hereditary Italian kingdoms. There can therefore be no reason to think that Humbert proposes that this hereditary German king should still be allowed even the empty title of Emperor. Similarly in the plan of Nicholas III there is no reason to think that the hereditary German king is to retain the title of Emperor. Certainly nothing is said in Ptolemy's account which points to such a conclusion. The only mention of the Empire is its partition. The very fact that it is the Empire, which it is proposed to partition, leads one, in the absence of anything said to the contrary, to suppose that the Empire, once partitioned, will no longer exist. The cause of the proposed partition was the fact that

accidentally an Empire, called Roman and traditionally composed of other territories besides Germany, had come to be associated with the German kingdom. Why then, when the Papacy had at last broken that association, should it leave the German king with the title of Emperor? For with that title would go a legacy of traditional claims, not easily to be separated from it. Nor must it be forgotten that the Papacy, in allowing the *Empire* to become hereditary, would lose, with the right of confirmation and coronation, the main source of its actual supremacy over so many Emperors. Theoretically the Pope did not confirm or crown the German king, but the king of the Romans. Accident had united those two crowns. An hereditary German kingship had no dangers for the Papacy; but an hereditary Empire, however restricted, could never be quite without danger: even if the Imperial claims over Italy were formally surrendered, the idea of its universality would remain.

However, we should remember that we have here only the report of the projects of Nicholas III, just as Humbert's memorial is not a treatise, but the heads of subjects to be discussed at the council. It may not be clear what either of them intends with regard to the Empire, but it is quite clear that neither of them reveals any conception of the Empire as a necessary part of the divine or human ordering of the world. There is as little sentiment in these proposals as was shown by the eighteenth century politicians who partitioned Poland. We are now come to a period of the Middle Ages, when it is no longer possible to say that men could not conceive of the world without the Roman Empire or could not

conceive of any other Empire than the Roman Empire. Nothing can better illustrate the different modes of thought, which in the Middle Ages, as in all other ages, lived side by side, than to compare the tone of these proposals to dismember, if not to destroy, the Empire, with the tone of Gregory X's letters to Rudolf of Habsburg. To Gregory the Roman Empire was still to be one of the twin divine powers, the gifts of God, by which, united "mutuis auxiliis," but independent each in its proper sphere, the world is governed[1]. We must be prepared in the political thought, which we are now to examine, for the most diverse views of the Empire—its character, its past and its future. We shall find some writers pleading for the Empire from the standpoint of Gregory X, and others arguing that, as the other world-monarchies were equally from God with the Roman Empire, and as God willed them to give place to the Roman Empire, so He may now will it, in its turn, to give way to those kingdoms which do not

[1] Vide the well-known letter, printed in Theiner, *Codex Diplomaticus Dominii Temporalis S. Sedis*, vol. I. no. 336, p. 188: "Gregorius episcopus, etc. carissimo in Christo filio Rudolfo Regi Romanorum illustri, salutem, etc. Sacerdotium et Imperium non multo differre merito sapientia civilis asseruit, si quidem illa, tamquam maxima dona dei a celesti collata clementia, principii conjungit idempnitas. Ea velut auxiliis mutuis semper egentia suffragii suis inter ipsa vicibus alternandi unit necessitas, et ad presentium mundi regimen instituta, ut alterum videlicet spiritualibus ministret, reliquum vero presit humanis, una et eadem institutionis causa finalis ipsa inseparabiliter licet sub ministeriorum diversitate conjuncta designat. Horum insuper necessariam unionem alterius considerata carentia evidenter insinuat, et emergentia exinde discrimina manifestant. Imperium namque in apostolice sedis vacatione sue destituitur a rectore salutis: Ecclesia vero in throni cessatione Cesarei oppressorum patet incursibus, dum suo defensore privatur."

or will not obey it. The necessity of the Roman Empire was no longer, if it ever had been, an axiom of political thought.

The first treatise which we propose to consider is that known as the *De praerogativa Romani Imperii* of Jordan of Osnaburg. The treatise well deserves its reputation, not for its scientific value as a work of political theory, but for its excellence as an illustration of political thought in the last half of the thirteenth century. Yet it is not altogether an easy treatise to study. Ever since Waitz produced a new and critical edition of it in 1869, controversy has been busy round it. In a chapter such as this it is impossible, as a general rule, to inquire into controversies as to the authorship or similar points connected with the treatises which we examine. We can only pause for such inquiries in cases where it is impossible, on the one hand, to neglect a particular treatise, and, on the other hand, to make a proper use of it without noticing the controversial questions which it involves. The present treatise is a case in point. We can make no pretence to solve the questions at issue; but it is right and necessary to state what these questions are, and to make clear what course we mean to adopt amid the rival solutions.

The treatise, as printed[1], is preceded by an intro-

[1] I shall refer to and quote from Waitz's edition, in the *Abhandlungen der königl. Gesellschaft der Wissenschaften zu Göttingen*. The treatise as printed in Goldast, *Monarchia S. Romani Imperii*, or Schard, *Syntagma Tractatuum*, does not give this introductory letter, and is called "Chronica Mag. Jordani qualiter Rom. Imperium translatum fuit ad Germanos."

ductory letter[1], in which the writer begins with professions of humility to one whom he addresses later as "pater sancte[2]," and begs for indulgence towards his work ("scriptum"). He has put his name in the rubric[3] above, not from ostentation, but that "cognita scriptoris imperitia scripto fides adhibeatur dumtaxat quatenus constituit ex ipsa rei evidentia vel ex scriptis auctenticis aliorum." The letter then goes on to relate how the writer was lately celebrating Mass at Viterbo. Coming to the passage where the Church was wont to pray for the Emperor, he found all mention of the Empire omitted from the book, "de capella Romani pontificis," which he was using. This he cannot ascribe to chance or the fault of the copyist[4]. So he fears that if the Roman Church presumes to say—"We have

[1] pp. 39–42. [2] p. 42.

[3] The rubric runs: "Memoriale reverendi patris domini Jakobi de Columpna Sancte Marie in Via lata diac. cardinalis de prerogativa imperii Romani." This heading (and indeed the whole letter) are wanting in some MSS. On the other hand one MS adds between the words "cardinalis" and "de prerogativa" the following—"quod sibi ad honorem nominis sui Alexander de Roes, canonicus Sancte Marie in capitulo (acc. to Schraub, *Jordan von Osnabrück und Alexander von Roes*, p. 21, this should read 'capitolio') Coloniensi, omnium clericorum suorum minimus et humillimus." Vide Waitz's apparatus criticus on p. 39.

[4] Vide p. 40: "Nuper itaque vacante sede per mortem sanctissimi patris domini Nicolai pape tercii, dum ego indignus peccator in civitate Viterbensi sacramentum corporis et sanguinis domini nostri Jhesu Christi conficerem, habui pre manibus librum michi ad hoc de capella Romani pontificis commodatum. Et cum ad illum locum canonis pervenissem, ubi sancta ecclesia catholica orare consuevit pro antistite et pro rege ac aliis orthodoxis, memoriam quidem inveni antistitis, ut oportuit, sed regiae dignitatis memoriam non inveni. Neque hoc casu vel scriptoris negligentia factum esse arbitror, cum eundem defectum in libris religiosorum et secularium clericorum alias tam in Urbe quam extra similiter invenissem."

no king but the Pope"—worse will befall it than befell the Jews, when they said—"We have no king but Caesar." "Sed tutius esse puto tacere quam de hac materia plura loqui." He will only add that, as the Roman eagle cannot fly with one wing, so also Peter's ship cannot be navigated with one oar amid the storms of this world. The dove that has only one wing will soon fall a prey, not only to the birds of the air, but to the beasts of the field. No monstrosity lives well or long. And so, with more excuses of his ignorance and professions of humility, he presumes to offer "quoddam scriptum viri doctissimi venerandi magistri Jordani canonici Osnaburgensis, quod ipse ad petitionem quorundam amicorum suorum de prerogativa Romani imperii edidit[1]."

We see at once that, if the letter be one whole, it is not by Jordan of Osnaburg; but then, in that case, what is the "scriptum" referred to in the earlier part of the letter? To answer this difficulty Waitz divided the letter into two parts—without manuscript authority[2]. The first part of the letter he ascribed to Jordan, and the "scriptum" referred to is his treatise; the second part of the letter he ascribes to the Cardinal Colonna, who is sending the treatise of Jordan to Pope Martin IV[3]. Wattenbach[4], soon after Waitz's publication, gave quite a different solution. The letter he considered to be one whole, addressed by Alexander of Roes to Cardinal

[1] pp. 41–2.

[2] Vide Schraub, op. cit. p. 18. In Waitz's apparatus criticus two MSS are mentioned as having "Prologus" at the place of division, but they are apparently of very little authority.

[3] Vide the introduction to Waitz's edition.

[4] Vide Schraub, op. cit. p. 3.

Colonna. The "scriptum" of Jordan, referred to at the end of the letter, he considered to be Chapter I. of the printed treatise; the "scriptum" of the writer of the letter was the rest of the treatise. He does not appear, however, to have gone into the question exhaustively. Numerous other solutions[1] have been offered, and in all of them the treatise is taken as a whole and ascribed to Jordan; the introductory letter has been the real centre of controversy. Finally, in 1910, Dr Schraub[2], one of the latest to approach the problem, has revived the solution of Wattenbach, supporting it among other evidence by a new collation of the manuscripts.

The actual attribution of the treatise, or of parts of it, to Jordan of Osnaburg or Alexander of Roes is for our purpose unimportant. In fact, we know so little of either of them, that they can be little more than names[3]. But, even putting aside the question of manuscript authority[4], the arguments brought forward by Dr Schraub are such as cannot be passed over in silence. On the other hand, it is not possible within our limits to enter into as full a consideration of the question as its interest

[1] They are enumerated by Schraub, op. cit. pp. 3–5. Most important, and the only ones, besides Waitz and Schraub, which I have seen, are Wilhelm, "Die Schriften des Jordanus von Osnabrüch" (in *Mittheilungen des Instituts für oesterreichischer Geschichtsforschung*, vol. XIX.), and Grauert, "Jourdain d'Osnabrüch et la Notitia Saeculi" (in *Mélanges Paul Fabre*).

[2] Vide his *Jordan von Osnabrüch und Alexander von Roes.*

[3] Jordan of Osnaburg is mentioned in Osnaburg charters from 1251–83. For what is known of him vide Waitz's Introduction, p. 4, and Schraub, op. cit. pp. 44–6. For Alexander of Roes vide Waitz, p. 9, and Schraub, pp. 47–8. The Cardinal Jacob Colonna played an important part in the history of these years and is well known for the later part, played by him and his family, in the reign of Boniface VIII.

[4] Vide Schraub, op. cit. pp. 5–14.

deserves. Our best plan will therefore be to examine Chapter I. of the treatise apart from the rest, leaving open the question of authorship, both in the case of Chapter I. and of the remaining chapters, and not binding ourselves to accept all Dr Schraub's conclusions as to the aim and character of either part[1].

The author of Chapter I begins by pointing out in how many ways God has honoured the Roman Empire—and not only has, but does, since, while the Roman Empire stands, the man of sin, Antichrist, will not come[2]. And as Christ Himself, so His vicar S. Peter bids it be honoured, saying: "Fear God and honour the king[3]." Would that the Germans, to whom has been transferred the "regimen" of the world and Roman Church, would understand this and act accordingly:

[1] The following point, for example, seems to me to need explanation. If, as Dr Schraub holds, the introductory letter is one whole, surely its form is very strange. If Alexander of Roes is sending his and Jordan's treatises together to the Cardinal, should we not expect him rather to mention the two treatises together, than, as he does, his own at the beginning and Jordan's at the end of the letter, with the important event—i.e. the omission of the prayers for the Emperor—between the two? That event was the origin of his fears for the safety of the Church and so the original cause of writing *his* treatise. It would therefore more naturally precede the mention of his own treatise than of Jordan's, which on Schraub's hypothesis he is adding to his own. Still, the beginning of the supposed second half of the letter—"nuper itaque vacante etc."—seems certainly against the division of the letter.

[2] Vide p. 47: "Item Dominus non solum honoravit, sed honorat Romanum imperium in hoc, quod Romano imperio stante et durante non veniet homo peccati, filius perditionis, Antichristus."

[3] Vide p. 49: "Sicut autem Christus dominus et magister omnium in se ipso Romanum imperium honoravit, ita beatus Petrus, cui Dominus ecclesiam suam regendam commisit, honorari precepit in epistola sua dicens: 'Deum timete et regem honorificate.'"

reverence the king, whom God has given them "loco justitie," and recognise that it is to the Roman Empire that they owe their exaltation. Would that those, whose right it is to elect a king, "afterwards to be promoted Emperor," would foresee the dangers which will come when the Roman Empire is no more. "For it must needs be that offences come; woe to that man by whom the offence cometh[1]." The author now points out that the right of election belongs to the three archbishops and the Count Palatine, who was originally mayor of the old royal palace in Trèves[2]. The people of these dioceses are the Germans, thus called either as being related to the Romans, through a common Trojan descent, or directly sprung from the Romans: "for the Emperor Julius subdued that land to the Roman Empire and occupied it with Roman inhabitants. And for this reason due order required

[1] Vide pp. 49–50: "Utinam Germani, ad quos mundi regimen est translatum et quibus ecclesie Romane regimen est commissum, saperent et intelligerent ac novissima providerent! Utinam saperent justitiam et eam diligerent et regem quem Dominus eis loco justitie posuit, reverenter intenderent, eique sicut Dei ministro honoris debitum exhiberent. Utinam exaltati per Romanum imperium et dilatati, magnitudinem bonorum in eos collatorum intelligerent et non essent ingrati! Utinam principes, praesertim hii ad quos pertinet jus et potestas eligendi regem in imperatorem postmodum providendum, pericula, que venient sublato Romano imperio, providerent! Dum enim sublatum fuerit Romanum imperium, tribulatio tanta fiet in mundo, quod, nisi dies illius tribulationis, ut dicitur in Marco et Matheo, 'fuissent breviati, non fieret salva omnis caro.' Utinam ergo Germani, ad quos et in quos imperiale regnum est translatum, hujus regni, quod Dominus posuit in prodigium super terram, novissima providerent et sublationem ejus pertimescerent! Licet enim necesse sit, ut veniant scandala, ve tamen illis, per quos sunt scandala ventura."

[2] Vide p. 50.

that the Romans, as senior, should have the Sacerdotium and the Germans, as junior, the Regnum[1]." Later the Bohemian and Saxon dukes and the "comes Marchie" were added to the electors; for at the time of the "translatio imperii" under Charlemagne these other peoples were either not, or only newly, catholic[2]. Finally, the author once more returns to the dangers that must follow the destruction of the Empire[3]. All that give a hand to this destruction are the precursors of Antichrist. Let the Romans and their pontiffs beware lest for their sins the Sacerdotium[4], by the just

[1] Vide p. 51: "Et hii populi dicuntur Germani quasi de eodem germine ortum habentes cum Romanis, videlicet de Trojanis, Enea scilicet et Priamo juniore; vel dicuntur Germani quasi de Romanorum germine germinati. Julius enim imperator illam terram Romano subegit imperio et eam Romanis habitatoribus occupavit. Et propter hoc debitus ordo requirebat, ut, sicut Romani tamquam majores sacerdotium, sic Germani tamquam minores regnum optinerent."

[2] Vide p. 51.

[3] Vide pp. 51-2: "Item notandum, quod cum Antichristus venturus non sit, nisi prius imperium destruatur, indubitanter omnes illi qui ad hoc dant operam ut non sit imperium, quantum ad hoc, sunt precursores et nuntii Antichristi. Caveant ergo Romani et eorum pontifices, ne peccatis et culpis suis exigentibus justo Dei judicio sacerdotium ab ipsis auferatur! Caveant nihilominus presules et principes Germani, ne ipsi per ambitionem temporalis potestatis jura sibi et possessiones imperii vendicent et usurpent, quia, sicut supra scriptum est, necesse est ut veniant scandala, ve autem illis per quos scandala sunt ventura! Et vere necesse est, quia tantus ardor dominandi et habendi cor eorum excecabit, ut nec facere velint veritatem, quam noverunt, nec ab aliis audire, quam ignorant, sicut scriptum est: 'Oculos habent et non videbunt, aures habent et non audient.'"

[4] Waitz reads "imperium" here, but gives in the apparatus criticus the reading of one MS as "sacerdotium." This I have ventured to adopt, as the author has already made a special point of contrasting the Roman *Sacerdotium* with the German *Imperium*. To say now that the Romans may lose the *Imperium* for their sins would be a contradiction—the *Imperium* has been translated to the Germans,

judgment of God, be taken away from them; and let the German princes, spiritual and temporal, beware of usurping the rights and possessions of the Empire—"it must needs be that offences come, but woe to that man by whom the offence cometh." It must needs be, he concludes in a tone of pessimism, because the lust of power and possession blinds them. "Having eyes, they will not see; having ears, they will not hear."

There is certainly nothing in this first chapter which argues against Dr Schraub's contention that it was written during the Interregnum, and that its object was to warn the Roman Pope and the German princes of the dangers in store for Christendom, so long as the Empire remained vacant[1].

As regards the remaining chapters there is no doubt as to their unity or that they were written when the Interregnum had come to an end with the election of Rudolf[2]. Dr Schraub has pointed out the various points of difference between Chapter I. and these remaining chapters[3], and he concludes that these latter were written to combat the idea of a new "translatio imperii" to the French[4], such, as we have seen, was actually proposed. Others have seen in the treatise a work directed against the plans of Nicholas III for a partition of the Empire[5]; but Dr Schraub denies this[6].

whom he goes on to warn against usurping the Imperial rights and possessions.

[1] Vide Schraub, op. cit. pp. 44–7.

[2] Vide below, p. 293, note 1.

[3] Vide op. cit. pp. 23–44.

[4] Vide op. cit. pp. 68–77.

[5] So both Wilhelm and Grauert in the articles mentioned above, p. 230, note 1.

[6] Vide op. cit. pp. 64–8.

It is not possible for us to enter into the arguments to be adduced for either interpretation of the treatise. Nor indeed is it necessary. It is not necessary, that is to say, to take for granted that the treatise—or, at least, Chapter II. and the remaining chapters of the treatise—is directed against any one project. We have attempted to show that both the plan of a new "translatio imperii" to the French and the plans of Nicholas III were symptoms, along with many other plans that came to nothing, of the consciousness that the fall of the Hohenstaufen Empire, both as regards its actual power and the theories which supported it, had left a blank in European politics and political theories which somehow or other had to be filled. Nor was the election of Rudolf of Habsburg in any sense a final answer to this problem. In this way it is possible to connect both parts of "Jordan of Osnaburg," even if we accept Dr Schraub's theory of their separate authorships. The author of the first, still writing in the long Interregnum, may see little hope for the future, while the author of the second, writing after the election of Rudolf, may be full of hope—certain that "in ipsius promotione divinum auxilium nunquam se subtraxit." But, in spite of this and all other differences, there is a fundamental similarity between the two, which for our purpose is all important. Both authors were Germans, who were writing to claim the Empire as of right belonging to the Germans. They might specially plead for the Interregnum to cease, or they might combat the plan of transferring the Empire to the French, or the plan of dividing up the Empire into separate kingdoms; but at the bottom of all their pleadings was the contention

that the Empire belonged to the Germans, both historically and by divine ordination.

This, then, is the first thing to be noticed about the authors both of Chapter I. and of the remaining chapters —they are patriotic Germans, though their patriotism, it is true, is as narrow as their Germany. The true Germans are, for both these authors, the "Franci Germani," that is to say, the Franks of the Rhineland archbishoprics. The author of Chapter I. is only concerned with two nationalities—the Germans and the Romans. They are related one to another either by direct descent or through a common Trojan origin, and the Romans are recognised as senior, the Germans as junior. The author of the later chapters is concerned in addition with another nationality, the Gallici. The Franci are the descendants of Priam junior, who came to Italy with Aeneas[1]. Thence passing into Gaul, they expelled the Gallici about the Rhine and drove them westward. They married Teutonic women and were called Germani by the followers of Aeneas in Italy—"eo quod illi et isti de Germanorum germine processissent." In course of time all Theutonia "tamquam a digniori" is called Germania. Meanwhile the Regnum Romanorum expanded and conquered the world. The ancient relationship between the Germans and Romans was renewed by Roman settlements in the Rhineland dioceses. The Alani opposed the Romans, and the Senate and the Roman people proclaimed that whoever overcame the Alani should be free ("franci, id est liberi") from tribute for ten years. The Germans succeeded and became known as Franci. These Franci (also

[1] Vide chap. IV. pp. 56–68, for the early history of the Franks.

known as Germani or Gallici Comati), through increase of population, sent a part of their number eastward beyond the Rhine. These emigrants became the Franci Orientales of Franconia. Another part went westward beyond the Seine and married Gallic women, adopting their manners and language. These became the Francigenae and their land is now called France.

Gaul, according to our author[1], is, "large sumendo," a province of Europe, bounded on the east by the Rhine, on the south by the Alps, on the west by the "termini Hispaniae," and on the north by the "sea of Brittany and Frisia." It is divided into three divisions—Gallia Comata, Gallia Togata, Gallia Bracata. We have seen that the original Franks of the Rhineland archbishopric's are known as Franci, Germani or Gallici Comati—"quae omnia unam gentem determinant." The "French"—the Francigenae—are descendants of Frankish fathers and Gallic mothers. Up to the time of Charlemagne this province of Gaul—in the large sense—formed one whole, though there were often many kings within it. "Et hec diversitas regum et regnorum in Gallia multas facit diversitates et contrarietates in scripturis, que gesta et antiquitates Gallicorum et Francorum descripserunt, indifferenter hiis populis hec nomina imponentes[2]." It is our author's object to trace the

[1] Vide chap. III. p. 54.

[2] Vide chap. IV. p. 61: "In ista igitur provincia que Gallia dicitur et modo a Germanis et Gallicis, Francis et Francigenis possidetur, quandoque unum, quandoque plura fuerunt regna, aliquando simul, aliquando successive, sicut modo est et diu fuit in Hispania, ubi licet plures sint reges, tamen unum dicitur regnum Hispanorum. Et hec diversitas, etc."

connection between these old Gallici and Franci and the French and Germans of his own day.

He therefore traces the history of this province of Gallia from Pharamond down to Charlemagne[1]. Under the Merovingians the kings lived chiefly in Gallia Togata, at Rheims and Paris, so that Belgica (i.e. the Rhineland dioceses), which S. Maternus had converted to Christianity, lived under its own "reges majores." At the deposition of Childeric, Pippin, the mayor of the Palace, became king; and thus the kingdom came to Charlemagne, to whom also the Empire was transferred from the Greeks, and whose mother was Teberga, sister of the Greek Emperor Michael.

Now Charlemagne, "de consensu et mandato Romani pontificis," ordained that the Imperium Romanorum should be for ever elective by the German princes; he considered that it was not right that the sanctuary of God, that is the "regnum ecclesie" should be possessed by hereditary right; that he himself was of Greek, Roman and German blood; and that both he himself and his father Pippin had freed the city of Rome and the church of God from the Lombards by the help of the Franks or Germans[2]. On the other

[1] Vide chap. iv. pp. 61–8.

[2] Vide chap. v. p. 69: "Sciendum est igitur, quod sanctus Karolus Magnus imperator de consensu et mandato Romani pontificis, ordinatione sibi divinitus inspirata, instituit et precepit, ut imperium Romanorum apud electionem canonicam principum Germanorum in perpetuum resideret. Non enim convenit, sanctuarium Dei, id est regnum ecclesie, jure hereditario possideri; considerans, quod ipse de Grecorum, Romanorum et Germanorum germine directa linea processisset, et quod etiam pater suus Pipinus primo et ipse Karolus secundo per Francorum, id est Germanorum, auxilium Romanam urbem et ecclesiam Dei de Lumbardorum infestatione liberasset."

hand, being king of the Franks as well as Roman Emperor, and further considering that he himself was *hereditary* king of the Franks, he decreed that the Francigenae should have an hereditary king of the blood royal and a certain portion of the Frankish kingdom; and that these kings, as the posterity of an Emperor, should own no temporal superior. As another recompense he added the "studium philosophie et liberalium artium" which he transferred from Rome to Paris[1].

Thus, according to due and necessary order, the Romans, as "seniores," have the Sacerdotium, the Germans or Franks as "juniores," the Imperium, and the Francigenae or Gallici, as "perspicatiores," the Studium. All three—Sacerdotium, Imperium and Studium—are necessary to the life, increase and government of the holy catholic church; they are its foundation, walls and roof respectively. Let those therefore, whose business it is, see that this house remains intact, lest Antichrist or his precursors come like thieves through its broken walls (the Imperium)[2].

[1] Chap. v. p. 70: "Porro, quia ipse Karolus rex Francorum extitit et illud regnum ad eum fuerat ex successione devolutum, impium fuisset et indecens, quod ipse suos heredes dignitate regia penitus denudasset. Statuit igitur iniciando, quod Heinricus ejus pronepos consummavit, ut Francigene cum quadam regni Francorum portione regem haberent de regali semine jure hereditario successurum, qui in temporalibus superiorem non recognoscerent, cui videlicet tamquam imperatoris posteritas ad homagium vel aliquod obsequium teneretur. Huic regi, suo heredi, in recompensationem regni defalcati adjecit studium philosophie et liberalium artium, quod ipse de urbe Romana in civitatem Parisiensem transplantavit." Waitz, p. 70, note 1, says that by the "pronepos" Henry, here mentioned, is meant Henry the Fowler.

[2] Chap. v. pp. 70–1: "Et est nota dignum, quod debitus et

We see how our author treats the French claims to be the descendants of Charlemagne and his Franks. Modern France is a portion of the old Gallia (in the large sense), which was Charlemagne's original kingdom. The inhabitants of France are Gallici and Francigenae; it has been allowed the Studium and its independence, and represents the hereditary kingdom of Charlemagne, though with shortened boundaries. But if the kings of France call themselves "reges Francorum," they do so merely "a digniori"; they are really "reges Francigenarum[1]." In the same way the true

necessarius ordo requirebat, ut, sicut Romani tamquam seniores sacerdotio, sic Germani vel Franci tamquam juniores imperio, et ita Francigene vel Gallici tamquam perspicatiores scientiarum studio dotarentur, et ut fidem catholicam, quam Romanorum constantia firmiter tenet, illam Germanorum magnanimitas imperialiter tenere precipiat, et eandem Gallicorum argutia et facundia ab omnibus esse tenendam firmissimis rationibus approbet et demonstret. Hiis si quidem tribus, scilicet sacerdotio imperio et studio, tamquam tribus virtutibus, videlicet vitali naturali et animali, sancta ecclesia katholica spiritualiter vivificatur augmentatur et regitur. Hiis etiam tribus, tamquam fundamento pariete et tecto, eadem ecclesia quasi materialiter perficitur....Studeant ergo illi, quorum interest, ut hec domus integra maneat et intacta, nec, quod absit, parietibus dissolutis fur ille Antichristus vel sui precursores intrent aliunde quam per ostium et gregem ovium interficiant cum pastore."

[1] Vide chap. v. p. 72: "Verum a tempore prenotato (i.e. the separation of 'France' and 'Germany' by Charlemagne and Henry I) reges Francigenarum se fecerunt tamquam a digniori reges Francorum appellari. Et similiter reges Francorum vel Germanorum, quod est unum, tamquam a superiori, reges vel imperatores Romanorum appellari voluerunt. Illi autem qui usque ad hec tempora reges Francorum dicebantur non sunt dicti reges Francorum a Francis orientalibus, qui sunt homines grossi et incompositi, neque a Francis occidentalibus, qui sunt homines delicati et compositi, sed a Francis Germanis, qui in habitu exteriori a Francigenis et in moribus a Romanis non multum discordant." Cf. a comparison on p. 60 between the Franci and Francigenae. They differ in speech, but are

"reges Francorum" call themselves *a superiori* "reges vel imperatores Romanorum." But the old "reges Francorum" were so called not from the "Franci orientales" of Franconia, "qui sunt homines grossi et incompositi," nor from the "Franci occidentales," i.e. the Francigenae, "qui sunt homines compositi et delicati," but from the "Franci Germani" (of the Rhineland), "qui in habitu exteriori a Francigenis et in moribus a Romanis non multum discordant."

Read in connection with our previous inquiries the significance of this is obvious. Some little confusion arises from the author's use of the terms Gallici and Gallia in two senses, as well as from the fact that both the Gallici (in the narrower sense of the Gallici Comati) and the Francigenae are taken as the ancestors of the modern French[1]. For, in so far as they are Gallici, they have no claim to the Frankish kingdom; but we have seen that he allows them, as Francigenae, to represent the hereditary kingdom of Charlemagne, through "defalcatum." Now, as Charlemagne was king of the Franks, it is not quite easy to see on what ground our author refuses to allow those, who represent his hereditary kingdom, to be Franks. Still the important fact is that he does refuse. Clearly and unmistakably he maintains that the *Germans* are the true Franks and that the true kings of the Franks are those who call

"exteriori habitu satis conformes," except that the Francigenae "tamquam juniores" are concerned with juvenile "mores"—tournaments, poetry, etc.—the Franci with more serious matters—wars and discord—"in hoc Romanorum germanitatem quodam modo imitantes."

[1] Vide a clear example of this, above, p. 239, note 2, the "Francigene vel Gallici," as "perspicatiores," have the Studium.

themselves by a higher title "reges Romanorum," as those with whom Charlemagne ordained that the Empire, transferred to him, should remain. French claims to the Empire could be made only on the supposition that Charlemagne and his Franks were "French." This our author denies. France is to have neither a French Emperor, nor even a French Pope. It is to be content with its acknowledged independence and its intellectual supremacy, as realised in the University of Paris.

The Empire, for the continuance of which in German hands this author, as the author of Chapter I., is pleading, is not the Empire of the Hohenstaufen—the lawyers' Empire—but the Empire of Charlemagne and his Franks. Indeed, our author is distinctly hostile to the Hohenstaufen. He traces the fortunes of the Empire from Charlemagne and through the Saxon Emperors up to the time of Frederick Barbarossa[1].

[1] Vide Chap. VI. pp. 77–9: "Translato itaque imperio de heredibus serenissimi principis Henrici primi imperatoris, culpis eorum exigentibus, electores vota sua in Fridericum quendam nobilem de Suevia direxerunt, post ipsum quosdam de suis successoribus et heredibus in reges eligentes. Sed utrum dictus Fridericus prece vel pretio, virtute vel vicio electorum gratiam meruerit, nescio. Sed hoc scio, quod ab illo tempore imperatores parum vel nichil operati sunt laude dignum vel vituperio de pleno consilio vel auxilio principum Germanorum, immo per Suevos et Bavaros ac ulteriores Almanos imperium gubernare laborabant, ita ut deinceps non regnum Germanie vel Theutonie seu Romanorum, sed regnum Almanie vulgariter nuncupetur; et ita sub Suevorum imperio potestas et auctoritas imperialis augeri desiit et vehementius decrescere incepit. Cujus decrementi causam et occasionem ego relinquo Gelphis et Gibelinis disputandam. Sed hoc adicio, quod, sicut Romani pontifices in Italia fecundiores terras imperii, sic Germani principes in Germania meliores terras regni sibi et suis ecclesiis quocumque modo vel titulo conquirunt et usurpant. Ex quo non est dubium, tandem regnum Romanorum et sacerdotium

How he was elected, "prece vel pretio, virtute vel vicio," he does not know. But he does know that from that time dated the speedy decay of the Empire. These Suabian Emperors did not seek to govern the Empire, whether well or ill, by the counsel and with the help of the German princes, but of Suabians, Bavarians and the "ulteriores Almani," so that men no longer talk of the "regnum Germanie vel Theutonie seu Romanorum" but of the "regnum Almanie." But he leaves the cause of the Empire's decline to be disputed over by Guelphs and Ghibellines, only adding that the usurpations of the Popes in Italy and of the German princes in Germany can but lead to the separation of the Regnum and Sacerdotium from their mutual dependence—"quibus divisis, utriusque desolatio est futura." He then recalls[1] a prophecy, long current in Germany, of another Frederick, who is to rise from the blood of

ab invicem dividendum esse. Quibus divisis, utriusque desolatio est futura."

[1] Vide pp. 79–82: "Verum tamen qualis Fridericus ultimus fuerit quem dominus Innocentius Papa IIII destituit, propheta insinuat ubi dicit: 'Percussisti caput de domo impii, denudasti fundamentum etc.' Dicunt etiam, a longis temporibus vatiocinatum esse in Germania, quod de hujus Friderici germine radix peccatrix erumpet Fridericus nomine, qui clerum in Germania, et etiam ipsam Romanam ecclesiam valde humiliabit et tribulabit vehementer. Dicunt praeterea, aliud ibidem esse vulgare propheticum, quod de Karlingis, id est de stirpe regis Karoli et de domo regis Francie, imperator suscitabitur Karolus nomine qui erit princeps et monarcha totius Europe et reformabit ecclesiam et imperium, sed post illum nunquam alius imperabit. Qui hujusmodi vaticiniis et incertis prophetiis vult fidem adhibere, adhibeat. Ego certus sum quod Creator sue presidet creature, et quod justo Dei et irreprehensibili agitur judicio, ut secundum merita cleri et populi aliquando ecclesia habeat defensorem, aliquando nullum, aliquando vero pro rege tirannum ad vindictam reproborum et ad exercitium electorum."

Frederick II and to humble and oppress the Church, and a second prophecy of another Charles, of the blood of Charlemagne and "de domo regis Francie," who is to be monarch of all Europe, reform the Church and Empire, and be the last of all Emperors. The author does not commit himself to belief in such uncertain prophecies. He is sure that God's judgment is just; and only lately, after a vacancy of thirty-two years, God has raised up Rudolf of Habsburg, to show that divine help is never wanting[1].

Our author had good reason to be incredulous with regard to these "vaticinia." There is little ground for supposing that, naturally, he was less likely than most of his contemporaries to be affected by the spirit of prophecy and the eschatological beliefs, which, rarely absent in the Middle Ages, were never more widespread and more potent in their effect on men's thought, political as well as moral, than in the years which followed the fall of the Hohenstaufen[2]. But to have

[1] Vide chap. VII. p. 82: "Novissime autem diebus istis, postquam imperium per annos quasi 32 vacaverat, visitavit Deus plebem suam et suscitavit ei principem serenissimum dominum Rudolphum de Habsburg comitem. In ejus electione concordi et coronatione solempnissima sicut Dei gratia cunctis manifestissime apparuit, sic etiam in ipsius promotione divinum auxilium nunquam se subtraxit."

[2] On the other hand Schraub, op. cit. p. 35, contrasts the personality of the author of Chap. I.—"hinter seinem predigtartigen Warnungen und Mahnungen verschwindet"—with that of the author of the remaining chapters, who relegates "die Prophezeiungen über einen künftigen Weltmonarchen oder Verfolger der Kirche mit energischen Worten in das Reich der Fabeln." But the latter author shows himself just as credulous as the author of Chap. I. with regard to the legend of Antichrist. It seems to me much better to explain his attitude here as dictated by the necessity of his theories, than by a natural spirit of scepticism, which the rest of the treatise hardly, I think, bears out.

expressed anything but scepticism with regard to these prophecies would have been to contradict the whole tenour of his treatise. The prophecy of a last Frankish Emperor, from the blood of Charlemagne, went back to the ninth century; the manifold prophecies connected with Frederick II began to be current immediately after his death[1]. Now at the date of this treatise[2] both prophecies had a real and present significance, when Charles of Anjou was attempting to procure a new "translatio imperii," and when the hopes of Ghibelline circles were centred on another Frederick, the nephew of Frederick II[3]. Our author's plea was

[1] Vide Kampers, *Kaiserprophetieen und Kaisersagen im Mittelalter*, pp. 53–9 and 107 and ff.

[2] According to Schraub, op. cit. pp. 50–62, it dates from the first months of Martin IV's pontificate, probably soon after his coronation. The words of the introductory letter, "nuper itaque vacante, etc." (vide above, p. 228, n. 4), show that the date must anyhow be near the accession of Martin IV—i.e. 1281.

[3] Frederick of Meissen-Thüringen (1257–1341)—vide for this very interesting point Grauert, "Zur deutschen Kaisersage" (in *Hist. Jahrbuch im Auftrage des Görres Gesellschaft*, vol. XIII. 1892), pp. 110–11, and especially p. 111: "Die beiden Kaisersprüche aber, von denen Jordanus uns berichtet, ohne sie selber sich anzueignen, gelten nicht einer ferner Zukunft, sondern beziehen sich auf Fürsten, die in jenen Tagen unter den lebenden weilten und in gewissem Sinne als die Repräsentanten der grossen Parteien der Ghibellinen und Guelfen angesehen werden konnten....Es handelt sich einmal um den jungen Sprossen des deutschen Fürstengeschlechtes der Wettiner, Friedrich den Freidigen von Meissen-Thüringen, durch seine Mutter Margaretha Enkel Kaiser Friedrichs II, und dann um Karl von Anjou, den ersten König von Neapel-Sizilien aus dem Hause Kapet. In der That sind diese beiden Fürsten, der deutsche Friedrich und der französische Karl, nicht bloss Rivalen bezüglich des Königreiches Sizilien gewesen. Führende Geister der Ghibellinischen und der Guelfischen Partei haben zeitweilig je nach ihrem Parteistandpunkt den einen oder den anderen an der Spitze des römischen Imperiums als Kaiser Friedrich III oder

neither for an Emperor Frederick III nor an Emperor Charles IV, but for an Emperor Rudolf. That he mentions these prophecies is perhaps proof enough that they were not without terror for him. A Hohenstaufen or a French Emperor, whether bad or good, would be fatal, in his opinion, to the salvation of Christendom, which was now assured, as he hoped, by the election of Rudolf of Habsburg. For to our author Christendom is one people, one Church, and within this Church are three powers—the Sacerdotium, Imperium and Studium. Each of these powers belongs historically and by divine will to one of the three principal nations of the world, the Romans, the Germans and the Gallici or Francigenae. Their concord is necessary to the welfare of the Church; and to assure this concord the three powers must be distributed among their rightful owners[1]. Only thus can Antichrist be warded off. Especially necessary is it that the Empire be preserved in the hands of the Germans, to whom it was translated, not by chance, but by divine ordination and the merit of the German princes[2]. He pleads for the continuance

als Kaiser Karl IV zu sehen gehofft." Vide also Kampers, op. cit. pp. 118–23.

[1] Vide Chap. VIII. p. 85: "Insuper, ut ego utar opinione singulari, cum verecundia audeo sic sentire, quod ad regimen universalis ecclesie nichil competentius expediat, quam ut sanctissimus pater Romanus pontifex, qui pro tempore fuerit, diligentiam adhibeat, quod studium Gallicorum in suo vigore floreat et fructificet ad confutandum hereticorum versutias et errores, et ut Germanum imperium in suo honore dilatetur ad supprimendas gentes et omnes barbaras nationes, et ut sacerdotium Romanorum in suo robore subsistat et firmetur ad congregandos filios ecclesie ad amorem et obedientiam per gratias competentes et justitiam expeditam."

[2] Vide Chap. II. p. 52: "Ne igitur...humana temeritas immutare presumat statum sacri imperii, quod non est dubium Sancti Spiritus

of that concord between the Imperium and the Sacerdotium, which Gregory X's pontificate and Rudolf's election seemed to promise. "Sicut ecclesia Romana est ecclesia Dei, sic utique regnum est similiter regnum Dei." It were amazing if, after the devotion and liberality shown by so many Emperors towards the Church, the memory of the "regia dignitas" were to be deliberately blotted out from the book of the living, and if at least once a year a general prayer were not to be offered "pro rege vel pro regno Romanorum," as it is for Jews and Saracens. God in His own time must rank such omission as ingratitude to Himself[1]. Nor is the Pope to despise the "secularis conversatio" of the German princes, who represent the Sacerdotium of Samuel[2]. Then turning to the Germans—"confidenter loquor: si Germani principes cum suis fidelibus Romano

ordinatione secundum qualitatem et exigentiam meritorum humanorum gubernari et disponi, videtur expediens, ut quedam antiquitates ex multorum scriptis collecte recitentur ad demonstrandum et declarandum, quod non eventu vel casu fortuito, sed magna sanctorum principum actum est solertia, ut Romanum imperium non apud Romanos remanere debuerit vel transferri in Gallicos, sed potius in Germanos."

[1] Vide Chap. VIII. pp. 83–5.

[2] Chap. VIII. p. 84: "Ipse etiam reges elegit in Israel et electum consecravit." This refers of course to the *German* coronation at Aix, as does his mention of Rudolf's "coronatio solempnissima" above (p. 244, n. 1), for Rudolf was never crowned Emperor at Rome. And it is interesting, in view of our author's enmity to the Hohenstaufen and partiality for the Rhineland archbishoprics, especially for Cologne (vide below, p. 250 in the legend of S. Maternus), to notice that the Imperial policy of the Hohenstaufen, which aimed at obliterating the German kingship in the Roman Empire, threatened especially the prestige of the Archbishop of Cologne, who stood in the same relation towards the *German* coronation, as the Pope towards the *Imperial*. Vide on this point in the Hohenstaufen policy, Krammer, *Die Reichsgedänke des staufischen Kaiserhaus*, pp. 22–5 and 64.

imperatori tamquam advocato ecclesie fideliter assisterent, sicut in temporibus preteritis consueverunt, tunc absque dubio omnis potestas contraria esset parva, tunc non solum Grecia, sed etiam Caldea contremisceret cum Egipto. Aves viso flore cantant et letantur, sed ad aquile intuitum silent et fugiunt; sic omnes barbare nationes aliorum regum insignia despiciunt, sed Romanorum et Germanorum aquilas timent naturaliter et abhorrent[1]."

In the last chapter of the treatise he develops this plea for the return to a better order of things, such as he hopes the election of Rudolf may presage—the Church directed by its three ruling powers, distributed each to its proper owner; concord in the German Empire, supported, not destroyed, by the German princes; and the Roman Papacy content with its spiritual supremacy.

He gives[2]—"velud ab alio inchohandum est exordio"—the legend of S. Maternus, whom in an earlier chapter he has mentioned as the converter to Christianity of the Franci Germani of the Rhineland dioceses. S. Peter sent him, with Eucharius and Valerius, from Rome to preach the faith in Gaul. When they came to Alsace, Maternus died and was buried; the other two returned to Rome. But S. Peter sent them back to Gaul, giving them his staff, by which they were to raise Maternus from the grave. This they did and almost all the people of the province were converted. Maternus lived

[1] He adds: "Insuper non est multum animadvertenda Romanorum civium consueta et sibi innata discordia, quia, licet ipsi propter amorem dominandi et habendi sint discordes, tamen per Dei gratiam in fide catholica tenacissime sunt concordes."

[2] Vide Chap. IX. pp. 86–90.

forty years after his resurrection, working miracles and converting the people, and though he died in Cologne, his body was miraculously translated to Trèves. The staff of S. Peter, with which he had been raised up from the grave, was divided into two, the lower part being kept at Trèves, where he was buried, the upper at Cologne. The author goes on to interpret the legend, in which some things are to be taken literally, others figuratively. What are we to understand by S. Peter but the "regale sacerdotium"? And what by his pastoral staff but the Holy Empire, that is, the "sacerdotale regnum"? The staff represents the Emperor, "terrena se denudans potestate," supporting and honouring the Pope. By the staff, which raised up Maternus from the grave, the wandering sheep is brought back to the fold, when the Emperor, "de mandato apostolico," brings back the wanderer to the faith by means of the material sword. Further, the staff sent by S. Peter through Eucharius and Valerius to Gallia Belgica represents the Roman Empire translated from the Greeks to the Germans in the person of Charlemagne[1]. The church

[1] Vide p. 89: "Sed quid per Petrum apostolorum principem et fundamentum ecclesie nisi regale sacerdotium intelligimus? Et quid per baculum pastoralem, per quem pastor sustentatur, ovis errans ad ovile reducitur et lupus rapax repellitur, nisi sacrum imperium, id est sacerdotale regnum, designatur? Per baculum siquidem pastor sustentatur, dum Romanus imperator terrena se denudans potestate summum pontificem et pastorem omni qua potest reverentia et honore sublevat et exaltat. Per baculum etiam ovis errans ad ovile reducitur vel Maternus mortuus suscitatur, dum quicumque christiani perversis moribus vel scismaticis vel aliis erroribus a Romane ecclesie obedientia deviantes, de mandato apostolico per imperatorem materiali gladio ad unitatem fidei revocantur. Per baculum insuper lupus rapax repellitur, dum inimici christiani nominis auctoritate Romani pontificis per Romanum imperium conteruntur. Hunc itaque baculum beatus

of Trèves keeps the lower part of this staff, and Cologne the upper, because though Trèves is older, it is far less in power and merit. For the archbishop of Cologne is the first of the electors and at Aix consecrates the king of the Romans, in this anticipating the office of the Roman Pope, who consecrates the king, once duly elected and consecrated, as Emperor.

Finally, our author again maintains that the translation of the Empire to the Germans was not only the work of human zeal but, even before it came about, was divinely presaged. But the Germans are not to boast of this, for they are the more blameworthy, the more they withdraw from their due obedience to the Emperor and show themselves unworthy of this "regnum ecclesie," which their ancestors "a Deo et hominibus sanguine proprio meruerunt[1]." May God, he concludes, by Whose providence the whole body of the Church is governed, deign to reform the Regnum and Sacerdotium and, when reformed, to keep them in concord[2].

Petrus Romanus et Antiochenus episcopus per Eucharium et Valerium transmisit ad Galliam Belgicam, dum Romanus pontifex per manus magnifici Karoli Romanum imperium de Grecis transtulit in Germanos."

[1] Vide Chap. x. p. 90: "Manifestum est igitur ex predictis omnibus, quod non solum humana solertia ex necessariis et rationabilibus causis fuit institutum, immo et antequam fieret divina fuit prefiguratione presignatum, quod Romanorum imperium in fine seculorum transferri oportuit in Germanos. Sed de hoc non est ipsis gloriandum, cum tanto magis se ostendant reprehensibiles, quanto magis ipsi se ab imperatoris obsequio faciunt alienos; immo ipsi propter suam superbiam et desidiam regnum ecclesie, quantum in eis est, vix obtinere poterunt, quod eorum progenitores a Deo et hominibus sanguine proprio meruerunt."

[2] Vide Chap. xi. p. 90: "Deus autem omnipotens cujus providentia totum corpus ecclesie disponitur et regitur, ita dignetur secundum suam voluntatem regnum et sacerdotium reformare et

With the treatise or treatises which go under the name of Jordan of Osnaburg's *De Praerogativa Romani Imperii* we may well compare another of very similar character, which is known as the *Notitia Saeculi*. The question of the authorship of the *Notitia* has generally been considered in close connection with the question of the authorship of the *De Praerogativa*. This time we have no need to enter into the question[1]. There can be no doubt that the *Notitia* is a single treatise, while its date can be fixed with practical certainty to January or the first half of February 1288[2]. Nor can there be any doubt as to the close connection between the treatise and "Jordan of Osnaburg[3]," reformata concordare, ut pacem habeamus diebus nostris et sancta ecclesia et fides catholica dilatetur et crescat ad laudem et gloriam nominis sui, qui est benedictus in secula seculorum, amen."

[1] Vide for this treatise the works of Wilhelm, Grauert and Schraub, referred to above (p. 230, n. 1) in connection with "Jordan." Wilhelm argues for the authorship of Jordan of Osnaburg; Grauert, of Alexander of Roes. Schraub, who, as we have seen, maintains Alexander to be the author of chap. II. and the following chapters of the treatise, usually ascribed to Jordan of Osnaburg, regards the author of the *Notitia* as unknown. He considers that this unknown author made use of the *De Praerogativa* and that in so doing he made considerable additions to it. Vide pp. 6 and ff., and *Anhang*, pp. 121–5. The *Notitia Saeculi* is printed by Wilhelm in his article, pp. 661–75, and I quote from and refer to this edition.

[2] The author tells us (p. 664) that he was writing in the year 1288 and that the Papacy was vacant after the death of Honorius IV, while he mentions Hieronimus of Ascoli, who became Pope as Nicholas IV on Feb. 15th, as still only bishop of Palestrina (p. 671). Vide Wilhelm's article, p. 637.

[3] Accepting Dr Schraub's theory of the different authorship of chap. I. and the remaining chapters of the *De Praerogativa*, this will, of course, chiefly apply to the later chapters, since chap. I., on this hypothesis, dates from the Interregnum. I have however attempted to show that there may still be a large degree of similarity in the outlook, and even in the aim, of the two parts of the *De*

however that connection may have come about. We may well consider some significant points of resemblance. There are points of difference as well[1], but fundamentally the two treatises rest upon a similar outlook and similar political theories.

The *Notitia Saeculi* is intended to deal shortly "de cursu seculi et statu reipublicae fidei christiane, id est ecclesie Romane[2]." The author begins by dividing all time into five periods—the time of innocence, the time of the law of nature, the time of the written law, the time of grace and the time of glory. Further, he divides the world into three principal parts, Asia, Africa

Praerogativa since Rudolf's election was not a final solution of the problems, with which the author of chap. I., writing in the Interregnum, was faced. The author of chap. I. might be said to be pleading for Rudolf's election, the author of the later chapters to be justifying it. Thus, though by "Jordan of Osnaburg" I should be understood to be referring in general to the later chapters of the *De Praerogativa*, it should be noted that the points of similarity between the two parts of the *De Praerogativa* will also, at least in part, hold good between chap. I. of the *De Praerogativa* and the *Notitia*.

[1] One point of difference should be noted at once. At the end of "Jordan's" treatise we saw him pray for the reform and concord of the Imperium and Sacerdotium. The author of the *Notitia* is far more concerned than Jordan with the internal corruption and discord of the clergy and especially with the struggle between the regular and secular clergies—a very real question at this time, particularly at the Universities. The whole of this side of the treatise we shall have to pass over, our object being only to illustrate the results of our previous inquiries into the theories of "Jordan of Osnaburg." But it ought to be kept in mind that this is an integral and important side of the treatise, and that it would be necessary to enter into it were we about to analyse the work in detail. Vide below, p. 258, n. 1, for a passage that will well illustrate this side of the treatise. Vide also below, p. 260 and ff. for another point of difference between the two treatises, namely their feeling towards the Hohenstaufen.

[2] p. 662.

and Europe, and the human race into Gentiles, Jews and Christians. Having ruled out of the five periods of time those of innocence, on account of its brevity, and of glory, on account of its eternity, he now declares that he will leave to others to treat of the periods of the law of nature and the written law, and confine himself to the period of grace. Similarly he will confine himself to Europe and the "populus christianus[1]."

From this we see at once that for the author of the *Notitia* the "State" in the true sense of the word no more exists than for "Jordan of Osnaburg." He conceives of Christendom as one whole—the "respublica fidei christiane" or "ecclesia Romana." This Christian republic resides in Europe, but principally in the two chief of the four Regna into which he divides Europe[2]—the Regnum Romanorum and the Regnum Francorum. These two kingdoms are further divided into three provinces, Italia, Teutonia and Gallia, inhabited by three different races, each with its own national characteristics[3]. By divine ordination the three "principatus" in the Church, the Sacerdotium, Regnum and Studium, are distributed among these three provinces.

[1] "...pauca intendo breviter et simpliciter prosequi de tempore gracie, de terminis Europe et de populo christiano."

[2] Vide p. 666. Europe has four principal Regna—the Greeks in the East, Spaniards in the West, Romans in the South, and Franks in the North. Among these four principal Regna, those of the Franks and Romans are "principaliora."

[3] Vide p. 668. He gives the "mores medii, boni et mali" for the three races but concludes: "Verum tamen, quia genus humanum pronum est ad malum et quia plures sunt errantes in via morum quam viventes virtuose, ideo supradictis provinciis pocius ascribuntur mali mores quam boni, ut Italie avaricia et invidia, Teutonie rapacitas et discordia, Gallie superbia et luxuria."

The Sacerdotium keeps the faith in Italy, the Regnum commands it to be kept in Germany and the Studium teaches it to be kept in Gaul[1].

The author of the *Notitia* claims both Charlemagne and the Franks as Germans, no less clearly—and with no wider a Germany in view—than "Jordan of Osnaburg." "Veri et primi Franci sunt populi habitantes contra Galliam in Magnutina, Coloniensi et Treverensi diocesibus[2]." Similarly, in a most interesting passage[3],

[1] Vide p. 668: "Ex hiis prenotatis rememorandum est, quod fides christiana, id est ecclesia Romana, summa est humani generis et ideo per certam ejus mutacionem consideratur principaliter mutacio seculorum. Verum res publica ecclesie Romane residet in Europa, principaliter tamen in Romano regno et Francorum. Quae regna in tres partes dividuntur: hoc est in Italiam, Teutoniam et in Galliam, nam pater et filius et spiritus sanctus unus deus ita disposuit, ut sacerdotium, regnum et studium una esset ecclesia. Cum ergo fides Christi hiis tribus regatur principalibus, sacerdotio, regno et studio, et sacerdotium fidem teneat in Italia et regnum eandem teneri imperet in Teutonia et studium ipsam tenendam doceat in Gallia, manifestum est, quod in hiis tribus provinciis principalibus residet res publica fidei christiane."

[2] p. 667.

[3] Vide p. 672: "Sufficit igitur, ut eligatur ad papatum Romanus vel Italicus clericus, qui rejecta avaritia et invidia firmus sit in fide, fortis in opere, fervens in caritate sicut Petrus, et ad regnum Germanus miles, generosus, magnanimus et prudens, sicut fuit Karolus. Has enim tres virtutes hec dictio rex in ydiomate Teutonico exprimit cum dicitur: cunig, id est generosus vel audax vel sciens. Nec est dubium quin Karolus fuisset Teutonicus, licet ipse Gallicos regnaverit. Ipse enim lingua materna, id est Teutonica, mensibus et diebus nomina imposuit, sicut in actis suis legitur manifeste, et etiam fere omnia nomina regum Francie inveniuntur Teutonica, ut Hildericus, Theodericus, Dagobertus...que in lingua Gallica nichil nisi personarum denominacionem significant, sed in Teutonica eorum interpretacionem faciliter exponerem, si Gallicorum derisionem non timerem. Unde non dedignet Francia minor se habere regnum reges et regum nomina a Francia majore, que sic ordinante providencia dei per ministerium principum in sortem regni Romanorum est translata, quia sicut Franci

he maintains that not only was Charlemagne a German, but that nearly all the names of the "French" kings are actually German—"que in lingua Gallica nichil nisi personarum denominacionem significant, sed in Teutonica eorum interpretacionem faciliter exponerem, si Gallicorum derisionem non timerem." France is "Francia minor." To "Francia major," that is Germany, the Regnum Romanorum has been translated "ordinante providencia dei per ministerium principum." To our present author, as to "Jordan of Osnaburg," the "French" are Gallici as well as Francigenae. Charlemagne was a German, though he ruled over Gallici. The original "regnum Francorum" was so called from the "primi Franci," that is the Franks of the Rhineland archbishoprics. Henry I, "dux Saxonie, Romanorum rex," was the first who divided up this kingdom, uniting "prima Francia," which he called Lotharingia in honour of his uncle, all Teutonia, the county of Burgundy and the kingdom of Arles to the Roman Empire, and leaving "Francia minor cum Galliis circumjacentibus" to the heirs of Charlemagne, who now call themselves "reges Francorum" and succeed to their kingdom by heredity. The kings of the "primi Franci" are elective and call themselves *a digniori* kings of the Romans and future Emperors[1].

sunt Germani Romanorum, ita Francigene geniti sunt Francorum; Romani igitur sunt radix, Germani stirpes et Gallici sunt rami arboris flores et fructus honestatis producentis."

[1] Vide pp. 667–8: "Ex hiis patet, quod regnum Francorum a primis Francis dictum est. Sed hoc regnum Henricus dux Saxonie Romanorum rex hujus nominis primus dividens primam Franciam, quam ipse in honorem Lotharii regis Francorum et imperatoris Romanorum, sui avunculi, Lotharingiam appellavit, cum tota Teutonia Burgundie comitatu et Arelatensium regno Romano univit

Here then again, if there is some confusion as to the origin of the French—whether Gallici or Francigenae—the answer is plain enough. The author of the *Notitia* recognises, as distinctly as "Jordan," the kings of France to be the heirs of Charlemagne. But they are heirs to his kingdom, not to his Empire, nor to those border provinces of Lorraine[1], Arles and Burgundy, which he holds Henry to have united to the Empire and on which, we may remember, French policy was already casting covetous eyes.

The period of grace, which, as we saw, was the only period with which our author proposed to deal, he divides, on the authority of the theologians, into four subordinate periods[2]. Of these the first two are the periods of persecution under the Gentiles and heretics respectively. These again he puts aside and resolves to confine himself to the two remaining subordinate periods—that "in quo clerus tribulabitur a christiano populo propter peccata sua" and that "quando veri christiani per totum orbem persecucionem pacientur sub antichristo." We must leave aside the first of these and confine ourselves to the second, which more properly concerns us. We are in a period, we may

imperio....Ac heredibus Karoli predicti Franciam minorem reliquit cum Galliis circumjacentibus, quorum reges se modo Francorum reges appellant et succedunt ex hereditate. Primi vero Franci reges suos eligunt ex dignitate et eos a digniori reges Romanorum, futuros imperatores appellant."

[1] Cf. "Jordan," chap. iv. p. 36: "Verum qualiter dictum regnum Francorum divisum fuerit in Franciam, Lothringiam et in Germaniam, t qualiter Lotharingia devoluta fuerit ad Germaniam etc." and cf. chap. vi. p. 75, though this latter passage is according to Schraub (op. cit. p. 8) one of the interpolated passages.

[2] Vide p. 663.

repeat, of widespread prophecies and eschatological beliefs. Whatever we may think of the scepticism of the author of the later chapters of the *De Praerogativa*, there is no doubt as to our present author's attitude. His division of the period of grace is given on the authority of the theologians, but the authority, to which he specially refers, is the author of a book called *De Semine Scripturarum*, ascribed to the famous Joachim, Abbot of Fiore, though actually, it appears, written after his death[1]. Our author is thus under the influence of one of the most powerful sources in the mystical and prophetic literature and thought of his age and of many years yet to come.

He begins by doubting the possibility or propriety of questioning when the advent of Antichrist is to be, and notes, among other things, that "apostolus dicit, quod nullatenus Antichristus veniet, nisi Romanum imperium penitus est ablatum[2]." He recalls the prophecy, which he has already mentioned, of the *De Semine Scripturarum*, that the "tribulacio symoniacarum," the purging of the Church and the recovery of the Holy Land are to come within the next twenty-seven years. The Church thereafter will remain for some time in peace and purity, till peace brings riches and riches luxury, and the old disorders return again more grievous than before. Then perhaps, he continues, the Roman Church, "auxilio Gallicorum," will wholly destroy the Roman Empire, which it has now destroyed in part. And then Antichrist will come and those, who have helped to

[1] Joachim died in 1202, the book was written in 1205, according to Schraub, op. cit. p. 99, who gives references.

[2] Vide pp. 672–3. He refers of course to II Thess. 2.

destroy the Empire, will feel the ill of it. For Antichrist can never come while the Church is defended "in temporalibus" by the Empire and has the Studium to aid it "in spiritualibus." Let the Pope beware lest he destroy the Imperium, as the king of France lest the Studium be dissolved[1].

The author gives elsewhere[2] another division of time, on the authority of the "antiqui sapientes," into

[1] Vide pp. 673–4: "Et forte Romana ecclesia imperium Romanum, quod nunc pro parte destruxit, auxilio Gallicorum tunc in totum destruet. Quo destructo tunc in annorum centenario, qui currere incipiet anno a nativitate Christi millesimo CCCC° quinto decimo, nascetur Antichristus et est notabile, quod quia clerici et Gallici nunc parte magna Romanum destruxerunt imperium, ideo in hoc tempore super eos venit et veniet magna tribulacio. Quando vero ipsi in totum destruxerunt imperium, tunc tanta et talis veniet omnium christianorum tribulacio, quanta et qualis ab inicio non fuit neque fiet...quia nullatenus veniet Antichristus, quam diu ecclesia Romana imperium habet defensorem in temporalibus et studium Gallicorum in spiritualibus adjutorem....Caveat igitur papa ne destruatur imperium et caveat rex Francie, ne studium dissolvatur, quia instigante diabolo ad utriusque destructionem jam sub boni specie laboratur. Sicut Christus non venit, nisi prius destructum esset regnum Judeorum, ita Antichristus non veniet, nisi prius destruatur regnum Romanorum. Dicebant olim summi sacerdotes: Regem non habemus nisi cesarem, et modo dicent summi sacerdotes: Regem non habemus nisi papam. Sicut enim clerici seculares affectant habere prerogativam potencie secularis, ita fratres regulares affectant habere prerogativam scientie naturalis, et sicut clerici seculares postponunt regulam theologicam vivendo, ita fratres regulares postponunt scienciam theologicam disputando et studendo, ex quibus potestas imperii in impotentiam et sciencia studii in heresem convertetur, et hec sunt preambula Antichristi." We have quoted this passage at length, because it well illustrates a side of the treatise (vide above, p. 252, n. 1) which finds little or no parallel in "Jordan." One sees how significant the idea of the Studium as a third governing "power" in the Church becomes in connection with our author's concern at the discord between the secular and regular clergies.

[2] pp. 664–6.

periods of forty-nine years. According to this mode of reckoning, he finds that the period between the consecration of Frederick II in the year 1220, when the Roman Empire was "in statu potissimo[1]," and the second council of Lyons, held by Gregory X, was a period in which the Empire so declined, "quod ejus vix habebatur memoria, et econtra in tantum Romanum creverat sacerdotium in temporalibus et in spiritualibus, quod ad pedes Romani pontificis non solum populus christianus et prelati ecclesiastici, sed etiam reges mundi, Judei, Greci et Tartari convenientes recognoverunt Romano sacerdotio mundi monarchiam." And so he foretells for the next fifty years, near the beginning of which he is writing, the contrary process, since the Empire could not decline further, unless it be entirely destroyed, nor the Papacy advance to greater power, unless "abjecta auctoritate apostolica in regalem potestatem convertatur." He sees the change foreshadowed in "those two princes of the world, Gregory X and Rudolf I." That there have been ten Gregories and one Rudolf

[1] There is some doubt as to the right reading here. Wilhelm reads: "Si igitur tempora preterita revolvimus, invenimus quod ab illo tempore, in quo Fredericus secundus consecratus fuit ab Honorio II A.D. MCCXX in statu potissimo Romanum tenuit imperium usque ad ultimum concilium...." Something is clearly missing between "MCCXX" and "in statu." In Wilhelm's apparatus criticus we find that two MSS give "qui"; but as Schraub, op. cit. p. 86, points out, "qui" makes the author contradict himself, since he cannot say that Frederick II "in statu potissimo tenuit imperium," if at the same time he dates the Empire's decay from Frederick's consecration. Schraub therefore proposes "in quo," which fits the context excellently: i.e., the year 1220 is the year in which the Empire both reaches its high-watermark and the decline of the next fifty years begins. This, from the whole context, is evidently what the author means.

means that the "unitas imperii sive regni ascendere debeat ad numerum denarium et denarius sacerdotii descendere debeat ad unitatem." Or, if human malice impedes this revival of the Empire, it can only mean that the time has come when the ten tyrants (who in the Antichrist legend are to secede from the Empire before the coming of Antichrist) will arise, and the "clericalis ordo" suffer accordingly. But looking back at the years which have passed since the second council of Lyons, noting how the temporal and spiritual power of the Church has decreased and how the power of the Empire has increased, our author has no doubt that the latter is to grow still greater as the former grows less.

This is interesting in many ways. It shows, to begin with, that the author does not share "Jordan's" hatred of the Hohenstaufen[1]. He dates the decline of the Empire from Frederick II—"Jordan" dated it from Frederick Barbarossa—but for this he blames rather the Popes than the Emperors. At least, at Frederick II's consecration the Empire was at the height of its power; nor do we hear anything, as with "Jordan," of the Hohenstaufen's partiality for the "ulteriores Almani." The author's attitude towards the Hohenstaufen is clearly shown by a curious poem which concludes his treatise[2]. It is an allegorical

[1] In "Jordan," however, we find in one MS a long passage in chap. VI., printed by Waitz, pp. 79–81, in the apparatus criticus, which is a very pro-Hohenstaufen account of Frederick II's relations with the Papacy and Holy Land. There can be no doubt that this is an interpolation, since it is in flat contradiction to the rest of the chapter.

[2] Vide p. 675: "Sed inter jam dicta et dicenta libet hic metricam illam interserere parabolam, quam alias ante terminum scripsi, cujus

account of the first Council of Lyons, at which Innocent IV deposed Frederick II. The poem is called the *Pavo*. The peacock is the Pope, who conspires against the eagle, the king of birds, who, of course, is the Emperor[1].

> "Anxia mens igitur dominandi fervet amore,
> ferventerque studet quo fine sequatur amatum.
> Tandem complacuit prorsus generale gregari
> concilium, quo possit aves involvere cunctas[2]."

The council meets and the peacock claims

> "...quod nobis debetur honos dominandi[3].
> . . . . . .
> Et sic competeret nobis imponere leges
> omnibus et nemo regnare potest sine nobis[4]."

The eagle is cited to appear and he is defended "mandato sufficienti" by the crow and the daw (corvus and

figure et similitudinis plene et perfecte intelligencie proprietates gentium et ordinum et causas perturbacionum universalis ecclesie declarabunt." The poem is not printed by Wilhelm and I shall therefore quote from, and refer to, it as printed by Karajan, who has printed both the *Notitia* and the poem in his article "Zur Geschichte des Concils von Lyon 1245" (in *Denkschriften der Kaiserlichen Akademie der Wissenschaften, Philosophisch-Historische Classe*, Vienna, vol. II. 1851), pp. 111–17.

[1] The key to the poem is given as follows after the Prologue (p. 111): "Pavo: papa; columbe: cardinales et episcopi; palumbes: abbates albi et nigri; turtur: abbates cistercienses; anser et anas: cives et burgenses; passeres: differentie clericorum; irundo: ordines mendicantes; corvus: laici et clerici gebelini; capo: episcopus gallicus; gallus: rex gallicorum; pica: guelfi, picardi, normanni, britones et alia genera gallicorum; aquila: imperator; alie aves rapaces: teutonici et alemanni; bubones: greci; milvi: seculi; falcones: hispani."

[2] p. 111, lines 19–22.

[3] p. 114, line 138.

[4] p. 114, lines 146–7.

monedula)[1]. But to no avail:

"Sed lex,
nec canon, neque commentum, neque glossa tuentur
absentem, quia mox in eum sententia currat,
et condempnatus cuncto privetur honori.
Unde monedula garrula, provida taliter orsa est:
'Ista dies, maledicta dies et causa timoris!
Ista dies, ubi nulla quies, ubi virga furoris!
Conveniant et condoleant inopes et habundi
nunc timeant et nunc fugiant pariter tremebundi[2].'"

The author of the *Notitia* thus shows himself a partisan of the Hohenstaufen. In the poem the peacock and other birds are considered rebels[3] against the rule of the eagle—those who

"nolebant aquila regnante modeste
conregnare, sibi contenti finibus illis
quos natura dedit,"

and will, by provoking schism, destroy the Regnum and

[1] Vide p. 115, lines 195–8:

"Monedula, corvus,
quelibet in totum mandato sufficienti
comparent, aquilam defendentes meliori
quo possunt jure, tutorum nomine."

The Pavo had said (p. 113, lines 83 and ff.),

"Expedit ergo via procedere juris et ipsum
citare, ut veniat promptus etc."

[2] p. 115, lines 198–206.

[3] Vide lines 219–24, p. 116:

"Si aquilam primo nature conditione
deserit obsequium pennarum, postea vero
juribus ablatis sors totis viribus ipsam
dejicit, ac inter pedes incedere jussit,
pavoni tribuens jus imperio dominandi
cum prius obtentis. Sic transit gloria mundi!"

The Pavo himself is looked on as the leader of the rebels—vide lines 17–18, p. 111:

"Namque feras jam pensat aves superare potentes
ut rex, quem timide fecere patrem sibi sponte"

(i.e., the other rebel birds).

receive their due punishment from the tyrants, whom they preferred to their own true king[1].

But, none the less, if we return to the passage in the *Notitia* itself, which we considered above, we see that our author is no more pleading for the Hohenstaufen idea of the Empire than was "Jordan of Osnaburg." He may, in marked contrast to "Jordan," be favourable to the Hohenstaufen, but the Empire, for which he pleads, is not their Empire, the civilian's Empire, centred in Italy, a world-wide State. His Empire is the old "regimen ecclesiae," one of the governing powers of the "respublica christianae fidei." He too, like "Jordan," looks back to the election of Rudolf as to the beginning of a more hopeful time. Though in this one passage he foretells a time of decadence for the Sacerdotium, and seems to regard the alternate rise and fall of the Imperium and Sacerdotium as necessary, elsewhere, and generally in his treatise, he too is pleading for concord between the three

[1] Vide p. 117, lines 263–72:

"Porro quis finis hiis principiis mediisve
conveniat, verax determinat auctor et inquit:
Regni scissuram sequitur destructio regni,
destructo regno veniunt pro rege tyranni,
qui penam sceleris reddant auctoribus equam,
ut qui nolebant aquila regnante modeste
conregnare, sibi contenti finibus illis
quos natura dedit, discant moriendo rebelles
bubones milvos et falcones peregrinos,
quos illis Grecus, Calaber transmisit et Hesper!"

Wilhelm (pp. 650–1) considers these lines a decisive proof that the poem could not have been composed by the author earlier than the Sicilian Vespers of 1282, to which, he thinks, they must refer. Cf. p. 670 of the *Notitia*.

powers and their proper distribution among their three rightful owners. Especially necessary is it that the Imperium should be in the hands of a German—"Germanus miles, generosus, magnanimus et prudens, sicut fuit Karolus"—and the Sacerdotium in the hands of a Roman or Italian—"firmus in fide, fortis in opere, fervens in caritate sicut Petrus[1]." He points to the terrible disasters which have overtaken Frenchmen under the pontificate of the French Pope, Martin IV, "qui ob amorem gentis sue turbavit ecclesiam dei totam, volens totum mundum modo Gallicorum regere[2]." Similarly the clergy and Gallici together have in part destroyed the Empire, and when they have succeeded in doing so altogether, the great "tribulation" under Antichrist will follow[3]. "Non enim ociose, ut credo, Spiritus Sanctus ordinavit, quod apud Romanos sacerdotium et apud Germanos esset regnum[4]." Together

[1] Vide above, p. 254, n. 3. [2] p. 670.

[3] In the *Pavo* also the alliance of France (Gallus) and the Papacy (Pavo) in destroying the Empire is clearly brought out. The Gallus is made (unhistorically) to attend the Council:

"Pavo gratulans suscepit ad oscula gallum"

(p. 112, line 42). Then later:

"Hiis mediis gallus et cum pavone columbe
funiculum nectunt triplicem qui dissociari
non queat ex facili, spondentes pondere firmo
auxiliis et consiliis relevari vicissim"

(p. 115, lines 191–4). And vide lines 248–50, p. 116:

"Ipse etiam pavo galloque superveniente
plumas et pennas aquile rapiebat, easque
alis et caude proprie religare studebat."

[4] Vide p. 671: "Et revera propter hoc summopere videtur expedire, quod ad sacerdotium et ad regnum ecclesie catholice, que utraque tamquam dei sanctuarium jure hereditario possideri non convenit, eligeretur ad sacerdotium quidam Romanus vel saltem Italicus et ad regnum Germanus. Non enim ociose, ut credo, Spiritus Sanctus ordi-

these three nations are a tree producing "flores et fructus honestatis," of which the Romans are the root, the Germans the stem and the Gallici the branches[1]. Elsewhere he compares them to a family. The Pope—"quia summa universalis regiminis ad Romanam revolvitur ecclesiam"—is the dutiful and prudent father, the Gallici an obedient son, the Germani a brother "de pari contendens," the Italians or Romans a recalcitrant son[2].

We have spent many pages in considering these treatises, their fears and forebodings and their interpretations of an often somewhat doubtful history[3]. They have none of the practical spirit of the lawyers or of the subtlety of the Aristotelians, to whom we are now to turn. Yet the study of these treatises is in no

navit, quod apud Romanos sacerdotium et apud Germanos esset regnum. Istud autem ego dico non supponens necessitatem, sed insinuans congruitatem, quia multi de Gallia, de Grecia et aliis mundi partibus viri sanctissimi adeo vocati sunt ad papatum, et plurimi Romanorum non solum ad papatum, immo etiam ad minora officia, inveniuntur minus habiles etc." He goes on to give a practical example of a *Roman* legate who, by his tactlessness, raised all Germany against himself.

[1] Vide above, p. 254, n. 3.

[2] Vide p. 670: "Et quia summa universalis regiminis ad Romanam revolvitur ecclesiam, ideo Romanus pontifex tamquam pius et prudens pater familias regere debet gentem Gallicam tamquam filium obedientem et gentem Teutonicam sive Germanorum, quod est unum, tamquam fratrem de pari contendentem et gentem Italicam sive Latinam tamquam familiam recalcitrantem et alias mundi naciones tamquam proximos et vicinos." The "alii mundi naciones" must be those outside the Church, non-Christian nations.

[3] It is worth noting that the author of chap. VIII. of the *De Praerogativa* confesses "in precedentibus ab aliquorum scriptis in quibusdem deviasse; sed sicut ipsi ex suis originalibus credunt veritatem excerpsisse, sic ego nullam puto admiscuisse falsitatem, petens cum humilitate veniam de erratis."

way lost labour. They may give us nothing that can properly be called scientific political theory, but they give us our first answer to the problems, which the fall of the Hohenstaufen Empire had left for solution. They give us the German answer. Its full significance will appear, when we have considered other answers given to these same problems by writers of other nationalities.

We have seen that for the authors of these treatises the "State" does not really exist. Mankind or Christendom forms a single Church, a Christian Republic or People, within which are different nations and kingdoms. Therefore the Imperium, for the maintenance of which in German hands they plead so earnestly, is not a universal "State," but the "Gelasian" Imperium—a ruling power within the Church. Their thought was unaffected alike by the political theories of the Roman lawyers, as by political theories still newer. Aquinas was dead before these treatises were written[1], so that already the political theories of Aristotle had begun that new life, which was to be of such lasting importance in the history of thought. We find no trace of such theories in these treatises.

We have already referred more than once to the influence of Aristotle's *Politics*, as they entered medieval political thought under the guidance of Aquinas and his followers. We pointed out in the last chapter that for the Aristotelian the "State" meant the "Civitas" or "Regnum." The Roman lawyers came to this conclusion

[1] This will not apply of course to chap. I. of the *De Praerogativa*, if we accept the theory that chap. I. and the remaining chapters are of different dates and by different authors.

independently, and only after a long process of reasoning, whereby the Civitas or Regnum was invested with one after another of the peculiar marks and privileges of the one true "State," the Roman Empire—until the Civitas and Regnum were themselves recognised as Empires in miniature, "sibi principes," and so "States." It is very important to observe that the State, in the modern sense of the word, has two independent origins: that it is both the Empire on a reduced scale and the older, self-sufficient, non-universal πόλις. Clearly the way was now open to a great advance in political thought. It was laboriously and against their will that the lawyers had raised up the Civitas and Regnum, from their original dependent position, to an independent and equal position with the one original world-state, the Empire. But, starting from Aristotle's *Politics*, the recognition of the πόλις (whether translated by Civitas or Regnum) as the "State," so far from presenting difficulty, would seem a necessary conclusion.

Yet in actual fact the modern State did not leap ready-made, nor at once, from the pages of the revived Aristotle or of his interpreters. Many obstacles were still to be overcome, before the modern State, either of theory or fact, could exist. Let us remember that we are still in the thirteenth century. Aquinas himself, his great pupil Egidius Romanus, and perhaps the greater number of the early exponents of the new political thought, were unhesitating supporters of the Papacy in its most extreme claims to political power. If, then, the idea of the State, as a secular, non-universal community and as the highest of all communities, became

prominent through the re-introduction of Aristotle's *Politics*, it was not, as it is perhaps needless to say, because they looked on the State as a means to merely secular ends or because they desired to limit the Papal power in any particular.

In the first place they adopted without hesitation Aristotle's dictum that man is naturally a political animal; they saw in Government a necessary consequence of man's innate tendency to live in society—a tendency which finds its completest satisfaction in the State[1]. The State is founded by a natural impulse of "human industry[2]," and political government is distinguished from slavery. Both are natural: but while political government is natural in a primary sense, and would have come into existence if mankind had never fallen, slavery is a result of the fall[3], natural in a secondary sense, as deduced by human reason on grounds of utility[4]. But then, though both sorts

[1] Vide Aquinas, Commentary on Aristotle's *Politics*, I. Lectio 1, where he comments on this dictum of Aristotle. Vide p. 3 of the edition printed at Venice 1568, containing both his Commentary on the *Politics* and his treatise *De Regimine Principum* (though with separate pagination) to which I shall refer in the following notes. It should be remarked that the Latin version of the *Politics*, given in this edition, is the later version of Leonardo Aretino (1370–1444), not the "vetus versio," which however will be found separately in this edition.

[2] Vide Aquinas, Commentary on Aristotle's *Politics*, I. Lectio 1, p. 3 verso: "Agit de institutione civitatis, concludens ex praemissis, quod in omnibus hominibus est quidam naturalis impetus ad communitatem civitatis, sicut et ad virtutes. Sed tamen sicut virtutes acquiruntur per exercitium humanum, ut dicitur in secundo Ethicorum, ita civitates sunt institutae humana industria."

[3] Vide Aquinas, *De Regimine Principum*, III. 9 (this is in the part of the treatise which was added by a later hand—vide below, p. 269, note 1), p. 14.

[4] Vide Aquinas, *Summa Theologica*, II. 1. 94. 5, p. 194.

of dominion are natural, they are also divinely ordained. In the continuation of Aquinas' treatise *De Regimine Principum*[1] this is discussed at length[2]. He shows how all dominion is from God[3]—sometimes, as in the case of the Romans, granted as the reward of virtue[4], at other times as punishment for sin: the second case applies equally to slavery and political dominion[5].

Then with regard to the aim of the State and Government. It is scarcely necessary to point out that to Aquinas, "the first Whig," and to those who followed him, the *raison d'être* of Government is the good of the governed[6]. The ruler who seeks his own good is a tyrant, not a king. The king's is a divine task. "Magnitudo regiae virtutis apparet quod praecipue

[1] According to Baumann, *Die Staatslehre des h. Thomas von Aquinas*, pp. 5–6, only Book I. and the first four chapters of Book II. are by Aquinas himself, and this seems generally accepted. The author of the latter part is generally held to be Aquinas' pupil, Ptolemy of Lucca.

[2] In Book III. vide chaps. 1–9. [3] Vide chaps. 1–3.

[4] Vide chaps. 4–6. Dominion was granted the Romans on account of their "amor patriae," the "zelus justitiae" shown in their laws, and their "singularis pietas et civilis benevolentia."

[5] Vide chaps. 7–8. The idea of tyranny as an instrument of punishment, allowed by God both on the sinning people and on the tyrant himself, is well expressed in a few lines by an Italian poet of the fourteenth century, Bindo Bonichi. The lines form an excellent commentary on these two chapters—"Iddio permette regni lo tiranno Acciò che opprima il popol peccatore, Non già per ben di lui ma per suo danno; Suscita dopo lui un ch' è peggiore, Che il fa morir o ver languir d' affanno: E in questo modo il punisce il Signore." The poem from which these lines come is printed in Carducci's selection, *Rime di M. Cino da Pistoia e d' altri del Secolo XIV*, pp. 154–5.

[6] Vide Aquinas, *De Regimine Principum*, I. 1, p. 1 verso: "Rex est qui unius multitudinem civitatis vel provinciae et propter bonum commune regit."

Dei similitudinem gerit, dum agit in regno quod Deus in mundo[1]"; and as his task is greater than other men's, so will be his reward in another life. But then, once terms like "good" and "virtue" were postulated as the end of Government, they could, in the Middle Ages, be interpreted ultimately in none but a Christian sense. Aristotle in a famous phrase had said that the State comes into existence τοῦ ζῆν ἕνεκεν, but exists τοῦ εὖ ζῆν ἕνεκεν. There were of course several points at which the Greek "good life" and "virtue" could meet the Christian: but there was this fundamental difference. To Aquinas the good life must inevitably be interpreted with final reference to another existence; the good life could not be an end in itself, as it was to the Greeks. This is a distinction of immense importance, since it left the way open for the Papalist's insistence on the superiority of the Sacerdotium above all secular governments. Two things, says Aquinas[2], are necessary for the good life

[1] Vide Aquinas, *De Regimine Principum*, I. 9, p. 4. Cf. chap. 12, p. 5: "Hoc igitur officium rex se suscepisse cognoscet, ut sit in regno sicut in corpore anima et sicut Deus in mundo." Cf. Egidius Romanus, *De Regimine Principum*, III. Part 2, chap. 6, pp. 465–7.

[2] Vide *De Regimine Principum*, I. 14 and 15. The whole of these chapters should be seen, but the following quotation from chap. 14, p. 5 verso illustrates the line of argument: "Sed quia homo vivendo secundum virtutem ad ulteriorem finem ordinatur, qui consistit in fruitione divina, ut supra jam diximus, oportet eundem finem esse multitudinis humanae, qui est hominis unius. Non est ergo ultimus finis multitudinis congregatae vivere secundum virtutem sed per virtuosam vitam pervenire ad fruitionem divinam. Siquidem autem ad hunc finem pervenire posset virtute humanae naturae, necesse esset ut ad officium regis pertineret dirigere homines in hunc finem....Sed quia finem fruitionis divinae non consequitur homo per virtutem humanam, sed virtute divina, juxta illud Apostoli Ro. 6 (Romans,

of man—the principal, which is virtue, and the secondary, which is sufficiency of temporal goods, and which is instrumental "ad actum virtutis." Unity moreover is a necessary preliminary to all good action; the unity of a man is natural, the unity of a multitude of men—"quae pax dicitur"—it is the task of the ruler to procure. Thus the State exists for three main purposes: to keep this multitude "in unitate pacis," to direct it by the bond of peace to good action; to supply the material provision which makes this good action possible. But virtue itself is not the ultimate aim of man, rather "per virtuosam vitam pervenire ad divinam fruitionem." Now, since it is not human virtue, but divine grace, which leads men to this ultimate end, the power that guides men thereto is not a human but a divine "regimen"—the "regale sacerdotium" of Christ and His vicar, the Pope. The end of the State, then, is "vitam multitudinis bonam procurare secundum quod congruit ad caelestem beatitudinem consequendam." But it is from the "lex divina," the teaching of which belongs to the Sacerdotium, that men can learn the way to this "celestis beatitudo": therefore the final authority in politics must rest with the Pope, as the power which

chap. 6) 'Gratia Dei, vita aeterna,' perducere ad illum finem non humani erit, sed divini regiminis. Ad illum igitur regem hujusmodi regimen pertinet, qui non est solum homo, sed etiam Deus, scilicet ad dominum nostrum Jesum Christum, qui homines filios Dei faciens in caelestem gloriam introduxit....Hujus ergo regni ministerium, ut a terrenis essent spiritualia distincta, non terrenis regibus, sed sacerdotibus est commissum, et praecipue summo sacerdoti successori Petri Christi Vicario Romano Pontifici, cui omnes reges populi Christiani oportet esse subditos, sicut ipsi domino Jesu Christo. Sic enim ei, ad quem finis ultimi cura pertinet, subdi debent illi, ad quos pertinet cura antecedentium finium, et ejus imperio dirigi."

directs to this final end, rather than with the king, to whom belongs merely the ordering of those means which contribute to the final end[1].

Beside the universal Papacy and Church, whether as a theory or a fact so entirely foreign to the world of Aristotle, the thirteenth century also possessed the theory, if not the fact, of a universal Empire, equally foreign to Aristotle and his world[2]. But while the universal Church,

[1] Vide *De Regimine Principum*, I. 15, p. 5 verso: "Quia igitur vitae, quam in praesenti bene vivimus, finis est beatitudo caelestis, ad regis officium pertinet ea ratione vitam multitudinis bonam procurare secundum quod congruit ad caelestem beatitudinem consequendam, ut scilicet ea praecipiat, quae ad caelestem beatitudinem ducunt, et eorum contraria secundum quod fuerit possibile interdicet. Quae autem sit ad veram beatitudinem via, et quae sint impedimenta ejus, ex lege divina cognoscitur, cujus doctrina pertinet ad sacerdotum officium etc." It is not to be suggested, of course, that the Papal supremacy was maintained only by this line of argument. Innumerable other arguments could be adduced—the need of one final authority in matters of faith, the analogy of the supremacy of particular bishops in particular "populi" to the supremacy of the one head of the whole Church in the whole Christian people, etc. Vide e.g. Aquinas, *Summa contra Gentiles*, IV. 76.

[2] It is noticeable that in commenting on the passage in Aristotle's *Politics*, IV. (according to the old arrangement of the books VII.) 7, in which Aristotle maintains the superiority of the Greek race, as occupying an intermediate position between the northern races and the Asiatic—*διόπερ ἐλεύθερόν τε διατελεῖ καὶ βέλτιστα πολιτευόμενον καὶ δυνάμενον ἄρχειν πάντων μιᾶς τυγχάνον πολιτείας*—Aquinas seems to take this last expression in the sense of a World-monarchia, as the Middle Ages understood the term; and a long argument is necessary to explain the historical fact that the Greeks had by no means always shown their superiority by the possession of this "monarchia." "Sed contra ista argueret aliquis rationaliter, quod cum ea quae sunt naturalia, semper vel in pluribus eodem modo se habeant, sed Graeci sunt nati principari aliis, non autem illi qui circa Asiam vel Europam; sequeretur quod Graeci semper vel in majori parte principarentur aliis et alii non ipsis, cujus contrarium apparet ex historiis antiquorum: Chaldaei enim et Persae qui sunt circa Asiam multo tempore dominati

with the Papacy at its head, was an integral and necessary part of the political thought of the medieval Aristotelians, the Empire was not. Neither Aquinas nor Egidius Romanus were in any way connected with or drawn towards the Empire; they were Papalists before everything[1]. Hence of the Roman Empire, as existing in their own day, they hardly speak; and though the old Empire provided them with many of their historical examples, they saw in it only a *species* of the *genus* Regnum, not, as the Roman lawyers, a form of State to itself, and even the only State.

Yet, if not through Aquinas or Egidius, the Empire was to enter the new political theories, which had

sunt ipsis et vicinis eorum monarchiam tenentes. Similiter Romani qui circa Europam sunt plurimo tempore dominati sunt Graecis quam econtrario: diuturnior enim fuit monarchia Romanorum quam Graecorum etc." Vide Comment. on *Politics*, VII. Lectio 5, p. 108. Cf. a passage in the *De Regimine Principum*, III. 10, p. 15, where the author gives the duration of the four World-monarchies. The Monarchia of the Assyrians lasted 1240 years, that of the Medes and Persians 233 years, whereas the "monarchia Graecorum in Alexandro incaepit et in eodem finitur, quo dicitur in primo Machab. quod regnavit Alexander annis 12 et mortuus est. Sed quamvis," he adds, "Graeci non habuerunt universale dominium, viguit tamen regnum Macedonum usque ad mortem Alexandri...annis 485."

[1] Egidius moreover was closely connected with France. In 1295 he became archbishop of Bourges, and he had been tutor to Philip the Fair, for whom he wrote his *De Regimine Principum*. The struggle between Boniface and Philip interrupted for a time his good relations with the king, for Egidius was, as we have said, before all things a Papalist. But after Boniface's death they were renewed, as a result, it seems, of Egidius having supported the king against the Templars. Vide Scholz, *Die Publizistik zur Zeit Philipps des Schönen und Bonifaz VIII.*, pp. 37–42 and p. 41, note 31 a. Aquinas also had been intimately connected with the university of Paris and received marks of favour from S. Lewis. His *De Regimine Principum* is dedicated to the king of Cyprus.

Aristotle's *Politics* for basis. Now Aristotle's "State" is the πόλις, but the πόλις entered medieval thought both as the Regnum or Provincia and as the Civitas. If the Civitas was the more obvious translation, there was none the less little difficulty in bringing the Regnum and Civitas under one rubric, as the "State." This was certainly the easier to do in that Aristotle himself had not distinguished between "kingship in a city-state and kingship in a nation[1]." Then, again, we should remember that, while in Italy the "State" might well be a city, outside of Italy there were great and powerful national kingdoms, with which not a few of these Aristotelians were in closer connection than with the city-states of Italy. But, though it is true to say that in general the Aristotelians translated πόλις by Civitas or Regnum almost indifferently[2], we find already in Aquinas the view that the Provincia is a more perfect community, because more self-sufficient, than the Civitas, as the Civitas itself is more self-sufficient than the Vicus[3]. This line of thought is more prominent

[1] Vide Newman, *Politics of Aristotle*, vol. IV. p. 11.

[2] In his Commentary on the *Politics* the "State" is almost always, if not always, Civitas; but even in his *De Regimine Principum*, where it is especially the "regni originem et ea quae ad regis officium pertinent" (vide "Argumentum operis," p. 1), of which he writes, we frequently have the Civitas mentioned along with the Regnum or Provincia, without any idea of a distinction between them—e.g. I. 14: "Institutio civitatis aut regni ex forma institutionis mundi convenienter accipitur." So too in Egidius, who, even more distinctly than Aquinas, sees in the Regnum a more perfect form of community than the Civitas.

[3] Vide *De Regimine Principum*, I. 1, p. 1 verso: "Cum autem homini competat in multitudine vivere, quia sibi non sufficit ad necessaria vitae si solitarius maneat, oportet quod tanto sit perfectior multitudinis societas, quanto magis per se sufficiens erit ad necessaria

in Egidius Romanus[1] than in Aquinas; it was only a small step further to see the culmination of this hierarchy of States in a universal Imperium, the finally most self-sufficient and perfect community.

In the third book of the *De Regimine Principum* by Aquinas, which is regarded as unauthentic, the Empire is viewed rather differently. The author distinguishes four kinds of "dominion"—the "sacerdotale et regale dominium," the "regale dominium" (under which the "imperiale dominium" is included), the "politicum

vitae. Habetur siquidem aliqua vitae sufficientia in una familia domus unius, quantum scilicet ad naturales actus nutritionis et prolis generandae et aliorum hujusmodi; in uno autem vico, quantum ad ea quae ad unum artificium pertinent; in civitate vero, quae est perfecta communitas, quantum ad omnia necessaria vitae; sed adhuc magis in provincia una propter necessitatem compugnationis et mutui auxilii contra hostes: unde qui perfectam communitatem regit, id est civitatem vel provinciam, autonomasice rex vocatur: qui autem domum regit, non rex sed paterfamilias dicitur."

[1] Vide *De Regimine Principum*, III. Part I. chap. 5, pp. 411–2: "Possumus autem triplici via ostendere, quod praeter communitatem civitatis, utile est humanae vitae statuere communitatem regni." In the first place "ex parte sufficientiae vitae"—"Quare sicut utile est vitae humanae in eadem civitate congregari diversos vicos, ut facilius habeantur quae requiruntur ad vitam: sic utile est civitates plures congregari sub uno principatu aut sub uno regno, ut facilius et melius sibi invicem subveniant quantum ad ea quibus indigemus in vita." Secondly, the legislator must aim, not merely at supplying the corporal wants of the citizens, but at making them live "secundum legem et virtuose." "Si constet de principe quod juste regat et quod non convertatur in tyrannum, expedit civitatibus propter virtuose vivere et propter corruptionem perversorum congregari sub uno regno; quod si tamen," he adds however, "princeps tyrannizare vellet, quanto minorem haberet potentiam, tanto magis esset expediens civitati." Thirdly, the kingdom, which is "quasi quaedam confederatio plurium civitatum," is better calculated to sustain hostile attacks—"propter faciliorem defensionem et tuitionem utile fuit ex pluribus communitatibus politicis constituere communitatem unam regni."

dominium" and the "oeconomicum dominium[1]." The last is not touched upon subsequently[2], and, actually, he makes a distinction between the "regale dominium" and the "imperiale." The "dominium sacerdotale et regale" belongs to the Pope, as vicar of Christ, who was both Priest and King; while the Imperium itself—the universal "monarchia"—the author holds to have descended from the Assyrians, Medes and Persians, Macedonians and Romans, as a fifth "monarchia," to Christ. Thus Constantine only surrendered into the hands of Christ's vicar what was due to him long since. We have met this identical view before in Bartolus himself, and we shall later have to consider it more closely. For the moment we note that, though the "potestas imperii ex judicio papae dependet," the "imperiale dominium" is still treated as to some extent a class of "dominium" to itself, though in general it is grouped under the heading of the "regale dominium." So far as the Empire is universal, the "imperiale dominium" is said to be superior to the "regale dominium," though for another reason, which is not mentioned, it is inferior[3]. Later it is placed between the "regale dominium" and the "politicum dominium[4]." The distinction between these two rests upon Aristotle's[5] distinction between the two forms of

[1] Vide chaps. 10 and ff.

[2] Since of course the "oeconomicum dominium" is not a species of *political* dominion at all. The idea of the "oeconomicum dominium" is derived from Aristotle, *Politics*, III. 14—*ὥσπερ γὰρ ἡ οἰκονομικὴ βασιλεία τις οἰκίας ἐστίν, οὕτως ἡ βασιλεία πόλεως καὶ ἔθνους ἑνὸς ἢ πλειόνων οἰκονομία.*

[3] Vide *De Regimine Principum*, III. 12, p. 15.

[4] Ibid. 20, p. 17 verso.

[5] Vide Aristotle, *Politics*, III. 14 and 15.

kingship, into which he resolves his original five, *ἡ Λακωνικὴ βασιλεία* and *ἡ παμβασιλεία*—the distinction between a king *κατὰ νόμον* and a king *κατὰ τὴν αὐτοῦ βούλησιν*. The latter alone is truly a king[1]. This distinction is naturally commented upon in Aquinas' Commentary on the *Politics*[2], and passed into general currency among the Aristotelian political theorists. It represents the distinction between a king, who is above the law, and an officer of state, who is the creature of law. Thus our present author sees the "politicum dominium" in the office of the Roman consuls or the "rectores civitatum" of Italy. The "imperiale dominium," then, resembles this "politicum dominium" in its generally elective character and its occasional examples of hereditary succession or usurpation. But it resembles the "regale dominium" with regard to jurisdiction, coronation and its "arbitraria potestas" above the law.

This may be ingenious, but it is not a very valuable theory of the Empire, nor does it really find a place for the Empire in the analysis of "dominia," which the author undertakes. And yet this continuation of the

[1] Ibid. chap. 16.

[2] Vide *Comment. on Arist. Politics*, III. Lectio 13, p. 47 verso: "In prima dicit quod fere duae sunt considerandae species monarchiae regalis, ad quas aliae aliquo modo reducuntur....Una est Laconica, in qua principatur aliquis secundum legem. Alia est regnum. Laconica autem differt a regno, quia in Laconica rex principatur secundum legem. Item non est dominus omnium. Sed in regno principatur secundum virtutem, et est dominus omnium." Cf. on *Politics*, III. Lectio 15, p. 49 and on *Politics*, I. Lectio 1, p. 1 verso: "Civitas autem duplici regimine regitur, scilicet politico et regali. Regale quidem est quando ille qui civitati praeest habet plenariam potestatem. Politicum autem regimen est quando ille qui praeest habet potestatem coarctatam secundum aliquas leges civitatis."

unfinished treatise of Aquinas is very interesting and in many points original, if it has not the consistency and logical precision that distinguishes Aquinas' own work. Whether it represents what Aquinas himself would have written, had he completed his work, must, of course, be doubtful. For us it has a distinct value. It shows how far medieval thought, with regard to the Empire, was from being hide-bound within one circle of ideas, and secondly the very real difficulty which faced the men of this period in fitting in the Empire both with the new political conceptions and with the facts which surrounded them—a powerful Papacy, powerful kingdoms, and a weak Empire with a great past and still great claims. Medieval political theory could not be constant, because there was on the one side, at least since the eleventh century, a continued influx of new thought; on the other side, a continual change in the external political conditions, which political thought in every age must, at any rate in part, reflect.

We shall illustrate this still better, if we turn to the work of a man, who, while deeply imbued with the new political philosophy, was, unlike the writers whom we have just been considering, what may properly be called an Imperialist, though at the same time in no sense anti-Papal. The work is the treatise of Engelbert, Abbot of Admont[1], *De Ortu et Fine Romani Imperii*[2], written in

[1] There is some account of his life in Riezler, *Die literarische Widersache der Päpste zur Zeit Ludwig des Baiers*, pp. 159 and ff. The date of his death is given as 1331 (p. 162). His treatise, *De Regimine Principum*, which according to Riezler (p. 162, note 4) was printed in the middle of the eighteenth century, I have not been able to find.

[2] In Goldast, *Politica Imperialia*, pp. 754–73.

the early years of the fourteenth century, during the reign of the Emperor Henry VII[1].

Engelbert, in the preface to his work[2], tells us that he had been sitting talking with some friends, and that the conversation had turned upon the condition of the Roman Empire. Some said that its end must be near, failing as it was both in its rights and power; others that, as it began in illicit and unjust conquest of other peoples, so it, in its turn, must fall before the encroachments of other kingdoms. He thought over these things, and, at the request of some of his friends, composed his treatise[3].

[1] In chap. xvi. p. 765, he mentions "Henricum hujus nominis septimum, qui nostro tempore ad imperii clavum sedet."

[2] Vide p. 754: "Consedentibus et colloquentibus mecum aliquando quibusdam familiaribus, viris prudentibus ac maturis, contigit inter cetera Romani imperii, sive regni, et status ipsius fieri mentionem: quibusdam asserentibus, in tantum jam ipsum imperium sive regnum in suis juribus et viribus defecisse, quod verisimile esset in brevi ipsum in totum deficere et cessare oportere: aliis dicentibus, quod sicut a principio sui ortus Romanum imperium illicite et injuste regna mundi et populos diversarum nationum et gentium subegisset armorum violentia et bellorum: ita et ipsum Imperium jamdudum et quotidie deinceps a diversis regnis et principatibus et nationibus impugnandum et imminuendum esse donec in brevi totaliter deleatur. Hac ergo hincinde collocutione et collatione habita, ab aliquibus tunc praesentibus rogatus, et consideratione ipsius rei etiam incitatus, subsequens opusculum de ortu, progressu et fine regnorum, et praecipue regni seu imperii Romani, adjunctis rationibus et authoritatibus ac exemplis ipsam materiam contingentibus, composui et collegi, credens legentibus nonnullum solatium, neque id inutile ex istius materiae indagine ac notitia posse provenire."

[3] It is curious to see that, in the preface to an edition of Engelbert's treatise, printed at Bale in 1553, we have a very similar conversation given as the cause of printing the treatise. The writer of the preface was Gaspar Bruschius, an interesting sixteenth century figure, a poet and antiquary, who recalls to Wolfgang, Abbot of Garsten, "his Maecenas," a conversation they had had "de ultimis temporibus ac

Thus the work excellently illustrates the existence of this problem of the Empire and its future. Men are openly discussing its future existence; its justness is doubted and its future despaired of. And it illustrates other sides of our previous inquiries. The treatise, though usually known shortly as *De Ortu et Fine Romani Imperii*, is called by Engelbert himself[1]—*De ortu, progressu et fine regnorum et praecipue regni seu imperii Romani.* The difference is significant. Engelbert is not starting from the "Romanum imperium seu regnum" of the lawyers, as the one political State, but from the *generic* "regnum," of which the Roman Empire is a *species.* Aristotle and Augustine are the foundations of his thought; we shall see that he has by no means always harmonised his Aristotle and Augustine. For the moment, we have only to note that we start from the general history of the Aristotelian "regnum[2]," of which the Roman Empire

mundi hujus fine et de Romani imperii (quod ante mundi finem collabi necesse est) interitu." He is convinced that they are nearing the end, and, from a prophecy of Regiomontanus, he concludes that this is to be about the year 1588.

[1] Vide above, p. 279, note 2.

[2] Vide e.g. chap. VII. pp. 757–8, where we have the Regnum as the culmination of a series of communities, beginning with the Domus. In chap. XII. p. 761, where he is discussing the meaning of "magnitude" as applied to Regna, he gives, on the authority of Aristotle, five species of communities—Domus, Vicus, Civitas, Gens and Regnum—which he contrasts with Augustine's three—Domus, Urbs, Orbis. Where in Aristotle he finds this series of five communities, it would be very difficult to say. Aristotle sees below the πόλις the οἰκία and the κώμη, but nothing above it. Probably Engelbert has merely misunderstood Aristotle's views on the ἔθνος (gens)—they are indeed not altogether easy to understand (vide Newman, *Aristotle's Politics*, vol. I. p. 39, and III. p. 346, note 2). Engelbert refers to Book IV., but he might well be referring to Book VII. (which is IV. acc. to the modern order) where

will afford the chief examples, because it is the special subject of the treatise.

Having proved from Aristotle the justness of "dominium" and its conformity to nature[1], Engelbert copies from S. Augustine some words of Justin[2], to prove, aided by other references to Cicero, Macrobius and Valerius Maximus, the original innocence and justness of all Regna. Such was their origin; their subsequent history is a falling away from this primitive excellence.

Taking Assyria as the earliest "of the very great kingdoms of the world," he holds, on the authority of Justin, that Ninus was the first to seek unjust dominion[3].

Aristotle is discussing the proper size of the πόλις. Vide chap. 4—ὁμοίως δὲ καὶ πόλις ἡ μὲν ἐξ ὀλίγων λίαν οὐκ αὐτάρκης (ἡ δὲ πόλις αὔταρκες), ἡ δὲ ἐκ πολλῶν ἄγαν ἐν τοῖς μὲν ἀναγκαίοις αὐτάρκης, ὥσπερ ἔθνος, ἀλλ' οὐ πόλις· πολιτείαν γὰρ οὐ ῥᾴδιον ὑπάρχειν· τίς γὰρ στρατηγὸς ἔσται τοῦ λίαν ὑπερβάλλοντος πλήθους, ἢ τίς κῆρυξ μὴ Στεντόρειος; Of course there is nothing whatever in Aristotle's words here or elsewhere about the πόλις leading up to the ἔθνος, as the less to the more self-sufficient, nor any idea of the ἔθνος as a more "perfect" community than the πόλις. On the contrary Aristotle says that, as the too small πόλις will not be independent, and so properly not a πόλις at all, so the too large πόλις will indeed be independent as regards the necessaries of life, but independent as an ἔθνος, not as a πόλις. The ἔθνος is excluded, from its size, from the possibility of a "constitution," and so cannot be a "State." Still, Engelbert may easily have interpreted this into the idea of the Gens as above the Regnum. But whether he did so or not, it is important to note that he himself adopts neither of the two series of communities, which he gives on the authority of Aristotle and Augustine. Throughout his treatise he adopts the quadruple series of Domus, Vicus, Civitas, Regnum, with the Vicus sometimes omitted, until finally, as we shall see, he caps the series with a universal Imperium. For Augustine's series vide *De Civ. Dei*, XIX. 7.

[1] Vide chap. I. p. 754.

[2] He borrows the reference, as most, if not all, his history, from Augustine. Vide *De Civ. Dei*, IV. 6.

[3] Vide chap. IV. p. 756, and Augustine, *De Civ. Dei*, IV. 6.

As regards Rome, he seems to distinguish three periods —that of the kings[1], that from the expulsion of the kings to the end of the Republic[2], and that of the Empire[3]—in each of which deterioration followed a good beginning.

The general aim of all kingdoms is felicity, which some men make to consist in virtue, others in pleasure[4]. Now, the felicity of the kingdom depends on no other causes than the felicity of man. Thus, adopting Augustine's well-known comparison between the "duos homines, unum mediocrem statu suo et rebus, alium vero praedivitem et magnum statu et rebus[5]," he finds the felicity of the kingdom to consist in freedom from want, trouble and fear, or affirmatively in sufficiency, tranquillity and security[6], all of which are included in the term Peace[7]. He shows that the large kingdom is better adapted to securing this felicity than the small,

[1] Vide chap. v. pp. 756–7.

[2] Vide chap. vi. p. 757.

[3] Ibid. ad fin. and cf. chap. xx. p. 770.

[4] Vide chap. vii. pp. 757–8.

[5] Vide Augustine, *De Civ. Dei*, iv. 3.

[6] Vide chap. ix. p. 759.

[7] Vide chap. xiv. p. 763: "Sciendum itaque quod licet superius distinguendo felicitatem per partes suas dictum sit, quod felicitas regnorum et regum consistat principaliter in tribus, scil. in bonorum regni sufficientia sine indigentia, et tranquillitate sine turbatione, et in securitate sine timore: omnia tamen ista sub una ratione et sub uno nomine pacis includuntur, quae est finis ultimus et principalis, ad quem tendunt omnes hominum communitates, parvae et magnae, majores et maximae, ut puta, communitas domus, communitas vici vel villae, communitas et societas gentis et regni, sicut dicit Augustinus 19 lib. de Civ. Dei. Pax enim est finis, propter quem omnis hominum communitas et societas est constituta: et forma secundum quam regitur, et ratio sive causa propter quam durat et conservatur, et functus in quo complete felicitatur." Vide Aug., *De Civ. Dei*, xix. 11–14, espec. 12.

though, with Augustine, he maintains the necessity of justice, if the kingdom is to be something more than "a fair thievish purchase[1]." The large kingdom is just "de facilitate," not "de necessitate." The small kingdom is not necessarily less just, but justness does not constitute the whole of felicity, though essential to its complete realization. Justice requires sufficiency and security for its execution, and these are more easily secured in the larger kingdom; but if they can be procured in the small kingdom, it may be preferable[2]. Whether the kingdom be just or not depends on two conditions[3]: the quality of its acquisition—of which

[1] Vide chap. XIII. pp. 761–3.

[2] Vide chap. XIII. p. 762, where he has just quoted Augustine's words on the "magna latrocinia": "Ex hoc etiam ulterius patet, quod si Romanum imperium orbem terrae et ejus dominationem obtinuit et tenet sola potentia, sine justitia, tunc jam non erit imperium, sed improperium, et non patrocinium, sed latrocinium orbis. Utrum ergo regni magnitudo faciat ad ipsius justitiam, ita ut ideo sit et dicatur regnum justum, quia magnum, sicut ille pirata arguebat et opponebat Alexandro, et per consequens regnum parvum ideo non possit esse justum, quia parvum, ad hoc solvendo dicimus, quod nullum regnum ideo est vel erit de necessitate justum, quia magnum, sed de facilitate....Manifestum est igitur ex praedictis omnibus, quod justitia per se operatur ad felicitatem regum et regnorum: magnitudo vero potentiae et regni, secundum dilationem et amplitudinem ipsius, cooperatur ad felicitatem, non per se, sed per accidens, scilicet mediante amore et diligentia justitiae in regnante. Parva vero regna, licet possint esse justa, non tamen propter hoc statim felicia, quia justitia non est tota felicitas, sed potior pars felicitatis regum et regnorum, cum justitia requirat sufficientiam et securitatem ad sui executionem. Parva vero regna non possunt esse sibi ex se sufficientia nec secura, nisi bonitas vicinorum regnorum praestet eis sufficientiam, et aequitas ipsorum concedat ipsis securitatem. Ubi vero parva regna ex se possent gaudere sufficientia et securitate, ibi esset melius habere regnum parvum et quietum, quam magnum et latum, et semper debile et infirmum etc."

[3] Vide chap. X. pp. 759–60.

he distinguishes three kinds, election as in the Empire, succession as in other kingdoms, and occupation—and the quality of its administration. While he thus vindicates the Roman Empire's just acquisition of Empire, either through conquest in a war, or testamentary disposition, or voluntary subjection, and its just administration, he argues that, on the other hand, neither he, who has acquired his kingdom justly, but administers it unjustly, nor he who has acquired it unjustly, but rules it justly, can be called a just king[1]. The question then remains, whether that peace, which is the end of all human communities[2], be best attained in one universal "monarchia" or in single and independent kingdoms. His treatment of this question is very detailed. He gives in the dialectical manner the arguments for and against, and finally the "solutio" of the objections raised against a "world-monarchia." The question is so pertinent to our inquiries, and his treatment of it so significant, that we shall first attempt, as briefly as possible, to give an analysis of the most important arguments on either side and of the "solution."

In favour of a universal "monarchia" it is argued[3] that it best fulfils the natural tendency to unity, which "art" imitates in single kingdoms and should consequently follow in "the whole multitude of kingdoms." For as the "commune bonum" is preferable to the "bonum singulorum" and the "res publica" to the "res privata," and as the lesser good of the Domus leads up to the greater good of the Civitas, and the

[1] Vide chap. xi. pp. 760–61. [2] Vide chap. xiv. p. 763.
[3] Vide chap. xv. pp. 763–5.

lesser good of the Civitas to the greater good of the Regnum, so the lesser good of many kingdoms must lead up to the "bonum commune omnium gentium et regnorum" in "one natural kingdom and Empire." He then adopts from Augustine Cicero's definition of "respublica" as the "res populi," and of the "populus" as "multitudo hominum communi consensu divini et humani juris sociata in unum," and argues that there is but one true "jus divinum," that is "the one true cult of the one true God," but one true "jus humanum," that is the canons and laws consonant to the Divine Law, but one "consensus" in this Divine and human Law, that is the Christian faith, and but one people, that is the Populus Christianus "fide consentiens in illud jus divinum et humanum," and therefore one only "respublica" of the whole Christian people. "Ergo de necessitate erit et unus solus princeps et rex illius reipublicae, statutus et stabilitus ad ipsius fidei et populi Christiani dilationem et defensionem." And so, he concludes, Augustine holds that there can be no true Empire outside the Church, however de facto there may have been Emperors who were outside both it and Christianity. Further he argues that the existence of a universal "monarchia," above all differences of race, tongues and laws, is necessary to preserve the concord of the world and is in the likeness of God's rule over the universe. This "world-monarchia" is not a spasmodic or fortuitous occurrence, but the continual result of God's providence, working through nature and human art and reason; it may be traced from the Assyrians to the Babylonians, thence to the Medes and Persians, to Alexander and his successors, "ever

fluctuating hither and thither" till it came to Antony and Cleopatra, and so, after the battle of Actium, to Octavian, the first "monarcha Romanorum."

We then have the arguments against a "monarchia[1]." It is argued that it is unnecessary to human felicity; for just as many households can exist peacefully and separately without forming a Vicus, many Vici without forming a Civitas, so there is no necessity for the single kingdoms to form one Empire, which is the less quiet as it is the greater—"quale nunc est et semper fuit regnum Romanorum." The Roman Empire was and is always troubled by wars and rebellions; hardly ever were the gates of the temple of Janus shut; the greater number of Roman Emperors have died violent deaths; and the Roman Empire has been the cause rather of disorder and war than of peace. The Roman Empire has therefore been "in vain," because it has not attained its end, while we see kingdoms, which are independent of it, living at peace with other kingdoms, whether dependent or independent of the Empire. The same might hold good of all kingdoms, if there were no universal Empire. Besides, there are differences of race, tongues, manners and laws, and as the true king governs according to the written law, but also according to his will or the unwritten law, how can there be one king for all diversities of peoples, each with their different customs? Nor is there one only Respublica or Populus, for Jews and Gentiles can have no place within the Christian Republic or People. Further, the Roman Empire has already in certain cases withdrawn its boundaries; while many kingdoms,

[1] Vide chap. xvi. pp. 765–6.

such as France, England, Spain and others, claim to be de jure independent of it. If they, why not others?

Before coming to the "solutio," Engelbert distinguishes[1] between the perfect felicity of the next life and the comparatively imperfect felicity of this life. All men aim at felicity, and, in order to obtain it in this life, human imperfection needs the subordination of the less perfect under the more perfect—the wife and family under the rule of the husband, the household itself under the Civitas, the Civitas under the Regnum, and finally, therefore, the Regnum under the culminating Imperium—"in cujus felicitate, tanquam universali et pro tanto una et ultima ac optima, consistit salus et felicitas omnium."

Passing now to the "solutio[2]," he maintains that it is better and juster that all kingdoms and kings should be subject to one Christian Empire and Emperor, since it were monstrous if the Christian Republic were to have more than one head. Here on earth an Empire is necessary to maintain the peace and concord of the world, as also for the defence and propagation of Christianity. As to the Roman Empire having been "in vain," he answers that, though in the next world all "praelatio" and "potestas" will cease, we cannot expect perfect security and quiet in this world. The felicity of the Regnum here on earth consists, not so much in the fact of being in peace, but in continual striving for peace and so deserving the eternal peace. It must strive for what it can obtain according to human imperfection. And though there may be some

[1] Vide chap. XVII. pp. 766–7.
[2] Vide chap. XVIII. pp. 767–9.

kingdoms which do not recognize the superiority of the Empire, the Empire is still necessary, that the Church and Christianity may, under one head, present a united front before their enemies and rebels. Nor, because some kingdoms, like France, may be specially exempt by privilege, does it follow that all should be—"privilegia paucorum non facit legem universalem." Otherwise it will not be exemption from, but the destruction of, the Empire—that falling away of the kingdoms from the Empire and of the Churches from the Apostolic see, which is to be the forewarning of the advent of Antichrist. This it is that they are hastening, who "zealously give their mind to the overthrow and dismemberment of the Empire." As for the arguments adduced from the differences of race, tongues, manners and laws, he answers that what may be true of the king, is not true of the Emperor, who is above the king. Law is divided into "jus naturale," which is the "jus commune omnium gentium" and the "jus positivum," which varies according to diversities of race and manners. Now all races use the "jus naturale," and those parts of Roman Law which are applicable to all races and kingdoms. Therefore it is proper and necessary that they should all obey the one Roman Empire, both for the preservation of the internal concord of Christendom and for the protection of the Christian kingdoms against the infidels. For the infidels also are bound by the "jus gentium" not to harm others and to respect the rights of others, and so may legally be coerced by the Emperor. Jews and Gentiles do not make a part of the Christian Republic or People, but they share, as men, in the "jus naturale" and "jus

gentium," and are subject to the Empire. Finally Engelbert disposes of the alleged examples of the retreat of the Imperial boundaries.

Engelbert's treatise shows us how the Empire was able to find a place in the new political thought, the basis of which was Aristotle's *Politics*. We saw that for the Aristotelian the State, the πόλις, was the Civitas or Regnum, but that before long the Regnum came to be considered as a more perfect and self-sufficient community than the Civitas. In the same way, Engelbert began by taking the Imperium as a *species* of the Regnum; he concluded by placing the Imperium above the Regnum, as the finally most perfect and self-sufficient State, completing the Regnum, as the Regnum completes the Civitas. That this process involved "confused thinking" is indubitable[1].

But we may consider this a little more closely. To begin with, when Egidius Romanus completes the Domus and Civitas with the Regnum, and when Engelbert, going a step further, completes the Domus, Civitas and Regnum with the universal Imperium, they do not imply that the Civitas in the one case, or the Regnum in the other, cannot be "States," but that they are less perfect, less self-sufficient communities, fulfilling their end better, if completed by a more perfect and self-sufficient community. In other words they are better fitted to be Communes or Provinces, though they can be States. The confusion is obvious. The very fact that the series of communities was made to start in the Domus, made it desirable that the conception of the State—and all it implied according to the new

[1] Cf. Gierke, *Political Theories of the Middle Age*, pp. 96–7.

political theories—should be reserved for one, that is to say the highest, in their series of communities. The line between "State" and "not-State" should have been drawn either below Regnum, or if they carried the series to its conclusion in the Imperium, below Imperium. They did not draw the line, and consequently the theory of the State, as distinct from the Province or Commune, was still to some considerable extent in the making. But we must remember that fact, as well as theory, was confused. In the feudal order of the thirteenth and fourteenth centuries there was not the sharp distinction, which we draw now, between State, Province, Commune. Cities of the same magnitude might actually be States in Italy and Communes in France.

If, then, the Empire entered political thought under the guidance of Aristotle, it did so as the highest and most perfect and self-sufficient community. Engelbert was by no means unique in this line of thought. We find it in Papalist writers, who had no prejudice in favour of the Empire. Now Engelbert *was* prejudiced in favour of the Empire—and therein lies a point of great importance. Engelbert was pleading for the existence of an Empire. The result is that, if we look a little closer at his treatise, we see that his Imperium was, in fact, something besides the highest, completest, most self-sufficient state of the Aristotelians.

In the first place we may notice that very curious discussion in which Engelbert argues from the diversity of race, laws, tongues and customs for the necessity of a supreme Emperor, in order to preserve the concord of kingdoms, where they are not separated one from

another by naturally inaccessible boundaries—otherwise, "providentia divina super ordinando et conservando statu regnorum mundi erit insufficiens et incompleta[1]." Then in the arguments, which he adduces against a "monarchia," it is argued that as, according to the Philosopher, he is not "simpliciter" to be called king, who rules merely according to written law, and not at all according to his will and reason, there cannot be one Emperor or king for all the different races, since there cannot be one law, whether written or unwritten, for the different races "secundum diversas linguas et patrias et patrios mores ac ritus[2]." Then, finally, in

[1] Vide chap. xv. p. 764: "Sed sicut superius dicebatur regna mundi sunt diversa ad invicem, secundum diversitatem unius cujusque patriae et linguae et morum et legum. Haec autem diversitas gentium et regnorum, ubi non est limitata et separata magnis montibus et fluminibus locisve aliis inviis ac desertis, ut unius gentis ad aliam non facilis sit accessus, est causa et occasio adversitatis et discordiae, gentis contra gentem, et regni adversus regnum. Ergo de necessitate erit aliqua potestas major ac superior, quae habeat authoritatem et virtutem concordandi et concordiam ordinandi et conservandi inter regna et gentes diversas adinvicem et adversas: aut providentia divina super ordinando et conservando statu regnorum mundi erit insufficiens et incompleta....Ergo ex divinae providentiae ordinatione erit de necessitate aliqua una potestas et dignitas suprema et universalis in mundo, cui de jure subesse debent omnia regna et omnes gentes mundi, ad faciendam et conservandam concordiam gentium et regnorum per totum mundum."

[2] Vide chap. xvi. p. 765: "Praeterea, ut dicit Philosophus quarto Politicorum, rex est lex animata etc. Exinde sumitur differentia inter regnum regis et regnum politicum; quia politia regit populum secundum legem scriptam, rex vero regit regnum secundum utramque legem, scilicet scriptam et non scriptam; quia, ut dicit Philosophus ibidem, non est simpliciter rex dicendus, qui non regit nisi secundum legem scriptam, et nihil secundum voluntatem et rationem propriam. Sed lex sive scripta, sive non scripta, non potest esse una diversis gentibus secundum diversas linguas et patrias et patrios mores ac ritus.

the "solutio" this is answered as follows: it is true that a king must rule according to the particular positive laws of each kingdom, which reflect its particular characteristics of race, language, customs; but there is also Natural Law—the law common to all nations—and those parts of Roman Law, which can with justice and utility be applied to all nations, both of which laws all nations are bound to observe "intra se," as well as in their dealings with their neighbours. This applies equally to Christian and Pagan nations, for Pagans, "in quantum homines," are subject to the dictates of the "jus gentium," i.e., not to harm others and to respect their rights, and can therefore be coerced "per imperium[1]."

Ergo nec unus rex vel imperator potest esse diversis gentibus secundum linguas vel patrios mores ac ritus patrios adinvicem diversificatos."

[1] Vide chap. XVIII. p. 768: "Ad quartum quod objiciebatur, quod non est possibile nec conveniens gentibus a se diversis, secundum diversas linguas ac patrias et mores et ritus patrios, esse unam legem; ergo nec unum regem; et per consequens ergo non est conveniens neque utile neque justum omnibus gentibus praeesse unum imperatorem etc.—Respondeo, quod alia ratio attenditur circa hoc in rege et alia in imperatore, qui est super reges; quia sicut lex (generaliter sumendo nomen legis) distinguitur in jus naturale, quod est jus commune omnium gentium, et in jus positivum, quod variatur secundum diversitatem gentium, juxta diversas patrias et mores ac ritus patrios; ita singulae gentes singulos habent reges unamquamque gentem, secundum suas leges proprias convenientes suae patriae et moribus et ritibus ipsius, regentes et gubernantes. Omnia vero regna simul secundum jus naturale commune omnibus gentibus et regnis, vel secundum ea quae ex ipsis legibus Romanis possunt omnibus gentibus et regnis juste et utiliter convenire, et quae omnes gentes et regna omnia tenentur intra se et ad vicinos et ad extraneos observare, non solum possibile, sed etiam necessarium et utile est, uni Romano imperio obedire, vel ad pacem et quietem uniuscujusque regni et gentis intra se simul et extraneos observandum, ut in regnis Christianis, vel saltem ad ipsa regna Christiana ab ipsis non invadenda nec pertur-

We have noticed above the difference between the "regnum regis" and the "regnum politicum," as it appears in Aquinas and his continuator, and have traced it back to Aristotle himself. The problem of the relation of the ruler to law, as presented by Aristotle, is to be compared with the problem, which had occupied the attention of the lawyers for many years before Aquinas, whether the Princeps, who is "solutus legibus," is free to act merely at caprice. This had in general been answered negatively, for not only is the Princeps bound by the higher Laws of God, Nature and Nations, but also, though he is not bound by, it is still right and proper that he should rule according to, his own laws. In the arguments, which Engelbert adduces against a universal "monarchia," he expresses the difference between the "regnum regis" and the "regnum politicum" by saying that the true king rules, not only according to the unwritten law, but also according to his will and reason. By will and reason Engelbert does not mean mere caprice[1], but an unwritten law consonant

banda, ut in regnis infidelium et paganorum, quae (quantum ad hoc) Romano imperio subesse tenentur; quia non solum est jus Christianorum, sed etiam jus gentium et omnium hominum (in quantum homines) jus suum unicuique tribuere et servare et alterum injuste non laedere; ad quod Christianis regnis observandum, possunt et debent ipsi infideles et pagani de jure per imperium coherceri."

[1] This is clear if we turn to Aquinas, Comment. on *Politics*, IV. Lectio 4, p. 57, whence the expression "voluntas et ratio" seems taken. Aquinas is commenting on the passage in Aristotle's *Politics* IV. (acc. to the modern order VI.) chap. IV., where Aristotle says that there can be no πολιτεία, where the Law is not supreme. "Sed aliquis argueret contra illud quod dicit, quod ubi leges non praevalent non est respublica, quia monarchia regalis politia est, tamen non est principatus secundum legem, sed secundum voluntatem et rationem principantis. Ad hoc posset aliquis dicere breviter, quod quaedam

to the customs of each particular kingdom; otherwise his argument that there cannot be a true king over all kingdoms with their discordant customs would not apply. And, thus, in the "solutio" of these arguments against a universal "monarchia," this particular argument is so stated as merely to express the view that there cannot be one law for all the diverse kingdoms, with their diverse tongues and customs, and therefore no one Emperor above these kingdoms. To this he answers, as we have seen, that "alia ratio attenditur circa hoc in rege et alia in imperatore, qui est super reges." He distinguishes between the "jus naturale"—"quod est jus commune omnium gentium"—and the "jus positivum," which varies from race to race, and compares this distinction to that between a single race, governed by a king "secundum leges proprias convenientes suae patriae et moribus et ritibus ipsius," and all nations which together observe the "jus naturale" and "ea quae ex ipsis legibus Romanis possunt omnibus gentibus et regnis juste et utiliter convenire." And from this he argues that the obedience of all nations to the Roman Empire is not only possible, but necessary, both for the

est politia monarchicha in qua unus dominatur. Alia est politia poliarchicha in qua plures principantur. In politia poliarchicha non corrupta principatus est secundum leges et de tali loquitur Aristoteles, in alia non. Aliter dicendum est et melius quod in omni politia principatur aliquis secundum aliquam regulam, quam dicimus legem. Sed in quibusdam illa regula est interior existens in voluntate et ratione, in quibusdam est extra in scripto. In monarchia regali, monarcha habet istam regulam quae est in voluntate et ratione ejus, in politia poliarchicha est extra in scripto. Quod ergo dicebatur, quod ubi est politia ibi est principatus secundum legem, verum est, vel intrinsecam, vel scriptam. Hic autem intelligit de scripta; et ideo non multum differt a prima, sed eam declarat."

internal and external peace of Christian nations and for their defence against the infidels, who "in quantum homines" are bound by the "jus gentium," and so subject to the Empire.

Now leaving aside the case of these infidels[1], one cannot fail to be struck by this argument. It amounts to this: as every particular kingdom has its particular laws, over which stands a particular king, so all kingdoms, having common laws, form an Empire, over which stands a universal Emperor. And note what these common laws are—the Law of Nature and those parts of Roman Law which can be applied to all races. That is to say, the Emperor is the head of a universal State with universal laws, above both particular kings and particular laws. The universal Empire is the Roman Empire; the universal law is, in part, also Roman.

This is a very different conception of the Empire from that which we have just been considering—the Empire as the highest, completest and most self-sufficient community. This is not the Aristotelian's Empire. If it is not the civilian's Empire, it is very near it. The Aristotelian's Empire is the highest and most perfect community, in which less perfect communities find their completion. In the passages before us the conception is quite different. The universal Empire and Emperor, with their universal laws, stand in an international position above the particular kingdoms and kings, with their particular laws. The difference between the Empire and the kingdoms is not merely one of degree of perfection, but rather a difference of kind. "Alia ratio attenditur circa hoc in rege et alia in

[1] Vide above, pp. 105–7.

imperatore, qui est super reges." The kingdom is a particular national unit with its own language, race, customs. The *raison d'être* of the Empire is the very fact that there are many such particular national units, and that consequently there must be one international power above them. The kingdoms represent the diversity of race from race, the diversity of their customs as expressed in their diverse laws. The Empire represents the unity of Christendom and even of mankind, as expressed in a common law, which binds them as men, not as members of this or that community.

But the changes in Engelbert's conception of the Empire do not stop here. The Empire was viewed originally as a *species* of the Aristotelian Regnum, and then as something above the Regnum, because more perfect and self-sufficient. We have then seen it approach very near to the lawyer's universal State. But, in his arguments on the question of a universal "monarchia," we have the first sign of change of view, which is obvious in the last chapters of the work. The Imperium as a "State" vanishes, and we return to the old conception of the Empire as the secular government of the Church. It is here that his interpretation of S. Augustine leads him to conclusions, which do not harmonise with the Aristotelian basis of his thought. From Aristotle he gets the conception of the Empire as the most perfect and self-sufficient State; from Augustine he interprets it as a "power" within the Church.

The first point to be noticed is that, in his arguments in favour of the Roman "monarchia," Engelbert

adopts[1] Cicero's definitions of "respublica" and "populus," which Augustine expressly held inapplicable to Rome. Augustine, as we saw, held them inapplicable, because Cicero's definition implied that the Respublica cannot exist without justice, and Augustine refuses to see the possibility of justice in a Pagan Rome—"where man does not serve God, what justice can be thought to be in him[2]?" Now Pagan Rome is a thing of many centuries past: and for Engelbert the very fact that there is a "consensus" in one "jus divinum"—that is to say, "the one true cult of the one true God"—and in one "jus humanum"—that is to say, the Canons and Laws consonant to the "jus divinum"—is a proof that there is but one Christian Republic and People. Therefore there is one only king or prince of that Republic.

[1] Vide chap. xv. p. 764.

[2] "Ita scribit August. 19 lib. de Civ. Dei ex verbis Ciceronis in lib. de Republica, quod respublica est res populi, populus autem est multitudo hominum communi consensu divini et humani juris sociata in unum etc. Ergo ubi est unum jus divinum et humanum, et unus et concors consensus populi in illud unum jus divinum et humanum, ibi erit unus populus et una respublica. Ubi autem est unus populus et una respublica, ibi de necessitate erit et unus rex et unum regnum. Sed est unum solum in toto mundo verum jus divinum, videlicet unus cultus verus veri Dei; et solum unum verum jus humanum, scilicet canones et leges consonae juri divino, quia jus humanum sumit authoritatem et principium a jure divino, et non e contrario. Et est unus solus consensus populi in illud jus divinum et humanum, scilicet fides Christiana; et unus solus populus, scilicet Christianus populus, fide consentiens in illud jus divinum; et per consequens una sola respublica totius populi Christiani. Ergo de necessitate et unus solus princeps et rex illius reipublicae, statutus et stabilitus ad ipsius fidei et populi Christiani dilationem et defensionem. Ex qua ratione concludit etiam Augustinus 19 lib. de Civ. Dei quod extra ecclesiam nunquam fuit, nec potuit, nec poterit esse verum imperium, etsi fuerunt imperatores qualitercumque et secundum quid, non simpliciter, qui fuerunt extra fidem Christianam et ecclesiam."

And so he can maintain Augustine to have held that there can be no true Empire outside the Church, however de facto there may have been Emperors outside both Church and Christianity. Now it is scarcely necessary to say that, neither in Book XIX., nor anywhere else in the *Civitas Dei*, does Augustine hold this view in so many words. He does deny that there can be a State, in the proper sense of the word, where there is not the worship of the true God: in other words he maintains that the true State is a Christian State. On the other hand, he expressly finds a definition of "Respublica," which can be applicable to Pagan Rome, and of which Engelbert takes no notice; and while he extols the felicity of a Christian Emperor, he expressly holds that God gave the Empire to the Pagan Julian, as He did to the Christian Constantine. How it became possible to interpret Augustine, as we see him here interpreted by Engelbert, we have already attempted briefly to indicate[1]. For our present purpose it is sufficient to see that Engelbert *could* read this meaning into Augustine: and that the result of so doing was to bring back the old conception of the Empire as within the Church, as the government and leadership of the Christian Republic and People. Engelbert began, like any other Aristotelian, from the Regnum, as the State. He proceeded, like many other Aristotelians, to advance the Imperium above the Regnum, as a yet more perfect and self-sufficient State. He did not, on the other hand, as Aquinas, argue that finally the Papacy must be above all States, because it directs man to his ultimate end, for the attainment

[1] Vide above, pp. 64–7.

of which the State merely supplies the means. He reverted rather to the older political thought, in which the State had not yet come to exist, in which the bond of human society was the Church or Christian Republic, of which the secular power was one—as he says here the only[1]—government.

Between the two views there is a vast difference, though both were opposed to the development of a theory of the State, in its modern sense. Aquinas did not destroy the State, but placed over it a universal Papacy, which itself came more and more to be invested with the political attributes of a State. The result was to retard the development of the State as an independent and secular "societas perfecta." The State was there, but it could not by itself lead the men who composed it to their ultimate end: that task could be fulfilled only by the universal Papacy, on which therefore every State must be dependent. Engelbert, on the other hand, reverted, as we have said, to a mode of thought in which the very conception of the secular State was wanting: so that the treatise which began with seeking the origin of the Roman Empire in common with all other Regna, saw in its end the destruction of the secular government of the Church—and, with that, of the Church itself.

This becomes quite obvious in the last few chapters, in which he treats of the coming of Antichrist. In Chapter XVIII., which is the "solutio" of the objections urged against the Roman "monarchia," he argues for the necessity of an Empire to insure the unity, defence and diffusion of the Church. Certain kingdoms may be

[1] But later, we shall see, he recognises the two governing powers.

free by privilege, but an Empire is still necessary; for its destruction will be the herald of the coming of Antichrist. The first sign of his coming will be the "discessio" of the kingdoms from the Roman Empire, to be followed by the "discessio" of the Churches from their obedience to the Apostolic see, and lastly of the faithful from the faith. The Church will then be a headless and lifeless body, its members uninfluenced by its twin temporal and spiritual heads[1]. This is repeated in the last few chapters. The Empire and Papacy are the twin heads—the temporal and spiritual—of the Church, of which the faithful are the members; Antichrist can only come when the Church is headless and its members consequently "without motion and

[1] Vide p. 768: "Quod subjectio omnium regnorum respectu imperii non solum ideo est utilis et necessaria ac justa, ut regna per ipsum imperium adinvicem pacificentur et concordentur...sed praecipue ideo justa vel utilis et necessaria est subjectio regnorum ad imperium, ut contra eos qui sunt extra ecclesiam et extra fidem et contra ecclesiam et contra fidem ipsa ecclesia atque fides ad omnibus suis membris, sub uno suo proprio capite concordantibus et unitis, defendatur et ad dilatandum locum sui tabernaculi fines suos faciat longiores. In quo casu et causa nullum regnum Christianum a subjectione et obedientia imperii credimus esse liberum vel exemptum....Sed privilegia paucorum non faciunt legem communem, nec si omnia regna essent libera et exempta ab imperio, ista esset vel dici posset exemptio ab imperio, sed potius peremptio et totalis destructio imperii, qualis futurus est secundum prophetiam Pauli Apostoli, quando, appropinquante tempore adventus Antichristi, veniet discessio primum regnorum omnium ab imperio, deinde ecclesiarum ab obedientia sedis Apostolicae, et ultimo fidelium a fide, sicuti postmodum dicetur. Tunc enim ecclesia sic acephalata et vacante, et membris influentiam suorum capitum in temporalibus et spiritualibus non capientibus et per consequens motu ac sensu gratiae privatis, locum et facultatem habebit deceptio et dominatio Antichristi: unde illi, qui studium et ingenium suum adhibent ad dejectionem et detruncationem imperii, videntur directe festinare ad hoc, ut locus et facultas praeparetur tyrannidi Antichristi."

sense[1]." The "discessio" will begin with that of the kingdoms from the Roman Empire, after which the Empire "deficiet et cessabit in totum." The "discessio" of the Churches will follow, which the spiritual sword, deprived now of the help of the temporal, will not be able to restrain. Lastly will come the "discessio" of the faithful, when there is no longer either secular or spiritual power left to preserve the unity of the Christian faith[2]. The blame rests with the "praelati," both spiritual and secular, and with the "subditi," but most of all with the Roman Emperors themselves, some of whom have rebelled against the Church itself, outside of which, he again repeats, there is not, nor can be, an Empire, while others, through pride, avarice, malice or slackness in the government of the Respublica, have themselves helped to bring about the dismemberment of the Empire. "Therefore the dissolution and destruction of the Roman kingdom or Empire is to be through the falling away of those kingdoms from the Empire, which were formerly coerced and subdued into the one body of this very Empire[3]."

In this account of its dissolution the Empire seems to assume the character both of a world-wide

[1] Vide chap. xxi. p. 771: "...Quia stante adhuc capite ecclesiae in spiritualibus scilicet apostolica sede, et capite in temporalibus scilicet imperio Romano, et stantibus adhuc fidelibus in fide, locum et commoditatem non habebit deceptio et dominatio Antichristi, capitibus praedictis et membris ipsorum ei resistentibus. Cum vero corpus ecclesiae factum fuerit acephalum et per consequens membra singula sine motu et sensu, quantum ad veritatem et unitatem ac firmitatem fidei, tunc locum et effectum habebit adventus Antichristi et malitia ipsius etc."

[2] Vide chap. xxii. p. 771.

[3] Vide chaps. xxii. and xxiii.

territory and of the temporal head of the universal Church. Its end is to be the "discessio" of the many provinces, which it had formerly conquered and reduced into the "unum corpus Romanae reipublicae[1]." Similarly, when Engelbert talks of the Emperors as rebels against the Church, he means, it is perhaps needless to point out, rather the clergy and Pope, than the "communio fidelium," of which the Empire has been called the "caput in temporalibus." And this only makes more evident what we have wished to demonstrate by our analysis of Engelbert's treatise. The treatise is a plea for the Empire. But, as we analyse the treatise in detail, we see that Engelbert's theory of the Empire contains elements drawn from different sources, which are not really harmonised. His Empire is much besides the most perfect and self-sufficing community of the Aristotelian material, which is the foundation of his political theories. It is this characteristic which makes it so interesting and important a work. The treatise shows us how the Empire entered the political theories of the Aristotelians; it also shows us that conceptions of the Empire, based on older political theories, still live on side by side with the new.

[1] Vide p. 772: "...Et ideo a diversis nationibus et gentibus, ut puta a Sarracenis, a Longobardis, a Gothis, a Vandalis, ab Hunnis, a Sclavis et Graecis, et demum a Francis et Hispanis, provinciae imperii seu regni Romani ab imperio sunt distractae, et in principatus et regna per se reversae et redactae, sicut prius ab ipsis Romanis iidem illi principatus et ea ipsa regna debellata et subacta, in Romanas provincias fuerant redacta....Sed per coactionem et bellicam subjectionem regna mundi et principatus et provinciae olim sunt subactae, et compactae quasi in unum corpus Romanae reipublicae....Ergo dissolutio et destructio regni sive imperii Romani futura est per recessum et discessionem illorum regnorum ab imperio, quae prius in unum corpus ipsius imperii taliter coacta fuerant et subacta."

The resemblance between this treatise and Dante's *De Monarchia* has often been noted. We have examined Engelbert's treatise in order to see how the new Aristotelian political theories might be made to support a plea for the Empire; we might with equal propriety have chosen the *De Monarchia*. But there is at least one very important point of difference between Engelbert's position and Dante's. Engelbert's treatise is the result of a quiet, cloistral conversation; his nationality never obtrudes into his work. Dante's is the work of a layman and an exile, who had lived an active, political life; Dante is always a fervid Italian patriot.

Italian patriotism naturally looked back to the past greatness of Italy, when Rome was in truth the centre and mistress of the world. The growth of the north-Italian communes meant the triumph of the Roman element in their population; Roman Law triumphed over Lombard Law; an Italian language, the direct offspring of vulgar Latin, grew up and acquired a stable form in a literature; the Italians became a nation, however disunited—and that nation was a Latin nation. While the lawyers were busy discussing the "Lex Regia," the Roman populace asserted its claim to be the source of the Imperium. The other Italian cities looked to Rome as to their mother-city[1]; it was the proud boast of great Guelph cities like Florence or Perugia that they were "daughters of Rome[2]." The Guelph opposition to the

[1] Vide Pomtow, *Ueber dem Einfluss der altrömischen Vorstellungen etc.*, pp. 4–15; D'Ancona, *Il Concetto della unità politica nei poeti italiani*, p. 7.

[2] Vide Graf, *Roma nella Memoria e nelle Immaginazioni del Medio Evo*, vol. I. p. 21.

Emperors might even appear in the light of a struggle by Italian nationalism against German invasion and conquest.

Dante was a Guelph by birth, but himself he was above party. In his *Divine Comedy* he metes out reward and punishment to Guelph and Ghibelline alike. He is equally severe on those who "oppose" and those who "appropriate" the Empire—the Guelphs with their clerical and French allies and the Ghibellines, who "ply their arts" under cover of the "sacred standard[1]." Dante's political thought contains a fusion of Guelph nationalism and Ghibelline Imperialism, both purged of their party signification.

We can do but scant justice to Dante's political thought in these pages. We are here concerned with but one side of it—and one which, while it receives illustration from every part of his work, we are sometimes apt to overlook. Dante's insistent claim for the independence of the Empire from the Papacy is apt to engross our attention. But we ought to remember that his insistence on the Roman character of this Empire occupies fully as much of his thought[2]. The Empire belongs to the Romans historically and by divine ordination. They conquered the world justly and therefore possess it on a just title; the Roman Empire was the divinely prepared organ of that peace, which is the aim of all human societies, and which was realised in its

[1] Vide *Paradiso*, VI. 31–3 and 100–11.

[2] It is illustrated by the whole of Book II. of the *De Monarchia*, by *Convivio* IV. 4–5, *Epist.* V., VI. and VII. (though, of course, the authenticity of these letters is by no means certain), and by numerous passages throughout the *Divine Comedy*, of which Justinian's speech (*Paradiso*, VI.) may be given as the most striking example.

perfection only once, when, under Augustus, the world was divinely prepared to receive Christianity.

The definition of peace as the "ultimate and principal end, to which all human societies tend," we have seen used by Engelbert as a chief argument for the existence of a universal Empire. This is the Imperialist standpoint—

> "Lo 'mperador con pace
> Tutto 'l mondo mantiene[1]."

Dante, we have said, was not only an Imperialist; he was also an Italian patriot. Like Petrarch[2], he went crying out for peace, and, as in the case of Petrarch, it was more especially peace for his own Italy, disunited and distracted by faction, the prey of tyrants, and with no pilot to guide it amid all these troubles[3]. For to Dante the Emperor was not only the universal pilot[4]; he was, in a special sense, the pilot of Italy[5].

The pilot was found for a while in Henry of Luxembourg, the man who realised Dante's ideal of an Emperor, who, unlike the false Albert, came, prematurely, but

[1] The lines occur in what is perhaps the best known of all the earliest Italian poems—the lament of the Crusader's mistress by Rinaldo d'Aquino. I quote it from the poem as printed by Butler, *Forerunners of Dante*, p. 21.

[2] "Io vo gridando pace, pace, pace." (Vide the last line of the famous Canzone beginning "Italia mia.")

[3] Vide *Purgatorio*, VI. 76–126.

[4] Vide *Convivio*, IV. 4, p. 299: "...Conviene essere uno quasi nocchiere, che considerando le diverse condizioni del mondo, e li diversi e necessari uffici ordinando, abbia del tutto universale e irrepugnabile ufficio di comandare."

[5] "Ahi serva Italia, di dolore ostello,
Nave senza nocchiere in gran tempesta...."
(Vide *Purg.* VI. 76–7.)

as in duty bound, to "straighten Italy[1]." Henry's untimely death shattered Dante's hopes, but not his ideals. The *De Monarchia* is not, as it has sometimes been called, the "swan-song" of the Empire; if the Empire had a "swan-song," Nicolas of Cusa, not Dante, sang it. Indeed, it is as likely as not that the *De Monarchia* was written after Henry's death, even in the last years of Dante's life[2]. His book is not a lament; it is, so far as it here concerns us, an answer to the problem of the Empire and its future. It gives us the Italian answer, just as "Jordan of Osnaburg" and the author of the *Notitia* gave us the German. The Germans claimed the Empire as German historically and by divine ordination; Dante on the same grounds claimed it as Italian. The Germans turned to Charlemagne and the Franks, Dante to Roman history and the great Roman Emperors and heroes. To the Germans the Rhineland was the seat of the Empire, while Italy was but a conquered province; to Dante Italy was the Empire's garden[3] and Rome itself its proper seat[4]. To Dante Henry VII was no German, but Roman Emperor, "Caesaris et Augusti successor[5]," Italy's spouse and

[1] Vide *Paradiso*, XVII. 80–90, XXX. 133–8.

[2] Vide Kraus, *Dante, Sein Leben und sein Werk*, pp. 678–87. He concludes: "Fasst man alle diese Gesichtspunkte zusammen, so wird man sich die Einsicht kaum verschliessen können, dass die Monarchia nach 1317, vermuthlich in derselben Zeit, wie die letzten Gesänge des Purgatorio entstanden, und zwar in Ravenna geschrieben ist."

[3] Vide *Purgatorio*, VI. 105.

[4] Vide *De Monarchia*, III. 10 ad init.

[5] Vide *Epist.* VII. 1 (to Henry VII), p. 409: "Quumque tu, Caesaris et Augusti successor, Apennini juga transiliens, veneranda signa Tarpeia retulisti, protinus longa substiterunt suspiria, lacrymarumque diluvia desierunt; et, ceu Titan peroptatus exoriens, nova spes Latio saeculi melioris effulsit."

Italy's glory[1]. He was the direct successor of Frederick II[2]: Rudolf, Albert, and Adolf, on the contrary, were Germans, who basely refused to do their duty, who paid no heed to the cry of "their Rome," who refused to be Roman Emperors[3]. To Dante the election of Rudolf was no presage of better times, as it was to "Jordan"; in his eyes the Interregnum lasted from Frederick II's death to Henry VII's coronation. For him a German Emperor was an impossibility; an Emperor was Roman, his proper place was in Italy.

Dante does not stand alone[4], however much his towering genius seems to isolate him among his contemporaries. A detailed inquiry into the political thought of the early Italian poets would be of great interest and well repay the study[5]. The poetry of the thirteenth and fourteenth centuries is full of politics, because the poets were for the most part politicians. Italian poetry began in the Sicilian court of the last great Emperor; he and his ministers and courtiers

[1] Vide *Epist.* v. 2, p. 406: "Laetare jam, nunc miseranda Italia etiam Saracenis, quae statim invidiosa per orbem videberis; quia sponsus tuus, mundi solatium et gloria plebis tuae, clementissimus Henricus, Divus et Augustus et Caesar, ad nuptias properat."

[2] Vide *Convivio*, IV. 3, p. 298: "...Federigo di Soavo, ultimo Imperadore de' Romani (*ultimo* dico per rispetto al tempo presente, non ostante che Ridolfo e Adolfo e Alberto poi eletti sieno appresso la sua morte e de' suoi discendenti)...." Dino Compagni, or whoever is the author of the "Chronicle," in the same way regards Henry VII as the direct successor of the Emperor Frederick II.

[3] Vide *Purgatorio*, VI. 97–126, VII. 91–6.

[4] Vide D'Ancona, "La Politica nella Poesia del Secolo XIII e XIV" (in *Nuova Antologia*, January 1867), pp. 30–52.

[5] The three articles by D'Ancona, to which I have referred in the note above (*Nuova Antologia*, Jan., Sept., Dec. 1867), are the only study of any length on this subject of which I know. So far as they go, they are very noteworthy, but they are by no means complete.

were all poets. Thence it passed northwards; the poets were men closely concerned with the active political life of the Italian cities, men who knew at first hand the meaning of exile, tyranny, faction and the other phenomena, which were, in great part, directly due to the practical non-existence of the Imperial authority in Italy. But here such inquiry is not to be attempted. We must pass on briefly to consider Dante's greatest successor, Petrarch; but, in passing, we may note that Cino da Pistoia, the master of Bartolus, whom, as a lawyer, we have more than once had occasion to mention, occupies a very similar position to that of his friend, Dante. He too was an exile, and he too set his public and private hopes on the success of Henry VII[1]; he too, when those hopes were destroyed, saw the dead Emperor

"co' gli altri nel beato regno[2]."

[1] Vide Canzone xv. (in *Rime di Messer Cino da Pistoia*, ed. Bindi and Fanfani), pp. 186–7:

"In uno è morto 'l Senno, e la Prudenza,
Giustizia tutta, e Temperanza intera.
Ma non è morto: ahi lasso! ch' ho io detto?
La fama sua al mondo è viva e vera.
* * * * *
Ma quai son morti, e quai vivono ancona
Di quei, che avean lor fede in lui fermata
Con ogn' amor, si come in cosa degna,
E malvagia fortuna in subit' ora
Ogn' allegrezza nel cor ci ha tagliata."

There is another Canzone by Cino on the death of Henry VII (Canzone xix. pp. 270–4), though this latter one is sometimes ascribed to Dante.

[2] Canzone xv. p. 188:

"Arrigo è Imperador, che del profondo
E vile esser quaggiù, su nel giocondo
L' ha Dio chiamato, perche 'l vide degno
D' esser co' gli altri nel beato regno."

There is no more interesting commentary on Dante's political thought than Petrarch's letters to Charles IV, the grandson of Henry VII. Charles, we know, had resolved definitely to renounce his family policy, to leave Italy and to build up a strong position in Germany, with his Bohemian kingdom as its foundation. No doubt he was right; he had learnt his lesson by experience during the two years which he had passed in Italy, when young, as viceroy to his father, John of Bohemia. But it is easy to understand the intense disappointment of all but the Guelphs, when they saw the grandson of Henry VII come to Italy to be crowned, and hasten back after a single day in Rome—all at the command of a French Pope in Avignon.

The burden of Petrarch's correspondence with Charles IV is—"remember your father and grandfather." "O si in ipsis Alpium jugis," he writes[1], dissuading Charles from leaving Italy after his coronation, "avus tibi nunc paterque fiant obvii! quid dicturos putas? crede illos audias vel absentes.—'Profecisti eximie, ingens Caesar, hoc tuo tot per annos dilato in Italiam adventu et festinato abitu. Refers demum istud ferreum, illud aureum diadema, simul ac sterile nomen imperii. Imperator Romanorum vocitaberis Bohemiae rex solius; qui utinam nusquam esses, ut vel eis altius coacta virtus assurgeret, famesque domestica neglectum aviti cultum patrimonii suaderet.'" Otherwise what need has he of being Roman Emperor[2]?—"Nihil

[1] Vide *Epist. Famil.* XIX. 12 (ed. Fracasetti), vol. II. p. 547.

[2] Vide XXIII. 21 (vol. III. pp. 245–6): "Tu, quod olim dixi, ad imperium natus es, amplum excelsumque opus: illud age fideliter,

est quod imperii majestas ac providentia atque justitia, et his viribus armata, non possit[1]." If he is Emperor, his main task must lie in Italy[2]—"extra quam ubi imperii caput quaeras nescio[3]." He is lord of the world[4], but Italy is the centre of his Empire. He may be German by birth, but Italy now claims him. "Quotiens in Germania inspexeris, Italiam cogita; illic natus, hic nutritus, illic regnum, hic et regnum habes et imperium, et quod nationum et terrarum pace dixerim, cum ubique membra, hic ipsum caput invenies....Te enim, ut libet, sibi Germani vindicent; nos te Italicum arbitramur[5]." It is more important for what a man is born, than where[6]. And indeed

bene si vixisse vis videri: alioquin quid juvat illas tuas ultimas mundi horas composuisse magnifice? Hoc et sine imperio potuisses et fortasse facilius."

[1] Vide XXIII. 21 (vol. III. p. 246): "Quod si forsan," he continues, "negatus tibi coelitus rerum finis; tamen glorioso in actu, quam in quiete languida mori, multo melius, multoque felicius opinor. Et hoc est quod divae memoriae avum tuum omnibus saeculis gloriosum fecit." Elsewhere, referring to Rienzi, he asks, "Si tantum ergo Tribunicium potuit, quid Caesareum nomen posset?" Vide XVIII. 1 (vol. II. p. 464).

[2] Vide XVIII. 1 (vol. II. p. 468): "Diruta est, inquis, imperii libertas: tu pater imperii dirutam restaurabis. Sumpta Latinis servitus: tu illam tuorum cervicibus excuties." Cf. X. 1 (vol. II. p. 60): "Hoc igitur primum fac, reliqua suum tempus invenient, quamquam placata ad plenum et composita Italia, nihil aut modicum putem negotii supererit."

[3] Vide XVIII. 1 (vol. II. p. 467): "Nunquam te Italia, nunquam tu Italiam videbis, extra quam etc."

[4] Vide XII. 1 (vol. II. p. 160): "Loquor ecce iterum ad dominum meum, et, nisi piget, ad cunctorum dominum loquor."

[5] Vide X. 1 (vol. II. p. 59).

[6] Vide XIX. 1 (vol. II. p. 514): "Jam juga Alpium transcendenti occurro animis: haud equidem solus: infinita mecum acies, quin ipsa nostrum omnium publica mater Italia, et Italiae caput Roma, tib

Rome, the home of the Caesars—"queen of all cities and of the world"—is his true home: "patriam et solium tuum pete[1]."

Petrarch failed to allure Charles beyond the Alps; unlike Dante, he found no living Emperor in whom he could realise his ideal Caesar. There is a note of despair and disillusion in Petrarch, that is not to be found in Dante; already in 1356 he writes of the Empire as "boni...omnis effoetum et solius umbrae vetustatis innixum[2]." Petrarch, indeed, turned elsewhere more than once to find the deliverer: twice he

obviae, altis vocibus Virgilianum illud exclamant—'Venisti tandem, tuaque expectata parenti Vicit iter durum pietas.' Neque vero Germaniae obtentu hanc fastidias aut repellas matrem, cum qua et vitae primordia egisti, et si tuum decus amas, extrema exiges. Nos te, Caesar, ut ab initio dicebam, ubicumque ortum Italicum arbitramur. Neque vero magni interest ubi sis natus, sed ad quid. Vive et vale, Caesar, et propera."

[1] Vide XXIII. 2 (vol. III. p. 193): "Habet jam Bohemia suum regem, tu Italiae mundique rex, post tergum linquendi orbis securus, et patriam et solium tuum pete. Nam etsi secundum apostolicam sententiam manentem hic non habeas civitatem, si qua tamen in terris patria est tua propria Caesarum domus, ac vera patria Roma est: quin et communis omnium est patria, rerum caput, orbis atque urbium regina."

[2] Vide the following passage from what was once, perhaps, the most popular of all Petrarch's works, *De Remediis Utriusque Fortunae*, lib. I. Dialog. CXVI.: *Spes* says: "Spero Principem venturum." *Ratio* answers: "Et illius commune omnium malum speras. Fuit enim quando et principes imperium et principem populi poterant sperare, nunc imperium principi labor est, princeps populi pernicies."...*Spes*: "Spero principem venturum." *Ratio*: "Et secum simul motus rerum varios, mutationes urbium, noxias novitates, famem, pestem, bella, discordias, haec vel universa vel singula modernis cum principibus venire sunt solita. Si haec placent, principem spera: ut nil horum formidabile sit, ipsum certe inane jam imperii nomen est plenum famae et rumorum; boni autem omnis effoetum et solius umbrae vetustatis innixum."

sought him in Italy—in Rienzi and in Robert of Naples[1]. Gradually the idea took form that Italy's deliverer, Dante's "Veltro[2]," must be a national king, who would weld the disunited nation into one—a hope that for nearly five centuries was to be the unrealised ideal of Italian patriotism[3]. An Italian contemporary of Petrarch expounds this as the one expedient left[4]:

> "O figliuol mio, da quanto crudel guerra
> Tutti insieme verremo a dolce pace,
> Se Italia soggiace
> A un solo re che al mio voler consenta."

It is interesting to compare with the poem from which these lines are taken, another of almost contemporary date, written in Latin by an acute German thinker, Lupold of Bebenburg[5]. The German poet, weary with reading the "gesta Romanorum Cesarum," wandered into the country for his recreation and lost his way. Suddenly he found himself before a throne on which sat a queen, the splendour of whose crown and jewels amazed him. She bade him have no fear—

[1] Vide D'Ancona, *Il Concetto della Unità nei Poeti Italiani*, pp. 18–25.

[2] Vide *Inferno*, I. 101–5.

[3] Vide D'Ancona, *Il Concetto della Unità*, &c. pp. 25–30; *La Politica nella Poesia*, &c. (Dec. 1867), pp. 750–3.

[4] Vide Fazzio degli Uberti's (circ. 1305–circ. 1368) fine poem in Carducci, *Rime di M. Cino da Pistoia e d' altri del secolo XIV*, pp. 334–42. Vide pp. 340–1: "Un sol modo ci veggio, e quel dirai: | Che piglino quel Buemo (Carducci reads "buono uom"; which as D'Ancona, *Il Concetto della Unità*, &c., note 66, points out, is inferior; "Buemo" obviously refers to Charles IV) che 'l può fare, | Che mi debbe donare | Un virtuoso re che ragion tenga | E la ragion dello impero mantegna | etc."

[5] "Ritmaticum et Querulosum et Lamentosum Dictamen de Modernis Cursibus et Defectibus Regni ac Imperii Romanorum" (1341) in Boehmer, *Fontes Rerum Germanicarum*, vol. I. pp. 479–84.

"Ait: 'Nichil paveas, audi que tibi pando.
Ego sum,' inquid, 'sacrum imperium Romanum.'"

She proceeded to give him her history, how she resided once in Rome, and transferred her seat thence, first to Constantinople, and later to Germany. She celebrated the great deeds and merit of Charlemagne, Otto and their earlier German successors, and the loyalty of the old German nobles. These memories made her weep, but the poet attempted to comfort her—

"O predulcis domina, quis est qui provocare
Vos ad fletum potuit? Nonne terram et mare
Deus vobis tradidit? Quare non vindicatis
Factas vobis iniurias? Quam ob rem exspectatis?"

She answered—"benigne"—

"Inconsulte loqueris! Nam talia dicendo
Contra tuam patriam allegas nescienter."

The Germans no longer honour her or serve her and the "vicini gentes" desert her[1]—

"Ex eo quod Germani sua, non mea, querunt."

It is only their forefathers' loyalty which keeps her from once more transferring her seat; and she ends by solemnly commanding the poet to declare to the German nobles that as, if they are loyal to her, they will find their reward, so, if they disobey her,

"Ad gentem aliam in brevi transmigrabo,
Et sedem ubi deo placuerit locabo,

[1] Vide lines 124–31:

"...Germani non multum me honorant,
Parum mihi serviunt, ymmo, que sim ignorant.
Vides, quod Ytalici me spernunt deridendo,
Et suis pro lybito tyrannis serviendo.
Hec offense patriam Germaniae contingunt,
Sed ad has propulsandas gladiis se non cingunt."

Eos juste deseram qui me deseruerunt,
Immo que sim et qualis scire non curaverunt."

Lupold's doggerel Latin seems centuries away from Fazzio degli Uberti's noble Italian; yet the two were of one age and concerned with but one problem, only viewed from different standpoints. The Italian poet—"della mia donna ragionando"—also wandered out into the country, and there, among the flowers, fell asleep and had his vision of Rome—

"Ell' era antica, solenne e onesta,
Ma povera pareva e bisognosa."

She was surrounded with her old champions, the Roman heroes and Emperors, whom she names to the poet and whose deeds she celebrates. The good days are no more—

"O lassa isventurata,
Come caduta son di tanta altezza,
Là dove m' avean posto trionfando
Gli miei figliuol, magnanima brigata!
Che m' hanno or visitata
Col padre loro in tanta gran bassezza.
Lassa! ch' ogni virtù ogni prodezza
Mi venne men quando morîr costoro,
I quai col senno loro
Domaro il mondo e riformârlo in pace
Sotto lo splendor mio, ch' ora si face
Di greve piombo e poi di fuor par d' oro."

There is nothing to hope for from Charles himself or from Naples; all that she can now do is to pray that the Bohemian Emperor will give her and Italy "a single king"—

"Un virtuoso re che ragion tenga
E la ragion dello impero mantegna."

The problem, we have said, was the same for both

poets, but the standpoint of each was very different. The one took his stand in Germany, the other in Italy: both countries, historically in the closest connexion with the Empire, were faced with the problem of finding some alternative to the Empire, when the fall of the Hohenstaufen had left it powerless. Lupold, like "Jordan of Osnaburg" or the author of the *Notitia*, can only appeal to the past; the appeal is amplified with immense skill and subtlety in his work *De Jure Regni et Imperii*. The Italian, on the contrary, has broken with the past. The Empire is lost to Italy past hope of recovery. It has become German and must remain such. Italy—

"L' Italo giardino
Chiuso da' monti e dal suo proprio mare"—

must now have its own national king.

We are now to turn to another group of political writings of very great importance. The struggle between Philip the Fair and Boniface VIII gave rise to a large output of political pamphlets and manifestoes, both in France and elsewhere; much, as in all such struggles, was ephemeral, but some of the writings, those produced in France especially, were of lasting consequence. Before we turn to these French apologists, it will be well to consider some of the Papal claims, which they set out to answer.

The very large place, which the pretended Donation of Constantine occupies in medieval political thought, does not correspond to the actual use which the Popes themselves made of it. None of the greatest medieval Popes—Gregory VII, Innocent III, Innocent IV, or Boniface VIII—appealed to it at the most important

crises of their struggles with Emperors and other secular rulers[1]. To appeal to it was, of course, to appeal to a human document, as the basis for the Papal claim to temporal power. Besides, though the authenticity of the Donation was rarely questioned before the Renaissance[2], its validity was often and openly denied; many held it either absolutely void or, even if valid, revocable by Constantine's successors. This may well account for the fact that the Popes seemed no more inclined to appeal to it, even after a theory had become current among the Papalist writers, which explained the Donation as, properly, the restitution of that which de jure already belonged to the vicar of Christ. This clearly avoided the awkward conclusion that the temporal power of the Pope rested upon a human foundation. Innocent IV seems to have been the first to give this explanation[3]; yet he did not appeal to the Donation in his struggle with, or deposition of, Frederick II.

Extracts from the document were in the *Decretum*, though not originally included by Gratian himself. And in view of the place which it occupies in medieval

[1] Vide Zinkeisen, "The Donation of Constantine as applied by the Roman Church" (in *English Historical Review*, vol. IX. 1894, pp. 625–32).

[2] Vide Zinkeisen, op. cit. pp. 629–30. Already Otto III seems to have doubted its genuineness, as also S. Henry II, "showing that it was the settled Imperial policy to disregard it." Vide a note by Lea in vol. x. of the *Engl. Hist. Review* (1895), p. 86. It was denied by the Arnoldists. Vide the end of note 283, p. 182, in Gierke, *Pol. Theories of the Middle Age*, and Döllinger, *Fables respecting the Popes of the Middle Ages* (Transl. by Plummer), pp. 141–2.

[3] Vide Lane Poole, *Illustrations of the History of Medieval Thought*, p. 250; Gierke, loc. cit.

thought, we cannot pass it by, however few the appeals to it in the world of actual politics. The arguments and theories which it occasioned, both in the Papalist writers and their opponents, are for our purpose of great importance[1].

The idea of the Donation, as properly a restitution to the vicar of Christ of that which by right was his long since, was elaborated by the continuator of the

[1] It will be convenient to give here the references to the Papalist authors, to whom we shall refer. Leaving out of account Aquinas and the continuator of Aquinas' treatise *De Reg. Princ.*, whom we have met before, we shall confine ourselves, apart from references to the Popes themselves, to contemporaries of Boniface. These are (1) Augustinus Triumphus. His great *Summa de Eccles. Potestate* was dedicated in 1320 to Pope John XXII, but there have lately been printed four small treatises ascribed to him, which date from the present struggle. Three of these are printed by Scholz in his *Publizistik zur Zeit Philipps des Schönen und Bonifaz VIII.* The treatises are (*a*) "De duplici potestate praelatorum et clericorum," Anhang, pp. 486–501; (*b*) "De potestate collegii mortuo Papa," Anhang, pp. 501–8; (*c*) "De facto Templariorum," Anhang, pp. 508–16. The fourth treatise is printed by Finke in his *Aus den Tagen Bonifaz VIII*, Quellen, pp. lxix.–xcviii., though not in full. It is named "Tractatus contra articulos inventos ad diffamandum sanctis. patrem dom. Bonifacium, etc." Finke prints it as anonymous, but Scholz, op. cit. pp. 175–6, ascribes it confidently to Augustinus. We shall make use of the first and fourth of these treatises. (2) Henry of Cremona, "De Potestate Papae," printed in Scholz, op. cit. Anhang, pp. 459–71. This treatise is especially interesting, as Henry of Cremona's opinions are combated by John of Paris and, according to Scholz, by other French writers as well, who do not, however, mention him by name, as John of Paris does. In John's treatise, as printed in Goldast, *Monarchia S. Romani Imperii*, he appears as "Johannes de Cremona." This is incorrect, vide Scholz, pp. 242–3, 281–2, 289. (3) An anonymous treatise on the Bull *Clericis Laicos*, printed in Scholz, op. cit. Anhang, 471–86. Scholz thinks that the author may be Henry of Cremona. Finally, "Dupuy" refers to the "Preuves" in his *Histoire du Différend d'entre le Pape Boniface VIII et Philippe le Bel*, etc.

treatise *De Regimine Principum*[1] of Aquinas, in a manner that deserves special attention.

The Roman Empire is the fourth in the series of "monarchiae" which forms the history of the world: it follows the Empires of the Assyrians, of the Medes and Persians, and of the Greeks. But "nos quintam possumus addere"—the "monarchia" of Christ, "qui fuit verus Rex et Sacerdos et verus Monarcha[2]." This Empire was His when He came to earth[3]; thus, to begin with, our author must show why Christ chose an "abject life" and why the Pagan Roman Emperors were allowed to continue ruling. He holds that Augustus and his successors were, unknown to themselves, the vicegerents of Christ. And so, instinctively, Augustus refused to be called "dominus," while Tiberius wished Christ "tamquam verum dominum inter deos transferri," but was prevented[4]. Christ

[1] Vide III. 12–18.

[2] Vide III. 12, p. 15.

[3] Vide III. 14, p. 15 verso: "Sed tunc oritur quaestio de justo Domini principatu, quando incepit, quia constat multos postea imperasse, ipse vero abjectam vitam elegit. Item in Joanne scribitur quod cum pavisset multitudinem, abscondit se quia volebant eum populi rapere ac regem facere. Item in eodem ipse dicit: Regnum meum non est de hoc mundo. Ad hanc autem quaestionem est responsio, quia principatus Christi incepit statim in sua nativitate temporali."

[4] Vide III. 13, p. 15 verso: "In quo vero satis apparet quod dominium Christi ordinatur ad salutem animae et ad spiritualia bona ut jam videtur, licet a temporalibus non excludatur, eo modo quo ad spiritualia ordinatur....In humilitate ergo vixit et demum in Augusto substituit ut describeretur universus orbis in ortu domini, ut Lucas evang. testatur. Et in hac descriptione solvebatur census sive tributum, ut historiae tradunt, in recognitionem debitae servitutis, non sine mysterio, quia ille natus erat qui verus erat mundi dominus et Monarcha, cujus vices gerebat Augustus, licet non intelligens, sed nutu Dei, sicut Cayphas prophetavit. Unde hoc instinctu dictus

chose the "abject life" for good reasons, to teach princes humility—"per quam quis redditur in regimine gratiosus[1]"—and to show that His "dominium" was different from that of others. "Quamvis enim temporaliter esset dominus orbis, directe tamen ad spiritualem vitam suum ordinavit principatum[2]."

Thus Christ permitted the secular Emperors to rule, both in His life and after His death, until His kingdom should be perfect: and to that perfection the virtues and martyrdoms of the Christians contributed[3]. When the right moment came, Constantine was struck down with leprosy. Healed miraculously by Pope Sylvester, he executed the Donation, or rather "cession," by which he restored to Christ's vicar what de jure was owing to him. "In qua quidem cessione spirituali Christi regno adjunctum est temporale, spirituali manente in suo vigore[4]."

After the removal of the Empire to Constantinople the Emperors, excepting the Arian Constantius and the apostate Julian, were all obedient to the Papacy[5]. He

Caesar mandavit tunc temporis, ut narrant historiae, ne quis de Romano populo dominum ipsum vocaret, etc."

[1] Vide III. 14, p. 15 verso. [2] Vide III. 15, p. 16.

[3] Vide III. 16, p. 16 verso.

[4] Vide III. 16, p. 16 verso: "Opportuno igitur tempore ut manifestaretur mundo regnum Christi compositum, virtus principis nostri Jesu Christi principem mundi sollicitavit, Constantinum videlicet, percutiens eum lapra, ac ipsum sanans supra humanam virtutem. Qua probata in dominio cessit vicario Christi, beato videlicet Sylvestro, cui de jure debebatur, causis et rationibus supra assignatis. In qua quidem cessione spirituali Christi regno adjunctum est temporale, spirituali manente in suo vigore. Quia illud per se quaeri debetur Christi fidelibus, istud vero secundario tamquam administrans primo. Aliter autem contra intentionem fit Christi."

[5] Vide III. 17, p. 16 verso: "Istud autem notabile abinde usque ad

illustrates this from the history of the ecclesiastical Councils[1]. Then, when the Lombards oppressed the Church and the Eastern Empire gave no help—"quia forte non poterat[2]"—the Pope summoned the Frankish king to his aid and transferred the Empire to him[3]. With Charlemagne the Empire became hereditary, and so it remained until Gregory V instituted the Imperial Electors[4].

We have met this theory of a "quinta monarchia" of Christ, succeeding the "monarchiae" of the Assyrians, the Medes and Persians, the Greeks and the Romans, in Bartolus himself. Bartolus gave it "adhaerendo opinioni S. Matris Ecclesiae," and there seems no reason against supposing that he has taken it from our present author. But it occupies no great space in the thought of Bartolus, while our very brief sketch above can hardly, perhaps, do justice to the elaborate and lengthy treatment of this theory by the continuator of the treatise of Aquinas. He has combined into one picture the succession of "world-monarchiae," the Donation, the "translatio imperii" and the supposed appointment of

tempora Caroli magni de imperatoribus refertur, omnes quasi obedientes et reverentes fuisse Romanae ecclesiae, tamquam ipsa principatum teneret, sive respectu spiritualis dominii, sicut sancta synodus Nicena diffinit, sive temporalis."

[1] Vide III. 17 and 18.

[2] The author's favourable attitude to the Eastern Emperors is worth noticing.

[3] Vide III. 19.

[4] Vide III. 19: "Et tantum durabit," he says (p. 17) of this institution of the Electors, "quantum Romana ecclesia, quae supremum gradum in principatu tenet Christi fidelibus expedire judicaverit." These are very significant words and must, of course, be taken in connection with the Papal projects, which we considered above.

the electors by Gregory V. All these elements in his picture had very different origins. The idea of the four "monarchiae" went farthest back. The Donation was a forgery of the eighth or ninth century. Innocent III, in a famous Decretal, had established the Papal doctrine of the "translatio imperii." The supposed appointment of the Electors by Pope Gregory V dated from even later[1]. From all these diverse sources our author has constructed a single picture of the Empire's history. Bartolus had no such aim. He introduced this idea of the "quinta monarchia" of Christ, when discussing whether de jure the Emperor is lord of the world. He was mainly thinking of the Empire as a territory: the Empire having become the Empire of Christ, the Pope, Christ's vicar, is considered as delegating a part of it, which becomes the territory of the Empire, to the Emperor, reserving a part to himself—the territory of the Church. Bartolus, when he discussed the Donation of Constantine, did not return to this version

[1] Vide the Decretal *Venerabilem* (*Decretal.* I. 6. 34): "Verum illis principibus jus et potestatem eligendi regem in imperatorem postmodum promovendum, recognoscimus, ut debemus, ad quos de jure ac antiqua consuetudine noscitur pertinere, praesertim quum ad eos jus et potestas hujusmodi ab apostolica sede pervenerit, quae Romanum imperium in personam Caroli a Graecis transtulit in Germanos." Innocent, we see, does not rest the institution of the Electors on Gregory V—it is the immediate result of the "translatio." Here he is at one with the Germans (vide "Jordan" above), the difference being that Innocent thence argues for the dependence of the Electors on the Papacy, while Jordan denies that the "translatio" was the mere work of the Pope and ascribes the appointment of the Electors to Charlemagne himself. The supposed appointment by Gregory V is general among the Papalists by the end of the thirteenth century. The history of the Papal theory of the "translatio" is traced in detail by Döllinger in *The Empire of Charles the Great and his successors*, pp. 150–80.

of the Empire's history. On the contrary, he took the Donation to be a real donation, not a "restitution," and based the "territorium Ecclesiae" on it. The two views as to the origin of the territory of the Church are, as we remarked, irreconcilable; but one may feel pretty certain that the latter would have been the view of Bartolus, had he not been in a country "friendly" to the Church. With our other author it is very different. His purpose in tracing the history of the Empire was to show that the true Emperor is now the vicar of Christ, the Pope. Bartolus might accept that theory on occasion, "adhering to the opinion of the Church," but it was not the general theory of the Empire with which he worked, and hardly could be.

But, returning to the Papalist theories, we must see that it is not merely by virtue of the Donation that the Pope claimed to be the true Emperor. "Adveniente Christo istud Romanorum Imperium incepit esse Christi Imperium." The Donation merely marked the de facto assumption of that Empire by the vicar of Christ; de jure it was his before. This is very clearly expressed by Henry of Cremona[1]. The jurists, he says, maintain that Constantine was the first to donate the Church, "que antea nil habebat." But, he answers, this was not "defectus juris," but "defectus potencie." God "inspiravit Constantinum, ut renunciaret imperio et confiteretur se ab ecclesia illud tenere, nec tunc, ut

[1] Vide *De pot. Papae*, pp. 467–8: "Praeterea opponunt juriste: talia non fiebant ante Constantinum, et Constantinus primo dotavit ecclesiam que ante nil habebat. Sed quod ecclesia ante non faciebat talia, non erat defectus juris, sed potencie....Ibidem dominus voluit fidei subvenire et hoc [aliter] bene fieri non poterat, humano more loquor, nisi potentiam ecclesie dando. Quare inspiravit, etc."

quidam dicunt, fuit dotata primo de jure, sed de facto, sicut satis manifestum est, quod imperator ecclesie dare non potuit licentiam habendi proprium nec etiam potuit bona imperii alienare: unde non dedit, sed recognovit [ab ecclesia] et ecclesia sine peccato proprium habet[1]." It is clear that the continuator of the treatise of Aquinas, though he does not say so perhaps in so many words, also considers the Donation, or "restitution," as including the whole Empire, and that therefore the Emperors at Constantinople, whose obedience he notes so approvingly, must be considered as Emperors merely by delegation from the Popes[2]. And, of course, it was by virtue of such a theory that the "translatio imperii" under Charlemagne was expounded from the Papal standpoint. The true Monarcha or Imperator is the Pope, the vicar of Christ[3]. The reigning Emperor is his delegate.

But if the Pope is the true Roman Emperor, is there necessity for this temporal Emperor, his delegate? Of course the development of the Antichrist legend demanded the existence of a Roman Empire. The theory of the "quinta monarchia" of Christ did not

[1] The way Henry of Cremona here takes his opponents' argument against the possibility of alienating the "bona imperii" and turns it to his own account is very interesting. He is, however, evidently not completely convinced himself, for a little later he adds: "Si imperatores aliquod jus habebant, propter peccata que commiserunt occidentes fideles in Christo, maxime summos pontifices, divinitus illo jure privati fuerunt, quia privilegium meretur amittere qui permissa sibi abutitur potestate."

[2] Vide above, p. 319, note 5: "Omnes quasi obedientes et reverentes fuisse Romanae ecclesiae, tanquam ipsa principatum teneret, sive respectu spiritualis dominii...sive temporalis."

[3] Gierke, *Political Theories of the Middle Age*, note 12, p. 107, says that already in the twelfth century many of the canonists say: "Papa ipse verus Imperator."

mean that the Roman Empire had ended. There was no such break between the fourth and fifth "monarchiae" as between that, for example, of the Medes and Persians and that of the Greeks. The Roman Empire still existed, but it had become the Empire of Christ—"incepit esse Christi imperium." There was thus no absolute necessity for a temporal Emperor and a temporal Empire, delegates of and dependent on the vicar of Christ, the true Roman Emperor. The Papacy did, indeed, need a temporal power—though by right it had both swords, it needed a delegate to whom it could normally entrust the temporal one, to be used for its own defence and at its command. But lesser powers than Emperors could have supplied this need. The Popes might insist that the Emperor was their delegate, even their vassal, but history was very obviously against them. The Empire however fallen, might always be dangerous. It claimed to be universal—it had still more dangerous claims over Italy. Then, with the rise of national states, ever more and more jealous of any suggestion of their subjection to the Roman Empire, even the need of a Roman Empire began to be doubted. We shall see John of Paris asking why the Roman Empire should not give way to others, as older Empires gave way to it; why France could not have prescribed its independence against Rome, as Rome had against the Greeks. Now John of Paris had no intention of recognising the Pope as the "verus imperator." On the contrary, he expressly rejected the idea[1]. He was arguing against the need of any Roman Empire at all. This was a bold position, because directly opposed to the

[1] Vide below, p. 346, note 1.

traditional belief in the absolute necessity of the Roman Empire, as standing between the world and Antichrist. The argument of John of Paris amounted in effect to a justification of that dismemberment of the Empire by the "discessio" of the Regna, which was one of the signs that would herald the coming of Antichrist. Now the Papalist *did* recognise the Pope as the Emperor: consequently from the Papalist standpoint the disappearance of the temporal Emperor and Empire would leave the true Roman Empire still standing. An interesting passage in Aquinas will illustrate this. "Quomodo est hoc?" he asks, in his *Commentary upon the Epistles to the Thessalonians*[1], referring to the prophesied secession of the kingdoms from the Roman Empire; "quia jamdiu gentes recesserunt a Romano imperio, et tamen necdum venit Antichristus. Dicendum est quod nondum cessavit, sed est commutatum de temporali in spirituale, ut dicit Leo Papa in sermone de apostolis: et ideo dicendum est quod discessio a Romano imperio debet intelligi non solum a temporali, sed a spirituali, id est a fide catholica Romanae ecclesiae." Thus to Aquinas the Empire was already dissolved. But that was true only of the *temporal* Empire. The Roman Empire still stood—"nondum cessavit, sed est commutatum de temporali in spirituale." The "discessio" of the kingdoms from the temporal Empire might have taken place, but the final "discessio," which was to herald Antichrist, was to be from the *spiritual* Roman Empire—"id est a fide catholica Romanae ecclesiae."

[1] The passage is quoted by Lane Poole, *Illustrations of the History of Med. Thought*, p. 246, note 19.

The belief that the prophesied "discessio" was to include the "discessio" of the churches from the Roman see, as well as that of the kingdoms from the Empire, was common enough in the Middle Ages[1]. We saw in Engelbert a triple "discessio"—that of the kingdoms from the Empire, of the churches from the Papacy, of the faithful from the faith. Now Aquinas was not thinking here of the "discessio" of the churches from the Papacy, but of the "discessio" of the kingdoms from the Empire; and by distinguishing between the temporal and the spiritual Empire, he could allow that the "discessio" from the temporal Empire had already taken place, while leaving the true Roman Empire intact—"commutatum de temporali in spirituale." Its end would come when the Regna, which have already receded from the *temporal* Roman Empire, receded from the *spiritual* Roman Empire as well, that is to say, from the Roman Church, in which the old temporal Empire was merged.

None the less the Papalist theory in general did not argue for the non-necessity of the temporal Emperor nor assume that the temporal Empire was already

[1] Vide e.g. the treatise, *De Adventu et Statu et Vita Antichristi*, ascribed to Aquinas himself, p. 38: "Circa statum praedicationis notatur quod ante praedicationem Eliae et Henoc praecedent quatuor. Primo dissidium regnorum a Romano imperio....Quia medium est dum universis circumquaque gentibus imperat, quibus ab ipso recedentibus, de medio auferetur, et tunc ille iniquus opportuno sibi tempore revelabitur....Secundo, inobedientia ecclesiarum Romanae ecclesiae...." This treatise was printed for the first time, along with another treatise, *De Preambulis ad Judicium*, *etc.* at Rome in 1840. Their editor, F. Hyacinthus de Ferrari, ascribed them both to Aquinas. They were printed in the subsequent Parma ed. of Aquinas (1852–73), vol. xvii., but their authenticity was very much doubted. Vide the preface to vol. xvii. pp. 3–4.

dismembered. The outlook of the Papalists varied according to the circumstances under which they wrote. But, in general, it may be said that their object was, not to deny the existence of the temporal Emperor or the necessity of his existence, but to insist on his subjection to the Pope. For, after all, the temporal Emperor and Empire were there. The Pope might be the "true" Emperor—but it could not be denied that there was a temporal Emperor as well. The existence of this temporal Empire was a fact, not to deny, but to explain. We have seen the elaborate explanation offered by the continuator of the *De Regimine Principum* of Aquinas; as to Aquinas himself, we may remember that he died in 1274, so that his active literary life fell in the period of the long Interregnum. Then the temporal Empire did seem to have disappeared, while the theory of the Pope as "verus imperator" received additional significance, since his right to administer the Empire during a vacancy was very widely allowed. It was very different when the Interregnum had ended. If Boniface VIII, in the well-known, but doubtful[1], story, exclaimed to the German ambassadors, as he sat crowned upon his throne—"Ego sum Caesar[2]," we shall see that, as a matter of fact, he found a distinct use for a temporal Empire and a temporal Emperor.

[1] Vide the monograph of Niemeier on the relations between Boniface and Albert, to which we shall have occasion to refer below, *Untersuchungen über die Beziehungen Albrechts I zu Bonifaz VIII*, pp. 47–50.

[2] The claim made in the Document, known as the "Dictatus Papae" and included in the Registrum of Gregory VII (in *Monumenta Gregoriana*, p. 174), that "solus pontifex possit uti imperialibus insigniis" may well be considered in connexion with this story, whether the "Dictatus" be by Gregory himself or not.

Needless to say, these "Imperial" claims of the Popes were strenuously denied. We shall see French writers arguing that the Donation, even if valid, gave only a "certam provinciam," not the whole Empire, which Constantine transplanted to the East, and of course not France itself. By denying that the Donation included the Imperium, they could even throw doubts on the "translatio imperii." On the other hand, they were sometimes willing to acknowledge, always supposing its validity, that the Donation might have given the Popes the dominion at least of Italy. And though the Popes themselves seemed very reluctant to base their wider claims upon this document, they did at times appeal to it in asserting their rights over Rome and the Papal territory in Italy. We may also illustrate this by an interesting passage from the *Summa* of Augustinus Triumphus[1]—a writer who had no intention of understating Papal claims. He maintains that the Pope, as vicar of Christ, has universal jurisdiction, both temporal and spiritual, "in toto orbe terrarum," but "ipsorum temporalium immediatam administrationem non recipit nisi in regionibus occidentalibus imperii per concessionem factam ecclesie a Constantino." Here, we see, the Donation is held to give an "immediata administratio" in the western portion of the Empire. Nothing is said of the East; but we may suppose that he includes France in the "regionibus occidentalibus imperii." For he goes on to explain how it is that the Church only uses this "temporalis administratio" in Italy, "mediante Imperatore quem eligit," and not in other parts of the West. It is not

[1] Vide Quaest. XLV. art. 2.

because it lacks authority, but for the sake of peace and unity—"quia ex quo imperium fuit divisum et a diversis partibus diversimode et tyrannice usurpatum, ecclesia propter vitandum scandalum et schisma temporalium administrationem in regnis illis dimisit, propter cujus scandali vitationem salvator humani generis etiam se tributarium fecit."

Augustinus here recognises that the Popes use their de jure universal temporal jurisdiction, and the "immediata administratio" derived from the Donation of Constantine, de facto only "in partibus Ytaliae." This can also be illustrated from the words of two of the Popes themselves. Gregory IX, in a letter to Frederick II[1], recalls to Frederick the good examples of his predecessors, and lays special stress, in mentioning the Donation, on the surrender of the city "cum toto ducatu suo." Similarly Nicholas III[2], skilfully

[1] Vide "Epistolae Saeculi XIII" (in *Mon. Germ. Historica*), vol. I. p. 604.

[2] Vide *Sext.* I. 6. 17 (The Decretal *Fundamenta Militantis Ecclesiae*): "Isti (SS. Peter and Paul) sunt, quid illam in hanc gloriam provexerunt, ut sit gens sancta, populus electus, civitas sacerdotalis et regia, per sacram beati Petri sedem caput totius orbis effecta. Ne autem ipsa mater ecclesia in congregatione et pastura fidelium temporalibus careret auxiliis...non absque miraculo factum esse concipitur, ut occasionaliter Constantini monarchae a Deo provisa, sed curata baptismalibus fomentis infirmitas, quandam quasi adjiceret ipsi ecclesiae firmitatem, qui quarto die sui baptismatis, una cum omnibus satrapis et universo senatu, optimatibus etiam et cuncto populo, in persona beati Silvestri sibi Romanam concedendo urbem relinquens, ab eo et successoribus ejus per pragmaticum constitutum disponendam esse, decernens in ipsa Urbe utriusque potestatis monarchiam Romanis pontificibus, declararet, non justum arbitrans ut, ubi sacerdotii principatum et Christianae religionis caput imperator coelestis instituit, illic imperator terrenus habeat potestatem; quin magis ipsa Petri sedes, in Romano jam proprio solio collocata,

applying to the Roman church the famous words with which Pope Leo apostrophised the Romans—"ut sit gens sancta, populus electus, civitas sacerdotalis et regia, per sacram beati Petri sedem caput totius orbis effecta"—appeals to the Donation as giving the Pope temporal authority over the city of Rome. This limited claim is explained by the fact, that in this decretal Nicholas was regulating the Roman Senatorship, providing especially against its assumption by powerful foreign princes[1].

The Popes, in the claims which they made as Italian princes, might occasionally appeal to the Donation. The wider claims which they made as Popes, that is to say, as vicars of Christ, the Priest and King, were never shortened. The thunderous words, which end the Bull *Unam Sanctam*[2]—"Porro subesse Romano pontifici omni humanae creaturae declaramus, dicimus, diffinimus et pronunciamus omnino esse de necessitate salutis"—expressed no new doctrine. They put the papal claims in

libertate plena in suis agendis per omnia potiretur, nec ulli subesset homini, quae ore divino cunctis dignoscitur esse praelata."

[1] With the special claim of this decretal over Rome may be compared Aquinas, *De Reg. Prin.* I. 14, p. 5 verso. Having maintained that kings of the Christian people are subject to the Pope, he allows that priests were below kings among the Gentiles and in the Old Testament: "sed in nova lege est sacerdotium altius, per quod homines traducuntur ad bona coelestia. Unde in lege Christi reges debent sacerdotibus esse subjecti." And he goes on to point out how, by divine providence, the custom grew up in the city of Rome, "quam Deus praeviderat christiani populi principalem sedem futuram," that the Rectores of the city should be subject to the Pope. "Sicut enim Maximus Valerius refert, omnia post religionem ponenda semper nostra civitas duxit, etiam in quibus summae majestatis decus conspici voluit. Quapropter non dubitaverunt sacris imperia servire."

[2] *Extrav. Commun.* I. 8. 1.

their most imposing and least conciliatory form, but the claims were not new. The doctrine of the "plenitudo potestatis" went back to Innocent III, and, in its essence, to Gregory VII[1]. The "plenitudo potestatis" was, as Dr Figgis has said[2], nothing less than sovereignty in a strict Austinian sense—sovereignty at once temporal and spiritual over the universe, or at least over universal Christendom. Into the general theories, which supported that claim, we have here no need to inquire. Their character and the ideas upon which they rest need no new exposition. It is the "Imperial" claims of the Papacy which especially concern us; we must consider a little more closely their place in the theories, upon which the Papacy based its claim to the obedience of the King of France.

The Popes had before now come into conflict with the kings of France and England, but the struggle of Boniface with Philip the Fair and Edward of England was the first which could compare in importance with the former struggles between the Papacy and Empire. Indeed, France had come to be considered as the special ally and defender of the Papacy[3]. The present

[1] Vide Gierke, *Political Theories of the Middle Age*, note 131, p. 144.

[2] *From Gerson to Grotius*, p. 17.

[3] Augustinus Triumphus compares the past and present conduct of France: "Nam dicemus, quod in domo Franciae zelus christiane fidei et reverencia sancte matris ecclesie et liberacio ejus pastorum de manibus imperatorum et aliorum persequencium eos temporibus retroactis potissime viguit et refulsit in tantum, ut domus illa quasi autonomastice et per quandam superexcellentiam capud christianorum et relatrix ac defensatrix fidei orthodoxe ubique diceretur et predicaretur. Ex tali nomine ergo et ex tali forma reges moderni gentis Francorum, eorum predecessorum vestigia non sequentes, in tantum sunt in superbia elati, quod quasi admodum regis Nebuchodonosor

struggle was, in fact, an interlude. The events in Italy, following the fall of the Hohenstaufen, when the Papacy had too eagerly embraced the French-Angevin alliance, led up directly to this struggle between Philip and Boniface. Its result was the Avignon exile, the trophy of Philip's victory. Avignon meant that the King of France did not intend to let the Papacy back out of an alliance, which had been, and was to be, of the highest advantage to France.

Boniface himself repeatedly recalled his intimate knowledge of France, and the proofs which he had given, of his affection for her[1]. He had certainly no prejudice in favour of the Empire. He had refused to recognise Albert as king of the Romans, when, after the death of

nolunt aliquem super se recognioscere." Vide the *Tract. contra articulos, etc.*, p. lxxxvi. Aquinas, *De Reg. Prin.* I. 14, p. 5 verso, sees in the pre-eminence of the Druids in old Gaul a divine presage that "futurum erat ut in Gallia Christiani sacerdotii plurimum vigeret religio."

[1] Vide the speech of Boniface in a Consistory held in 1302 (in Dupuy, pp. 78–9): "Prima est quod nunquam volumus respondere juxta stultitiam suam, quia in quantum in nobis est, volumus esse in pace et in amore cum rege, quia semper dileximus regnum et illos de regno, et sciunt multi qui hic sunt, quod ego semper quamdiu fui in cardinalatu fui Gallicus, ita quod frequenter fuit mihi improperatum a fratribus meis Romanis, a quodam qui est mortuus, et etiam ab alio qui est juxta me, quod eram pro Gallicis et contra Romanos; dicebant enim quia semper alii cardinales Campani fuerant cum Romanis: etiam postquam fuimus in statu isto multum dileximus regem, et fecimus ei multas gratias, quas nolumus modo explicare per singula, quia melius sederet in ore alterius quam in nostro. Audemus dicere quod vix teneret rex pedem in stallo nisi nos essemus; cum enim insurgerent contra eum Anglici, et Alemanni et quasi omnes majores subditi et vicini ejus, ipse habuit triumphum de omnibus—et per quem? nos—et quomodo? per depressionem adversariorum suorum.... Nos scimus secreta regni, nihil latet nos, omnia palpavimus, nos scimus quomodo diligunt Gallicos Allemanni, et illi de Lingadoch et Burgundi etc." Cf. the Bull *Ausculta Fili* of the year 1301 (in Dupuy, p. 48).

Adolph, Albert had applied for recognition. But the great struggle with France altered matters; and in April 1303 Boniface recognised Albert as king of the Romans, in return for which Albert was well pleased to own the dependence of his crown upon the Papacy, while acknowledging his past errors and his duty of future obedience.

A report of the speech, which the Pope made on this occasion to the envoys of Albert, has come down to us, and is of the greatest importance for the proper understanding of the literature, which we are about to examine. Boniface[1] begins by recalling the old simile of the two luminaries—the sun and the moon, that shines only with borrowed light—but he gives it a special interpretation to fit the occasion. This time the sun is to be the king of the Romans, "qui est sol sicut monarcha qui habet omnes illuminare et spiritualem potestatem defendere, quia ipse est datus et missus in laudem bonorum et in vindictam malefactorum." Then he recalls that vicar of Christ, the successor of S. Peter, transferred the Empire to the Germans and gave the right of election to the seven princes, who are to elect a king of the Romans, "qui est promovendus in imperatorem et monarcham omnium regum et principum terrenorum." Then follow memorable words which have often been quoted: "Nec

[1] The speech is to be found in a Memorial of the Consistory at which the recognition took place. The whole Memorial is printed by Niemeier, *Untersuchungen über die Beziehungen Albrechts I zu Bonifaz VIII*, pp. 114–28, the Pope's speech occupying pp. 114–18. Niemeier maintains the trustworthiness of the speech as reported, which had been doubted: vide pp. 109 ff. The Memorial as a whole had not been printed before.

insurgat hic superbia gallicana, que dicit quod non recognoscit superiorem. Mentiuntur, quia de jure sunt et esse debent sub rege Romano et imperatore[1]." He contrasts Albert's present devotion and obedience with his former arrogance. And he reminds the Germans that, as the Empire was transferred to them by the Pope, so, if he wish, he may again transfer it elsewhere —"et hoc sine juris injuria[2]." He supplies the many defects in Albert's election, because he hopes well of him; his father was the good king Rudolph, "catholicus, fidelis et devotus isti ecclesie, homo verax et veridicus." But he warns Albert, that should he belie his hopes, he, the Pope, could easily repress him. "Quidam enim principes," he continues in a passage of splendid confidence, "faciunt colligationes suas. Et audacter dicimus, quod si omnes principes terreni essent hodie colligati contra nos et contra ecclesiam istam, dum

[1] "Et nescimus," he continues, "unde hoc habuerunt vel adinvenerunt, quia constat, quod Christiani subditi fuerunt monarchis ecclesie Romane et esse debent: nec habent hoc a lege veteri vel nova, nec aliquo propheta, vel evangelio, vel apostolo. Unde hic dicimus, quod dicit apostolus: 'Et si quis evangelizaverit vobis aliud, quam evangelizamus, etiam angelus de celo, anathema sit.' Et nos volumus, quod, quicunque evangelizaverit aliud, anathema sit."

[2] P. 116: "In nomine Domini constituimus sic eum hodie, non in hodie eternitatis, de quo dictum est filio: 'Ego hodie genui te,' sed in hodie temporis. Sicut enim pater dedit filio potestatem non in tempore, sed in eternitate, sic Christus homini et Christi vicario dedit potestatem in tempore, ut ipse habeat jus constituendi imperatorem et imperium transferendi. Et attendant hic Germani, quia sicut translatum est imperium ab aliis in ipsos, sic Christi vicarius successor Petri habet potestatem transferendi imperium a Germanis in alios quoscumque, si vellet, et hoc sine juris injuria....Unde si subveniat justa et legitima causa, juste posset transferre et justa faceret, si eos privaret. Tamen hic fuit semper patientia istius ecclesie, que magis voluit cum eis de benignitate agere, quam de rigore, ut non privaret eos, licet juste privare potuisset."

tamen nos haberemus veritatem et staremus pro veritate, non appretiaremus eos unam festucam; et sine dubio, si veritatem et justitiam non haberemus, bene timeremus, sed alias omnes confunderemus et veritas confunderet eos." After this he again returns to the duty of all men to obey Albert—"Iste est rex praecellens super omnes reges et nullus est ab eo exemptus"—and ends with promises of support.—"Igitur faciat bene rex, quia si bene defendat et recuperet jura sua et jura regni et imperii, audacter dicimus, quod nos defendemus plus jura sua quam nostra, et hoc contra quemcumque de mundo, et per nos firmabitur sententia sua et non flectetur."

That this is all directed against the king of France needs no demonstration, and the significance of thus finding Boniface maintaining the subjection of all kings to the Emperor, and bidding the Emperor defend and recover the rights of the Empire, cannot be over-estimated. Hitherto the Papal theory had been ever advancing its claims at the expense of the Empire. Hitherto, we may say, the whole Papal armoury had been forged as weapons against the Empire. But here, on the contrary, we have a weapon, made expressly to fit the struggle with a king, and one whose whole force must depend upon alliance between the Empire and Papacy. Nor was Boniface unique among his contemporaries in adopting this line of argument. The author of the anonymous treatise on the Bull *Clericis Laicos* insists on the necessity of unity, and cannot believe that Christ, when about to leave this earth, would have wished His Church to have more than one head, namely S. Peter and his successors[1]. So also Rome could not

[1] Vide p. 475.

have two kings. "Item," he continues in a passage well worth quoting in full, "universi reges et principes fatentur se imperatori Romano subesse quantum ad corporalia, quod quidem jus superioritatis in temporalibus quicumque attribuunt ei de jure, cum ipse dicatur mundi dominus...et omnia dicantur esse ipsius...et tunc non poterunt negare, quin etiam subsunt papae in temporalibus mediate, cum imperium teneatur ab eo et ipse confirmat ejus electionem et coronam imperii concedit; etiam ipse imperator jurat sibi fidelitatem.... Non obstat si dicatur quod imperium a deo processit... quia hoc non tollit quin imperium teneatur a papa, cum ipse sit vicarius, ut supra probatum est. Si enim noluerint confiteri se subesse imperatori, necessarie habent confiteri se subesse pontifici Romano in temporalibus."

Let us note this passage well. To begin with, it is very probably of earlier date than the speech of Boniface, that is to say, earlier than the actual accommodation between the Pope and King Albert[1]. But be that so, or not, the passage must be taken along with Boniface's words. It shows us that the Pope's insistence on the subjection of the King of France to the Roman Emperor was something more than an angry and random flight of

[1] Scholz thinks the date may be February–July 1297, but that a later date, i.e. 1302, is quite possible. Vide op. cit. pp. 169–70. In any case, then, it is earlier than the speech. The author, he thinks, may be Henry of Cremona. Henry of Cremona was a canonist, and in this connection it may be noted that he attacks the Ghibellines bitterly in his own treatise (vide p. 460). If he is also the author of this anonymous treatise, his argument becomes yet more noteworthy in the mouth of a Guelph, writing before the recognition of Albert by Boniface.

rhetoric, such as Boniface was not slow to shower on his enemies.

Secondly, we see that neither Boniface nor the author of this treatise find any contradiction to their plea for unity in the government of the Church, when they maintain the subjection of all kings to the Roman Emperor. Such unity is not inconsistent with the existence of two powers, both "a Deo." Boniface himself on one occasion, in another public speech, made a point of affirming his belief in the divine ordination of the two powers—how, he asked, could a lawyer of forty years' standing do otherwise? "Quadraginta anni sunt quod nos sumus experti in jure, et scimus quod duae sunt potestates ordinatae a Deo[1]." Boniface was speaking the literal truth, but he was also begging the question. The avowal by Boniface and the Papalists that they do not deny the existence of "two powers ordained by God" is important, as an illustration of the fact that the Papalists did not follow up the idea of the human, sinful or diabolical origin of the Regna and Imperium, which the Investiture struggle had suggested. But the real point at issue between the Papalist and his opponent was not so much—Are there two powers ordained by God? as—What are the relations between these two powers? Are they equal? And are they "distinct and separate"?

The French writers pointed to declarations of the Popes[2] themselves, as conclusive proof that the two

[1] In Dupuy, p. 77.

[2] *Decretal.* IV. 17. 13 and II. 1. 13. Cf. also *Extrav. Commun.* V. 7. 2—the decretal of Clement V, which, while not condemning the

powers are distinct—above all to the decretals *Per venerabilem* and *Novit ille* of Innocent III. And, of course, so far as the Popes claimed to interfere in temporal matters "ratione peccati," they did indirectly recognise the normal independence of the temporal power in its own sphere[1]. To explain away these decretals was no easy task; they stood in black and white in the Canon Law. None the less the Papalists continued to deny the separation of the two powers, unless it were recognised as being merely de facto[2]. Rightly

Bull *Unam Sanctam*, declares that in no way "per illam rex, regnum et regnicolae praelibati amplius ecclesiae sint subjecti Romanae quam antea existebant etc." The decretal *Causam* (IV. 17. 7) is appealed to in support of English independence. Vide below, p. 354, note 1.

[1] This comes out very clearly in the decretal *Novit ille*: "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 velimus?...Non enim intendimus judicare de feudo, cujus ad ipsum spectat judicium, nisi forte jure communi per speciale privilegium vel contrariam consuetudinem aliquid sit detractum, sed decernere de peccato, cujus ad nos pertinet sine dubitatione censura quam in quemlibet exercere possumus et debemus....Quum enim non humanae constitutioni, sed divinae legi potius innitamur, quia potestas nostra non est ex homine, sed ex Deo: nullus qui sit sanae mentis ignorat, quin ad officium nostrum spectet de quocunque mortali peccato corripere quemlibet Christianum, et, si correctionem contempserit, ipsum per districtionem ecclesiasticam coercere." So, in the speech in which Boniface affirms his belief in the two "powers" (vide above), he continues—"Dicimus, quod in nullo volumus usurpare jurisdictionem regis...Non potest negare rex seu quicunque alter fidelis, quin sit nobis subjectus ratione peccati."

[2] Innocent IV in his *Commentary on the Decretals* says of the famous words in the decretal "Per venerabilem"—"Et cum dominus rex superiorem in temporalibus minime recognoscat"—"De facto, nam de jure subest imperatori Romano, ut quidam dicunt. Nos contra:

the temporal power is only separated from the spiritual by delegation from the Pope. Originally there was no separation at all. Thus, Henry of Cremona[1] can allow that the Imperium is "a Deo" no less than the Sacerdotium, but maintains the two jurisdictions to be from God "non divisim sed conjunctim." The Pope, as vicar of Christ, the Priest and King, in the well-worn phrase has both swords, the spiritual and temporal. The spiritual sword is wielded directly by the spiritual power, the temporal power is wielded for the Church by "kings and knights[2]," but "ad nutum et patientiam sacerdotis." That is to say, the kings and knights are delegates of

immo papae." Cf. Augustinus Triumphus, *De duplici potestate*, p. 550: "Secundum primariam institucionem et auctoritatem universalem utraque potestas in Romano pontifice residet et ab ipso, tamquam ab uno capite universalis ecclesie, in clericos et laicos debet derivari. Et per consequens omnes praedictae (i.e. all secular or spiritual powers) potestates casu interveniente per Romanum pontificem possunt privari, quia sicut ab ipso potestas spiritualis et temporalis omnibus confertur, sic ab eis per eum auferri potest. Si vero aliqui contrarium faciunt vel contrarium dicunt, contra facientes de facto faciunt, non de jure, et contrarium dicentes in favorem principum et regum hujus seculi dicunt pocius quam secundum veritatem."

[1] Vide pp. 446–7: "Sed contra hec supradicta multa opponuntur. Et primo, quia imperium a deo processit sicut et sacerdotium, ut in Authentic. 'Quomodo oporteat episcopos.'...Et ego respondeo; quod est verum et hoc supra in principio probatum est, quod a deo processerunt iste due jurisdictiones, sed non divisim, sed conjunctim."

[2] Vide Bull *Unam Sanctam*: "In hac ejusque potestate duos esse gladios, spiritualem videlicet et temporalem, evangelicis dictis instruimur....Uterque ergo est in potestate ecclesiae, spiritualis scilicet gladius et materialis. Sed is quidem pro ecclesia, ille vero ab ecclesia exercendus. Ille sacerdotis, is manu regum et militum, sed ad nutum et patientiam sacerdotis. Oportet autem gladium esse sub gladio et temporalem auctoritatem spirituali subjici potestati....Nam, veritate testante, spiritualis potestas terrenam potestatem instituere habet, et judicare, si bona non fuerit."

the Sacerdotium—"its organs and instruments[1]." As properly the two powers belong "conjunctim" to the Sacerdotium, so, when they are divided by the delegation of the one power to temporal rulers, the powers, thus separated, are not equal and coordinate. The temporal ruler must be dependent on the spiritual, who delegates the temporal sword to be used on his behalf and at his command. The Pope is set above all kings and kingdoms "ad evellendum, destruendum, disperdendum, dissipandum, aedificandum atque plantandum[2]."

Albert was willing to accept the humble position, which the Papal theory offered him. His power was above that of all other temporal rulers and was of divine ordination, but mediately through the Pope, on whom his possession of the Empire depended. Now if he, the supreme and universal temporal ruler, recognised none the less that he was subject to, and dependent on, the Pope, it was an obvious conclusion that inferior temporal powers must be at least equally subject. Thus the Roman Empire became a stalking-horse behind which the Papacy could attack French claims to independence.

[1] Vide Augustinus Triumphus, *De duplici potestate*, p. 550: "Utramque ergo potestatem spiritualem et temporalem residere consequitur in summo pontifice, unde Christus, cujus personam representat, dicit...'Data est michi omnis potestas in celo et in terra'; sed potestas spiritualis residet in ipso, quantum ad auctoritatem et ad execucionem, sed temporalis, quantum ad auctoritatem, non autem quantum ad immediatam execucionem, quia committit execucionem talis potestatis secularis regibus et principibus, qui debent esse organa et instrumenta ejus in parendo mandatis ipsius in omnibus et in exequendo potestatem temporalem ad requisitionem ejus; et quantum ad talem execucionem non est inconveniens, quod papa aliqua recognoscat a regibus et secularibus."

[2] Bull *Ausculta Fili* (in Dupuy, p. 48).

And if the inferior king refused to recognise a supreme universal Emperor, there was still no escape. The Papal claims came out from the cover of the Empire. The kings, as all other Christians, were subject immediately to the Pope, the one head, temporally and spiritually, "of the body of the Church or congregation of the faithful." Let us now turn from the Papalists to their French adversaries.

We have already remarked upon the attempt made by Charles of Anjou to procure the nomination by Pope Gregory X of his nephew, Philip III of France, to the Empire. This attempt was not an isolated ambitious scheme of Charles of Anjou, but must be taken in connection with the political problems, which the defeated Hohenstaufen had bequeathed to Europe. Those problems were still to be solved. Consequently, there is nothing surprising in the fact that the attempt to procure a French Emperor should reappear under Philip the Fair. There is, indeed, this important difference. Charles of Anjou wished Gregory X to exercise the right of effecting a new "translatio imperii," which right, we have seen, the Papacy actually claimed. Philip the Fair attempted to work directly upon the electors, in spite of the fact that the Papacy was already in its French exile. Again, Charles of Anjou wished the reigning king of France to become Emperor; Philip the Fair tried to procure the election of his brother, Charles of Valois, and at the time had little reason to think that the Valois would so soon succeed to the French crown. These differences, however, noteworthy as they are, need not detain us. We have only to notice the definite existence of these French pretentions

to the Empire, and to see that they were not the effect of a spasmodic policy of ambition. They were claims based upon a supposed right to the Empire. The French kings claimed to represent the royal line of Charlemagne; the "French" were the descendants of his Franks. We see, then, that France, as well as the Papacy, has "Imperial" claims[1], and we need only point to Dubois to show that the French political literature has its aggressive, as well as its defensive, side. Dubois repeats the same projects time after time, and in all of them the central point is the domination of Europe by France, and the consequent acquisition of the Empire by the French king[2]. Whether Dubois was really in the king's confidence has been doubted; but whether he was, or not, his works are equally valuable as illustrating the aggressive side of French policy.

It is however the defensive, not the aggressive, side of the French position that chiefly concerns us. "Vult

[1] Bodin in the sixteenth century still makes these claims.

[2] The best known of the works of Dubois is the "De Recuperatione," published by Langlois in *Textes pour servir à l'étude...de l'histoire*. But it is a great pity that the earlier "De Abbreviatione" has not as yet been printed, though there is a long abstract of it (in French) in *Mémoires de l'Institut de France* (Académie des Inscriptions et Belles Lettres, vol. XVIII. Part 2) by de Wailly. It would be very interesting to have Dubois' schemes in their earliest form—for the "De Abbreviatione" dates from 1300. For our purpose the little tract printed by Boutaric, in *Notices et Extraits des Manuscrits*, vol. XX. Part 2, pp. 186–9, is very important. Two little pieces ascribed to Dubois, the "Deliberatio" (in Dupuy, p. 44) and the "Supplicatio" (Ibid. p. 215), will also illustrate the defensive side of the French political literature. But that side we are about to consider at length, as it appears in more important treatises, two of which have also been ascribed by some to Dubois himself—the *Quaestio de Potestate Papae* and the *Dialogus inter Clericum et Militem*. To me it seems that in both hese cases the style is utterly unlike the very distinctive style of Dubois.

sibi mundi monarchiam vendicare?" asks a note, evidently by a Frenchman, appended to the manuscript, from which the anonymous treatise on the Bull *Clericis Laicos* has been printed[1]. The Empire of the world[2] —that is what the Papal claims amounted to. The claim might be made by the Pope as Pope, or by the Pope as "verus imperator," or by the Pope on behalf of the temporal Emperor, as a power set up by, and dependent on, the Papacy, and who, in the particular circumstances of the time, had been willing to accept that position. The first object of the French politician, whether practical or theoretical, must be to deny the subjection of France to any such "mundi monarchia"—whether the Pope's or the Emperor's[3].

The Papal claims to a supremacy, even "in temporalibus," over the French kingdom, were most easily met when based on the Donation of Constantine. John of Paris discusses the Donation at length, and maintains that neither the Donation nor the "translatio imperii" can give the Pope any ground for claiming

[1] The Note is printed by Scholz at the end of the treatise; op. cit., Anhang, p. 484.

[2] Vide the following passage from the anonymous treatise itself: "Christus...mundum relicturus, ad instar prudentis patris familias, qui peregre profecturus ad partes longinquas procuratorem seu vicarium loco sui dimittit, voluit dimittere loco sui vicarium, scilicet beatum Petrum et quemlibet ejus successorem, qui in omnibus, quae optima erant ad universale mundi regimen, haberet plenitudinem potestatis, alias non reputaretur pater familias" (p. 474).

[3] As illustrating the defensive side of the French position we shall consider above all the work of John of Paris, *De Potestate Regia et Papali*. Besides this we shall refer to three anonymous works—the *Quaestio de Potestate Papae*, the *Quaestio in Utramque Partem*, and the *Dialogus inter Militem et Clericum*.

a supremacy over the king of France[1]. The Donation only gave a "certam provinciam"—Italy and some other lands—but not France; it did not include the Empire, for that Constantine transferred to New Rome and the Greeks. So the "translatio," whether it was merely a nominal transference, which left the Empire "secundum rem" with the Greeks, or whether it was rather a division of the Empire, cannot give the Pope any ground to claim supremacy over France, since the fact that there still remained Emperors[2] at Constantinople after the "translatio" proves that it did not include the whole Empire[3]; and later he shows

[1] Vide the whole of chap. xxii. pp. 139–41, of his "De Potestate Regia et Papali" (in Goldast, *Monarchia S. Romani Imperii*, vol. ii. pp. 108–47); and cf. chap. xvi. p. 130. It is worthy of note that earlier in the treatise, chap. x. p. 120, John of Paris remarks on a difficulty, which we have seen the Papalists had actually to face, namely that the acceptance of temporal power from a human donation was out of harmony with the Papal claim to both swords, as representative of Christ's kingly and priestly power. None the less, he points out, the Canon Law, in including the Donation, clearly regards it as a "donatio," not as a "redditio"—"Mirum etiam videtur, quod Constantinus Imperator dedisse dicitur imperium Italicum ecclesiae et totam jurisdictionem temporalem, et quod ecclesia illud tamquam datum, si hoc habuit, de jure recepit. Tunc enim non fuisset facta beato Silvestro donatio: sed redditio ejus quod suum erat, cujus contrarium sentit ecclesia distinct. 96 Constantinus."

[2] Cf. on the other hand Radulf de Colonna, "De Transl. Imp." (in Goldast, op. cit., vol. ii.), chap. x. p. 95: "Nec est imperium jam modo apud Graecos, licet largo vocabulo imperator vocatur etc."

[3] He has already, but more briefly, discussed the Donation and "translatio" in chap. xvi. (p. 130). As to the Pope having translated the Empire, he refers us back to his argument on the supposed deposition by Pope Zachary of Childeric. There he argues that "non oportet ex talibus factis singularibus, quae variis causis fieri possunt, argumenta juris sumere." He points out, in a most interesting line of argument, certain exceptional cases in which the Emperors have interfered, often at the request of the Church, in purely spiritual or

that the French were never subject to the Empire. But the Donation can be proved invalid for reasons given by the Gloss, which maintains the illegality of acts of the Emperor tending to diminish his Empire or to bind his successors. Then John of Paris goes on to argue that, even supposing the Donation were valid and had included the whole Empire, even so the Pope would have no supremacy over France. The Gallici were, indeed, subject to the Empire in the time of Augustus, but the Franci, who were related to the Trojans, never. They were always very hostile to the Roman Empire, and, refusing to pay tribute, were expelled from their homes in Pannonia. Thence they came to the banks of the Rhine, and the Emperor Valentinian, being unable to defeat them, named them Franci, "id est feroces." They conquered all Germany and Gaul as far as the Pyrenees—"Galliam habitantes,

ecclesiastical matters, and then turns to his Papalist opponents and asks them if they wish to draw a general conclusion from these single facts—"Ex quo posset modo consimili sumi argumentum, quod ad imperatorem pertinet primatum ecclesiae transferre et de ecclesiis ordinare....Numquid ergo propter hoc ad principem pertinet interesse consiliis episcoporum et dissensiones et causas eorum modo consimili determinare, an non?...Numquid dicimus propter talia, quod ecclesia Romana habeat ab imperatoribus primatum ecclesiarum?...Legitur etiam, quod tempore Henrici imperatoris Romani juraverunt non se papam electuros sine imperatoris assensu. Est igitur hoc observandum? etc." (vide chap. xv. p. 129). So with the "translatio"—it was an exceptional fact. Then he offers other explanations—"non transtulit veritatem, sed nomen," "non fuit factum per solum papam," etc. "Quicquid autem de hoc factum sit," he concludes, "papa non ordinavit, nisi de eo quod sibi a Constantino collatum fuerat, quod concedo fieri posse de jure,"—and the Donation, he has suggested, might have included the city, *certain* western provinces and the "signa imperialia," but not the Imperium.

eamque Franciam nominantes, nullis Romanis nec aliis quibuscumque subjecti."

But supposing the Franks had been subject to the Empire, the Pope does not gain thereby, since he is not Emperor[1]. Or supposing he were, the Franks would by now have prescribed their independence. It is said that prescription does not run against the Roman Empire—but why not? There were "regna et imperia" before the Roman Empire—Babylon, Carthage and Greece, all of which were "aeque a Deo sicut imperium Romanorum." Never, indeed, has the world been less in peace than under the Roman Emperors. "Horribilia scelera per mundum currebant et dissensiones permaximae." And if the Romans could prescribe against the Greeks, why should not others prescribe against the Roman Empire[2]? If it be said that God willed all other Empires to cease in face of the Roman Empire, why should it not be said that now God wills

[1] p. 140 he says: "Et ideo volunt aliqui quod ratione hujus doni pontifex imperator est et dominus mundi, et quod potest reges constituere et destituere, sicut imperator et praecipue imperio vacante." But this is of course not allowed. "Ex dicta donatione, data quod valuerit et toto imperio facta fuerit, et dato quod Franci tunc fuissent imperio subjecti, quod non dicimus, adhuc papa nihil potest super regnum Franciae, cum non sit imperator..." (p. 141).

[2] Vide p. 141: "Mirum etiam si praescribi non possit contra imperium Romanorum, ut dicunt illi, cum ante regnum Romanorum fuerunt regna et imperia, scilicet Babyloniorum, quod incepit a Nino, tempore Abrahae: Carthaginense, tempore Judith: Macedonum sive Graecorum ab Alexandro tempore Machabaeorum: et quodlibet praedictum est aeque a Deo, sicut imperium Romanorum. Si igitur, non obstante quod Graeci habuerunt imperium a Deo, Romani praescribunt et praescripserunt contra Graecos et usurpare tentaverunt Graecos expellendo: quare non possunt alii homines praescribere contra imperium Romanorum, etiam eorum dominium a se abjiciendo: praecipue cum eis se non subjecerunt voluntarie, sed violentia Romanorum?"

the Roman Empire itself to cease? Scripture is witness to this[1].

Similarly the author of the *Quaestio de Potestate Papae* disposes of the Donation[2]. It only gave the Pope temporal jurisdiction over those who are "de Romano imperio." The Eastern Empire Constantine did not give; and this proves that the Pope is not "dominus temporalis omnium Christianorum," since there were many Christians in Constantinople, both before and after the Donation—witness the foundation of many churches, and especially of S. Sophia, by Constantine. "Ergo ratione illius donationis non potest dici dominus temporalis omnium Christianorum, sed saltem illorum Christianorum, qui sunt de Romano imperio. Quantum ergo ad illa regna, quae non subsunt Romano imperio, non est papa dominus superior

[1] p. 141: "Si vero aliquis dicat quod Deo ordinante cessare debuit imperium aliorum, et crescere debuit imperium Romanorum; quare non sic potest dici de Romano imperio, quod cessare debeat Deo ordinante, ut illi qui ante Romanis qualitercumque fuerunt subjecti, amplius non debeant subjici, si discedere velint et possint? Imo expressius videtur haberi in Scriptura, de imperio Romanorum, quod deficere voluerit, quam de alio....Similiter in Danielem, ubi agitur de imagine quadriforma, percussa in pedibus, dicit glossa, quod regno Romanorum nihil fortius fuit et nihil in fine debilius aut fragilius erit." (These words come, of course, from Jerome's *Comment. on Daniel.*) Even an Imperialist like Engelbert of Admont, *De ortu et fine*, etc., chap. xx. p. 770, declines to believe those who "divinatores magis quam veri prophetae, adulando Romanis imperatoribus et imperio asserere ausi fuerint, quod Romanum imperium esset aeternum ex eo, quod bene vel male, et nunc cum augmento, nunc vero cum diminutione et detrimento, longiori tempore duraverit quam alia regna mundi, ut Assyriorum et Medorum et Graecorum regnum." None the less, according to Engelbert, when it does cease, Antichrist will come—so that it *is* to last until the end of the world is imminent.

[2] "Quaestio de Pot. Papae," pp. 675–6 (in Dupuy, *Histoire du différend*, etc., pp. 663–83).

in temporalibus[1]." The kingdom of France is not under the Empire and has never been within the memory of man. Therefore the Pope is not superior "in temporalibus," but only "in spiritualibus"—as regards the latter, in France as elsewhere. If, however, it be said that France is subject to the Empire de jure, whatever may be the case de facto, our author answers by insisting, like John of Paris, on prescription[2]. The French kings have been in peaceful possession of their kingdom, owning no temporal superior, but God—neither Pope nor Emperor—for much more than a hundred years. The kings of France have always been devoted and loyal to the Church, and it is not conceivable that S. Lewis, had he not rightly possessed the independence which he claimed, would have been canonised by the Church and proved his sanctity by so many miracles[3].

The author of the *Quaestio in Utramque Partem*[4]

[1] He continues: "Regnum autem Franciae non subest Romano imperio: immo sunt certi limites, et fuerunt a tempore, ex quo non extat memoria, per quos regnum et imperium dividuntur. Ergo Papa in regno Franciae non est dominus nec superior in temporalibus, sed tantum in spiritualibus, sicut et ubique terrarum."

[2] "Si vero diceret aliquis, regem et regnum Franciae subesse in temporalibus Romano imperio de jure, et per consequens etiam papae, quamvis de facto fuerit aliud observatum; contra hoc opponitur. Nam per praescriptionem legitimam jus acquiritur praescribenti. Nulla autem praescriptio magis est legitima, quantum ad cursum temporis quam centenaria; unde et ipsa currit contra Romanam ecclesiam. Reges autem Franciae longe plus quam a centum annis sunt in possessione pacifica, quod solum Deum superiorem habent in temporalibus, nullum alium recognoscentes superiorem in istis, nec imperatorem nec papam, etc."

[3] Cf. John of Paris, chap. xxii. p. 141, *Quaestio in Utramque Partem*, art. v. p. 102.

[4] "Quaestio in Utramque Partem," art. v. pp. 105–6 (in Goldast, *Monarchia*, vol. ii. pp. 96–107).

begins by referring to the decretal *Fundamenta Ecclesiae* of Nicholas III[1], which we have mentioned above, and which was mainly concerned, in its mention of the Donation, with justifying the Pope's temporal power over Rome itself: this he is willing to concede[2]. Turning, however, to the Donation itself, as it appears in Gratian's *Decretum*, he maintains its invalidity, as did John of Paris, on the authority of the "juristae[3]."

[1] In quoting from the decretal he says "dicit Bonifacius Papa." The decretal appeared in the *Sext*, published by Boniface VIII in 1298.

[2] His argument is interesting and worth quoting as showing, in connection with the passage from John of Paris (quoted above, p. 344, note 1), that the French Apologists are quite aware of the weak point in the Donation of Constantine as the basis of papal claims. After quoting from the decretal, he continues: "Responsio: si ex institutione divina papa dicit se esse dominum omnium temporalium, necessitas est dicere quod ex donatione Constantini sit monarcha utriusque potestatis in urbe. Si dicat quod hanc monarchiam Constantinus declaravit, et inde caute dictum est 'declararet' (i.e. in the decretal, vide above, p. 329, n. 2), respondeo, quod ex constitutione divina monarchia totius mundi, quantum ad utramque potestatem, non fuit concessa Petro, nec successoribus ejus, sicut est superius declaratum. Sed ex dono Constantini posset ibi esse monarchia, sic intelligendo: quod cum papa spiritualem potestatem haberet in urbe et orbe, Constantinus ipse temporalem illam potestatem, quam habebat in urbe, transtulit in papam, ut in ipsa urbe utraque potestas (quae in duabus personis erat) esset in solo papa, sicut dicimus quod aliquis episcopus est dominus temporalis et spiritualis in sua civitate et sic est ibi monarcha utrumque obtinens principatum. Sic ergo concedimus quod papa habet monarchiam utriusque potestatis in urbe, non tamen in orbe."

[3] "De ista donatione Constantini dicunt juristae communiter, quod non valuit multiplici ratione." The reasons given are: (1) The Emperor being "semper Augustus" must increase (augere) the Empire, not diminish it. Further the Donation was excessive. (2) The Emperor is "administrator imperii et reipublicae, ut dicunt jura." (3) He cannot prejudice his successors. (4) If it were valid, others of his successors might imitate him, and thus in the end the Empire "detruncaretur." Further he adds—"Dico quod si dicta donatio

Further he maintains that it could not apply to the Franks, who were not subject to the Empire; or, supposing that they were subject—"quod non concedimus"—they would have prescribed their independence. On both of these points[1] he refers us to discussions earlier in the treatise, where the arguments used do not call for special notice after our examination of John of Paris and the *Quaestio de Potestate Papae.*

It is evident that these Frenchmen were very concerned to prove France's absolute independence of the Empire. They had no thought of denying the universal spiritual supremacy of the Pope: what they denied was that there is any *universal* sovereign "in temporalibus"—be he Pope or be he Emperor.

We have earlier in this chapter examined the entry into political thought of a material, which had come into existence long before the Roman world-monarchy was dreamed of; even the great Empire of Alexander had found no place in the political thought of his teacher. Aristotle knew of no State above the πόλις, and, consequently, to the medieval Aristotelians the State, as we have seen, was primarily the Civitas or Regnum, not the Imperium, though subsequently they might evolve a theory of the Imperium, as the finally most perfect community. Thus these Frenchmen could start from the Regnum as the "State"—John of Paris points out expressly that Aristotle holds the "generationem regni esse naturalem in singulis civitatibus vel regionibus, non autem imperii vel monarchiae[2]."

valuerit, tamen ecclesia non fuit in possessione, nisi illius portionis terrae, quae dicitur patrimonium B. Petri."

[1] Vide art. v. ad init., p. 102. [2] Vide chap. III. p. 112.

Accordingly, John of Paris having defined the Regnum as the "regimen multitudinis perfectae, ad commune bonum ordinatum ab uno[1]," and the Sacerdotium as the "spiritualis potestas ecclesiae, ministris ecclesiae a Christo collata, ad dispensandum fidelibus sacramenta[2]," insists on the necessity of unity "in spiritualibus": this unity is found in the Pope[3]. But the unity, which in spiritual matters is ordained "ex divino statuto," is not equally necessary for the "fideles laici." By natural instinct men are inclined to diversity. A "suprema hierarchia in temporalibus" is derived neither from natural instinct nor from Divine Law. All the faithful form the one body of the catholic faith, outside of which there is no salvation, but there is no necessity for them to be united "in aliqua republica communi." Climate and natural conditions produce various forms of polity—"quod est virtuosum in una gente non est virtuosum in alia[4]." A supreme temporal head is not necessary and is neither "de jure naturali" nor "de jure divino." Aristotle knew of no

[1] Vide chap. I. p. 109.

[2] Vide chap. II. p. 111. [3] Vide chap. III. pp. 111–2.

[4] p. 112. He continues: "Non est ergo sic necesse mundum regi per unum in temporalibus, sicut necesse est quod regatur per unum in spiritualibus, nec ita trahitur a jure naturali vel divino. Unde Philosophus in Politicis dicit etc. (vide above, p. 350).... Augustinus etiam, quarto De Civitate Dei, dicit quod melius et magis pacifice regebatur respublica, cum uniuscujusque, vel unumquodque regimen suae patriae terminis finiebatur. Et ibidem etiam dicit quod causa destructionis imperii Romani fuit ambitio propria dominandi vel provocans alienas injurias. Et sic non ita trahitur a jure naturali, quod in temporalibus sit unus monarcha, sicut in spiritualibus, nec huic obviat quod 7 quaest. 1 in apibus, ubi dicitur quod unus debet praeesse et non plures: quia ibi loquitur de re una, ubi non expedit plures ex indistincto dominari: sicut ostendit de Remo et Romulo, qui simul et ex indistincto dominabantur: et ideo unus in alium fratricidium commisit."

Imperium. Augustine shows that it was Rome's "ambitio propria dominandi" which was the cause of its ruin. And the famous Cap. *In apibus*, in Gratian's *Decretum*, which was so often appealed to as proving the necessity of unity, is explained as proving, not the necessity of unity in the whole world under its one universal temporal head, but the necessity of unity in each particular kingdom[1].

Our author's interpretation of the Cap. *In apibus*[2] is especially interesting. He is not arguing against unity, but he wishes to prove that the necessary unity "in temporalibus" is, not unity under one single universal head, but the unity of particular kingdoms. He has no intention of throwing doubt on the necessity of unity in the kingdom. On the contrary, by passing over the "imperator unus" and laying stress upon the "judex unius provinciae" and the two *kings* Romulus and Remus, he proves that one temporal head is a necessity in the *kingdom*. Only it proves nothing else—"ibi loquitur de re una."

[1] Cf. *Quaestio de Pot. Papae*, p. 678: "Quando ergo dicitur, ecclesiastica hierarchia exemplata est ad similitudinem hierarchiae caelestis, dico quod verum est in spiritualibus; sed in nullo exemplatio ista trahenda ad temporalia vel corporalia: et concedo quod sicut in caelesti hierarchia est unus qui praeest omnibus spiritibus, ita in ecclesia est unus qui praeest omnibus animalus (sic), quantum ad ea, quae pertinent ad spiritum et spiritualitatem, sed non quantum ad ea, quae pertinent ad temporalitatem." Cf. *Quaest. in Utramque Partem*, p. 102.

Which runs: "In apibus princeps unus est; grues unam secuntur in ordine literato; imperator unus, judex unius provinciae. Roma condita duos fratres simul habere reges non potuit et fratricidio dedicatur. In Rebeccae utero Esau et Jacob bella gesserunt; singuli ecclesiarum episcopi, singuli archiepiscopi, singuli archidiaconi, et omnis ordo ecclesiasticus suis rectoribus nititur."

Sometimes we find arguments intending to prove that, even if the dependence of the Emperor on the Papacy be conceded, no analogy can be drawn from this with regard to France. The *Quaestio de Potestate Papae* offers a good example of this. Among the Papalist arguments, which the author brings forward to be refuted, it is urged that, since the Pope confirms the Emperor, therefore the Pope is the Emperor's temporal superior, and consequently the superior of any other Christian[1]. Later on this argument is answered as follows[2]: the Pope can no more claim superiority over the Emperor on the ground of confirmation and coronation, than can the Cardinal of Ostia over the Pope himself, on the ground of consecrating the Pope. This, however, is given on the authority of a "dicunt aliqui." Our author himself is quite willing to waive the question of the Pope's supremacy over the Emperor, and merely to argue that the conclusion from this premiss of a

[1] p. 666: "Item non confirmatur quis, nisi a superiori....Sed imperator confirmatur per papam in jurisdictione imperiali, quae est temporalis....Ergo papa est superior imperatore, et etiam in temporalibus; et consequenter quolibet alio Christiano."

[2] pp. 681–2: "Ubi dicitur de confirmatione imperatorum per papam, dicunt aliqui, quod sicut cardinalis Hostiensis consecrat papam, et tamen post consecrationem nullam jurisdictionem spiritualem habet super ipsum papam: ita papa confirmat imperatorem et etiam coronat; et tamen post confirmationem et coronationem nullam jurisdictionem temporalem super ipsum habet. Ego dico, quod quicquid sit de imperatore, nunquam tamen super regem Franciae habet papa, vel habuit, aliquam temporalem jurisdictionem. Et hoc, quia idem rex habet regnum, non per electionem, sed per successionem, nec unquam a papa recepit confirmationem vel coronationem. Unde patet quod non bene concluditur, quando dicitur: papa est superior in temporalibus imperatore; ergo quolibet Christiano. Quia aliquae causae sunt in imperatore, quae non inveniuntur in aliquibus regibus, sicut in regibus Franciae et Hispaniae etc."

supremacy over all other Christians does not hold good. For the French crown goes by succession, not election, and the French king is neither confirmed nor crowned by the Pope. "Aliquae causae sunt in imperatore quare subditus sit papae in temporalibus, quae non inveniuntur in aliquibus regibus, sicut in regibus Franciae et Hispaniae, et fuit etiam aliquando in rege Angliae[1]." In the same way our author, who denies that Childeric was deposed by the Pope, but rather "per barones[2]," elsewhere agrees that

[1] "Videlicet," he goes on, "usque ad tempus regis Joannis, qui dicebatur Sine Terra, sicut apparet per inspectionem Chronicarum, unde etiam illa decretalis, Extra. Qui filii sunt legit. Causam, quae facta fuit ante tempus illius Joannis regis Angliae, sicut notat Hostiensis in suo apparatu super eandem decretalem." The decretal (*Decretal.* IV. 17. 7) is of Alexander III (1159–81). The Pope distinguishes in a case, committed by him to the bishops of London and Worcester, between the question which belongs to the king's court and the question which the bishops are to decide—"Nos attendentes, quod ad regem pertinet, non ad ecclesiam de talibus possessionibus judicare, ne videamur juri et dignitati carissimi in Christo filio nostri Henrici regis, Anglorum principis, detrahere, qui, sicut accepimus, motus est et turbatus, quod de possessionibus scripsimus, quum ipsarum judicium ad se asserit pertinere, volumus et ...mandamus, quatenus regi possessionum judicium relinquentes, de causa principali, videlicet utrum mater praedicti R. de legitimo sit matrimonio nata, plenius cognoscatis etc." The decretal was continually appealed to in order to prove that the Pope had no jurisdiction "in temporalibus" in England, as the more famous decretal *Per Venerabilem* (*Decretal.* IV. 17. 13) to prove the same for France. But it was generally allowed that since the time of King John the Pope was, even "in temporalibus," superior to the king of England. Cf. *Quaest. in Utramque Partem*, p. 98 (where the decretal is wrongly referred to as "Cap. Tantum enim" instead of "Causam"): "Si hoc dicitur de rege Angliae, qui Romanae ecclesiae feudalis est et censualis, multo magis de rege Franciae verum erit, qui in nullo praedictorum penitus est subjectus."

[2] Vide pp. 663 and 667. This explanation of the deposition of Childeric, as having been properly "per barones," not "per papam,"

Frederick II was deposed by Innocent IV. "Dico quod verum est, et de illo imperatore concedo quod papa est dominus temporalis, quoniam ille imperator fit per electionem et a papa confirmationem recipit et coronam; sed nihil horum est in rege Franciae[1]."

So far these French authors have denied the subjection of France to a temporal superior, whether Pope or Emperor, either by appealing to history, or by taking their stand on the Aristotelian Regnum, as the highest and most perfect community, or, lastly, by maintaining that there is no analogy between the Empire and France, so that, granting the dependence of the Empire on the Papacy, the dependence of France does not follow. The appeal to history was safe enough. All sides in the Middle Ages appealed to history—and the appeal, except in rare cases, was merely the

the Pope having done no more than consent to the deposition, is general in the anti-papalist writers. Cf. John of Paris, chap. xv. p. 129, though he also argues that, even if the Pope did depose Childeric, no argument could be drawn from such isolated facts. Cf. also *Quaest. in Utramque Partem*, p. 106. Radulf de Colonna, *De Translatione Imperii*, chap. IV. p. 91, has an interesting discussion of the question. He is a Papalist, but he gives both versions. He does not actually declare for one or the other—but concludes: "Qualitercumque dicatur...salva semper in omnibus veritate, credo authoritatem papae in talibus omnibus negotiis praesupponi, ex eo quod omnis potestas ex eo in hoc dependet etc." In Marsiglio of Padua's version of Radulf's treatise (in the same volume of Goldast, *Monarchia*) the preference is of course given to the version, which would explain the Pope's supposed action as merely consent to the deposition, which was actually carried out by the Franks themselves —"nam talis depositio regis et alterius institutio propter rationabilem causam non ad episcopum tantummodo neque ad clericum aliquem aut clericorum collegium pertinet, sed ad universitatem civium inhabitantium regionem, vel nobilium vel ipsorum valentiorem multitudinem." Vide chap. VI. p. 150.

[1] Vide p. 678.

arbitrary selection of suitable facts and legends, often their obvious perversion. But the two other lines of argument were not altogether satisfactory. They might say that Aristotle knew of no Empire, or they might hand over the Empire to the Papacy—the truth is that they themselves could not altogether do without the Empire. The struggle between Boniface and France was the first great struggle between the Papacy and *kingdoms*, and it followed the previous struggles between the Papacy and the *Empire*. Now neither side opened this new struggle with a completely new set of arguments. It is true that, since the last struggle between the Popes and the Hohenstaufen, the new political theories, the basis of which was Aristotle's *Politics*, had entered medieval thought—and we have seen the importance of this for these Frenchmen. None the less the old struggles provided both parties in the new struggle with a whole armoury of arguments, either ready to hand, or to be adapted to the new political ideas. But, then, the old arguments, so far as they were favourable to the temporal power, were in the main arguments for the Emperor; therefore, if these French authors were going to adopt them, wholly or in part, this distinction between the Empire and other kingdoms could hardly be maintained. If the Papalist arguments against the Empire were conceded, but held not applicable to France, why should Imperialist arguments be held valid, when favourable to France?

We have seen Boniface maintain that he did not deny the existence of two powers ordained by God, and we have said that he was begging the question. Our authors were, of course, quite ready to maintain that the

temporal power was "a Deo[1]," but the struggle was not waged over that question. It might be denied occasionally in the course of argument, but in general it was a postulate accepted by both sides. The real question at issue was whether the temporal power was independent, that is to say, whether the two powers were "distinct and separate." "Quaestio est," begins the *Quaestio in Utramque Partem*, "utrum pontificalis et imperialis, sive regalis, sint duae potestates distinctae ad invicem. Et hoc est quaerere, utrum summus pontifex plenam jurisdictionem et ordinariam potestatem habet tam in temporalibus, quam in spiritualibus, ita quod omnes principes temporales subsint ei quantum ad temporalia[2]." Needless to say, the answer of these Frenchmen is that the two powers *are* distinct and separate, that the Pope has *not* "plenam jurisdictionem et ordinariam potestatem," alike in the temporal and spiritual spheres[3]. Now we have seen, in an earlier part of this essay, that the doctrine of the

[1] Vide e.g. John of Paris, chap. ix. pp. 117–118: "Respondetur secundum illud quod dicitur in Glossa ubi dicitur quod Christus quaedam fecit ut imperator, quaedam vero alia ut sacerdos: non quia una eadem persona illa duo exerceat vel gerere debeat: sed hoc ideo fecit ut ostenderet quod utraque potestas ab eo processit, ut scilicet Deus erat. Haec enim duo, imperium et sacerdotium, ab uno sunt."

[2] p. 106.

[3] Vide e.g. *Quaest. de Pot. Papae*, p. 681: "Nam et jurisdictio spiritualis, quam habet papa, et jurisdictio temporalis, quam habet rex in regno suo, omnino distinctae sunt, et disjunctae, ita quod, sicut rex non habet se intromittere de jurisdictione spirituali, quae est penes papam, ita nec papa habet se intromittere de jurisdictione temporali, quae residet penes regem. Unde non est inter istas duas jurisdictiones mutua dependentia, nisi quantum ad mutuam defensionem, quam sibi mutuo tenentur exhibere, cum necesse fuerit, prout ad unamquamque pertinet, ut bene valeat regi respublica, tam spiritualiter quam corporaliter."

distinction and separation of the two powers became, since the Investiture struggle, essentially the standpoint of the Imperialists, as it had been, before the Investiture struggle, of the Papalists. It was a defensive doctrine, and it was the Imperialists who, since the Investiture struggle, were on the defensive. So were these Frenchmen. Hence they had to fall in line with the defensive standpoint of the Imperialists in former struggles; they could afford neither to ignore the Empire nor to hand it over to the Papacy. They needed the old arguments for the Emperor: their cause and the Emperor's was one—the cause of all temporal powers. Long ago the Emperor Frederick II had warned the kings of Europe that they must realise this[1]. That these Frenchmen in some degree, at any rate, realised it, in spite of the attitude which as yet we have seen them adopting towards the Empire, is sufficiently shown by the opening words of the *Quaestio in Utramque Partem*—the question to be decided is whether the Imperial *or* Royal power be distinct from the Papal.

And so, in fact, we find John of Paris arguing quite as often for the Emperor as for the king of France[2]. We saw above that Henry of Cremona—who did not deny that the Empire was mediately from God—maintained, in discussing the Donation of Constantine, that "si imperatores aliquod jus habebant, propter peccata quae commiserant occidentes fideles in Christo, maxime summos pontifices, divinitus illo jure privati

[1] Vide Gierke, *Political Theories of the Middle Ages*, note 35, p. 118.

[2] Chaps. xi.–xx. especially, where he is stating and refuting the Papalist arguments, illustrate this.

fuerunt." John of Paris considers this amongst the other arguments of Henry of Cremona, which he refutes. Now John of Paris himself, as we have also seen, maintains that the world was never less in peace than under the Roman Empire—never more crimes and dissensions[1]. Hence, in answering Henry of Cremona, he cannot altogether deny that the Emperors were sinners. But he denies that they all were; he denies that, because they were sinners, they could therefore "de jure divino" be deprived of their Empire, for, on Augustine's authority, "regna et imperia vult Deus esse communia bonis et malis"; he denies that the Pope can lay claim to the Empire, because of the sins of its Emperors; and finally he denies that the Empire is in any sense a delegation from the Pope—the Emperors possess it, not by a "privilege" granted "a clericis," of which he has never heard, "sed de jure eis debetur imperium populo seu exercitu faciente...et Deo inspirante, quia a Deo est[2]." This is but one

[1] Vide chap. XXII. p. 141: "Tempore imperatorum nunquam fuit mundus in tanta pace, quanta fuit postea et ante: sed frater fratrem et mater filium occidebat et converso, et cetera horribilia scelera per mundum currebant et dissensiones permaximae etc."

[2] Vide chap. XX. p. 136: "Quod autem dicitur de peccato imperatorum, quod propter peccata eorum translatum est jus imperii ad papam, respondeo, hoc totum ridiculosum est. Primo quia, ut ostendit Augustinus 4 De Civitate, regna et imperia vult Deus esse communia bonis et malis, felicitatem non nisi bonis, et ita non est de jure divino, quod imperatores propter peccata sua jure imperii priventur. Secundo quia non omnes imperatores praedicta flagitia commiserunt, nec eorum peccata aliis obfuisse debuerunt: et praecipue quia in imperio non succedunt haeredes, sed ab exercitu vel populo rite eliguntur. Tertio etiam quia aliqui papae inventi sunt flagitiosi vel haeretici et juste depositi, nec tamen malitia eorum obfuit aliis successoribus eorum vere et debite electis. Quarto, quia dato quod imperator culpa sua privetur

example of the way in which these Frenchmen were forced to make the Emperor's cause their own.

We saw above that the author of the *Quaestio de Potestate Papae* was quite willing to concede the dependence of the Empire on the Papacy, maintaining that therefrom no argument for the dependence of France could be deduced. "Aliquae causae sunt in imperatore, quare subditus sit papae, quae non inveniuntur in aliquibus regibus." Yet elsewhere we find him putting the Emperor and king on a level, as both alike independent, as both the "fundamentum reipublicae." The Pope, he says, may be the head of the "corpus ecclesiae," but the temporal power is the heart. The heart, on S. Isidore's authority, is "totius corporis fundamentum." Aristotle says that the heart is the "principium" of the veins, which carry blood, "sine quo non est vita," to the members, and further that "in generatione corporis animalis" the heart is created first, even before the head. And therefore the "dominus temporalis, sive rex in regno, sive imperator in imperio, recte dicitur fundamentum propter soliditatem et firmitatem, quae in ipso debet esse, sine qua respublica nullomodo potest esse stabilis, sicut nec aedificium sine fundamento[1]."

jure suo, tamen nihil juris ex culpa ejus papae in imperio accrescit... quia dominatio sacerdotibus interdicta est. Quinto quia falsum est quod in fine argumenti insinuatur, sc. quod imperatoribus debeatur ex privilegio. Hoc enim privilegium imperatoribus datum a clericis nusquam audivimus, sed de jure eis debebatur imperium populo seu exercitu faciente...et Deo inspirante, quia a Deo est...."

[1] Vide p. 670: "Spiritualiter vigere debet discretio et sapientia, qua Christi fideles, qui sunt membra ecclesiae, dirigantur ad opera salutis. Unde ad ipsum (i.e. the Pope), sicut ad caput, spectat omnibus fidelibus dare sensum discretionis....Spectat etiam ad ipsum dare

The conception of Christendom as governed by "two powers" went back to the days of the old Christian Empire and was, therefore, in its origin, a theory of *only* two powers. The theory postulated the unity of Christendom; within that unity were two spheres, the spiritual and temporal, each with its supreme governing power. But we have seen that these Frenchmen, while maintaining the necessity of unity in the spiritual sphere, expressly denied a similar necessity in the temporal sphere. For them Christendom was spiritually one, with the Pope at its head; but, temporally, Christendom was divided between more than one power, each of which was supreme in its own Regnum or Imperium.

Of course the "regalis potestas" of Pope Gelasius had long since been applied to others than Emperors—never at any moment in the Middle Ages was the temporal unity of Christendom complete. The fact that Gelasius, though writing to the Emperor, had written "regalis," not "imperialis," made easy its applicability to more than one temporal power. None the less the

fidelibus motum bonae operationis, per virtuosam operationem et bonam vitam, seipsum praebendo bonum exemplum fidelibus....Nervi autem, ab ipso capite derivati, sunt diversi gradus et ordines ecclesiastici, quibus, secundum eorum diversa et distincta officia, membra ecclesiae suo capiti, scilicet Christo, et sibi invicem, quasi quibusdam connexivis compaginibus, colligantur. Unde in unitate fidei faciunt unum corpus. Cordis autem proprietas adaptatur rationabiliter illi, qui jurisdictionem temporalem exercet et est dominus temporalis. Dicit enim Isidorus quod cor est totius corporis fundamentum. Et Arist. in lib. 12 De Animalibus dicit, quod in corde est principium venarum, deferentium ad membra sanguinem, sine quo non est vita. Item dicit lib. 16 quod in generatione corporis animalis primo creatur cor, etiam antequam caput. Dominus autem temporalis etc."

conception of the two powers was one that necessarily betrayed its origin. In the comparison, used here by the author of the *Quaestio de Potestate Papae*, of the "corpus ecclesiae" or the "respublica" with the human body and its members, or in the time-honoured simile of the two luminaries, we see at once that the idea of the two powers was one that was most applicable to conditions both of spiritual and of temporal unity. If the Pope was the one head of the "corpus ecclesiae," should not its one heart have been the Emperor, not the king *or* Emperor? If the sun stood always and only for the Pope, should not the moon have stood always and only for "imperator," not for "imperator *vel* rex[1]"?

Then we must remember that the idea of a universal Empire was far from dead. In Engelbert we saw it enter the new political theories, which were based on Aristotle. The lawyers were still discussing whether the Emperor be "dominus mundi"; many of the civilians at least were still deciding that de jure he is. Certainly the Gloss had said that he is. Yet for these authors the Gloss and the Civil Law were as prime authorities as Aristotle. In appealing to the Gloss they were appealing to an authority, to whom the "State" meant the "Imperium Romanum" as essentially as it meant "Regnum" for the Aristotelian. In appealing to Civil Law they were appealing to a law claiming a universal validity: and it was still by no means certain that the Civil Law was not merely the Law of the Roman Emperor.

The *Disputatio inter Militem et Clericum* can well illustrate how these French authors have need of, and

[1] Vide John of Paris, chap. XII. p. 121.

yet must fear, both the Empire and Roman Law. The knight has argued[1]—"Sicut ego super certos agros habeo certum censum, sic imperator super orbem terrarum pro defensione reipublicae, cum opportunum fuerit, pro arbitrio voluntatis potest levare tributum." And the clergy are not exempt. The clerk asks if—"per reges tollendae sunt gratiae nobis per leges concessae et per beatorum principum privilegia sanctae ecclesiae concessa." The knight answers that all privileges granted to them must be understood as liable to be revoked or altered "secundum exigentiam temporis," if found to be harmful, or "pro ardua necessitate vel utilitate reipublicae." The clerk then remarks that the privileges, granted to the Church, were granted by Emperors, not by kings—"et ideo per bonos imperatores, O miles, nunc erit legum gubernacula moderari." The knight cannot conceal his anger. "Hoc responsum est blasphemiae," he answers. It argues either ignorance of history or malice. History shows that France "dignissima conditione imperii portio est, pari divisione ab eo discreta et aequali dignitate et auctoritate quingentis annis circiter insignita; quidquid ergo privilegii et dignitatis retinet imperii nomen in parte una, hoc regnum Franciae in alia." Just as the Emperor is supreme over the Empire, so, by this "fraternal division," the king of France is supreme over the kingdom[2]. As the

[1] Vide p. 17 (in Goldast, *Monarchia*, vol. II.).

[2] "Cum enim fraterna divisione Francorum regnum a reliqua parte discessit imperii; quidquid in parte decedente, et penitus ab imperio existente, Imperium ipsum quondam obtinuit, aut ibidem jure altitudinis aut potestatis exercuit, hoc principi seu Francorum regi in eadem plenitudine cessit. Et ideo sicut omnia, quae infra

Emperor is above all things "infra terminos imperii," so is the king in his kingdom. And as the Emperor must give laws to his Empire, so the king of France can, within his own kingdom, accept or revoke the Emperor's laws, as he wills, or promulgate new ones[1]. And if the king cannot, who can—"quia ultra eum non est superior"? Let the clerk check his tongue and recognise that the king is supreme over all laws, customs and privileges emanating from his royal power, and that he can add to or detract from them, as seems good to him, according to equity and reason or the advice of his counsellors.

The task before the French publicists was thus exceedingly difficult. Turning to John of Paris again, it need not now surprise us if we find him, in spite of the fact that he holds it better "plures pluribus regnis dominari quam unum toti mundo[2]," here and there recognising the existence of a universal Empire and Emperor.

Thus, on one occasion, he discusses a much-used Papalist argument, that since "in artibus ordinatis" the art, which leads to the principal and ultimate end, "commands" those arts which lead but to secondary ends, so the spiritual power should command the secular, since the end at which the secular power aims is only to direct men to the good life that is attainable "virtute naturae," while the end at which the spiritual power

terminos imperii sunt, subjecta esse noscuntur imperio, sic quae infra terminos regni, regno."

[1] "Et sicut imperator supra totum imperium suum habet leges condere, addere eis, aut demere, sic et rex Franciae, aut omnino leges imperatoris repellere, aut quamlibet placuerit permutare, aut illis a toto regno suo proscriptis et abolitis, novas si placuerit promulgare."

[2] Vide chap. xxii. p. 141.

aims is supernatural, namely eternal life[1]. "Multipliciter deficit argumentum," says John of Paris. We need only notice the second of his arguments[2]. The "superior art" does not always command the inferior "per modum necessitatis, ut instituendo eum," but "per modum dirigentis," just as a physician directs the druggist and judges of his work, but does not appoint him or depose him—that is the duty of the superior, "apud quem est totus ordo civitatis, ut rex vel dominus civitatis." And so, he adds, in the point in question, "totus mundus est quasi una civitas, in qua Deus est suprema potestas, quae papam et imperatorem instituit."

Here we see the king is dominus of *a* Civitas, while the Emperor is one of the supreme powers in the *one universal* Civitas. Now John of Paris has, of course, no thought of suggesting that the king is dependent on the Emperor—he merely wishes to show that it is the Pope's duty to inform the Emperor, as the physician imforms the druggist, while it is God alone who sets up or deposes the Emperor. But it is remarkable that John of Paris is here admitting that the world is "quasi

[1] Vide chap. XII. p. 122.

[2] Chap. XVIII. p. 132: "Quod vero dicitur 23 de ordine finium, respondeo: multipliciter deficit argumentum. Primo....Item plus deficit, quia ars illa superior non semper imperat necessario inferiori, movendo per modum necessitatis, et instituendo eam, sed solum ei imperat per modum dirigentis, et sicut medicus pigmentarium informat et judicat an bene conficiat pigmenta et debita, sed ipsum non instituit, nec destituit: sed est aliquis superior utrobique apud quem est totus ordo civitatis, ut rex vel dominus civitatis: et iste, si pigmentarius non conficiat pigmenta prout medico competit, habet ipsum destituere sicut et constituere. Et ita est in proposito. Totus mundus est etc."

una civitas," with its two supreme "hierarchies," while before he has been at pains to deny it. It illustrates the great difficulty, which faced these Frenchmen, both of avoiding a universal conception of the Empire, when they united the cause of the Empire to their own, and of maintaining the unity of Christendom or the world, without temporal unity under one universal Empire. And, elsewhere, we actually find John of Paris confessing that "papa et imperator, universalem et ubique habent jurisdictionem, sed iste spiritualem, ille temporalem[1]." He is considering the mutual duties of the Pope and Emperor to depose each other, in cases of incorrigible heresy and the like, and it is very significant to find him maintaining that it is the duty of the Emperor to depose, or rather to procure the deposition of, an heretical Pope. The Conciliar movement at the end of the century was to show how rooted in men's minds was the conception of the Emperor, as the temporal head of western Christendom, and how inevitably the union of western Christendom in common action brought that conception into practical importance.

Even more significant perhaps is the reply of John of Paris to another Papalist argument. He states the argument that, as there is but one Church, one Christian people, one "corpus mysticum," so there should be one head alike "in spiritualibus" and "in temporalibus,"

[1] Vide the whole of chap. XIV. The Pope cannot depose the Emperor or kings directly, but only indirectly by excommunicating those who obey them; so the Emperor, "si esset" (there is no mention of *kings* in regard to the deposition of the Pope) can only depose the Pope indirectly—"posset sub hypotheca rerum vel poena corporum inhibere omnibus et singulis, ut nullus ei obediret vel serviret."

on whom all the other "members" should depend[1]. In Engelbert we have seen this argument brought forward in favour of the Empire. John of Paris answers that it is true that there is but one Church, one Christian people, one "corpus mysticum," but the sole head is not Peter or Linus, but "proprie et maxime" Christ. The Pope may be called "head," in so far as he is "principalis inter ministros," just as the Roman Church is the head of all Churches. But he is not head "in temporalibus," neither as regards their government nor disposition—"sed quilibet rex est in hoc caput regni sui: et imperator monarcha, si fuerit, est caput mundi[2]."

The "si fuerit" here, and the "si esset" above, show that John of Paris fully realised the danger of admitting the Emperor to be "caput mundi," or to have "ubique

[1] Chap. XII. p. 122.

[2] Chap. XIX. p. 134: "Quod autem dicitur 29 de vero capite, dici potest, quod una est ecclesia, unus populus Christianus, unum corpus mysticum: non quidem in Petro vel Lino, sed in Christo, qui solus proprie et maxime est caput ecclesiae, a quo distributa est utraque potestas dicta, quoad diversos gradus, secundum Psalm...et Ephes. 2...ubi dicit Ambrosius quod 'Christus est caput ecclesiae.' Potest nihilominus summus pontifex, quantum ad exteriorem ministrorum exhibitionem, dici caput ecclesiae, quantum ipse est principalis inter ministros, a quo ut a principali Christi vicario in spiritualibus totus ordo ministrorum dependet ut ab hierarcha et architecto; sicut Romana ecclesia indubitanter est caput omnium ecclesiarum. Non est autem caput quantum ad regimen in temporalibus seu dispositionem temporalium, sed quilibet rex est in hoc caput regni sui, et imperator monarcha, si fuerit, est caput mundi." Cf. *Quaestio in Utramque Partem*, p. 103: "Sed istud caput dicimus esse Christum, qui solus est proprie caput ecclesiae, a quo derivata est utraque potestas....Potest nihilominus papa dici caput ecclesiae, in quantum est principalis inter ministros ecclesiae....Sicut etiam Romana ecclesia dicitur caput omnium ecclesiarum, non est autem caput quantum ad regimen temporalium, sed quilibet rex est caput regni, et imperator imperii."

et universalem temporalem jurisdictionem." When John of Paris wrote, there was strictly no Imperator, but only a Rex Romanorum; for neither Rudolf nor Adolf nor Albert ever received Imperial coronation. Dante himself looked on Frederick II as the last Emperor before Henry VII. Dante had his own reasons for this opinion, and they were not such as could have influenced John of Paris. The important point is that John of Paris has recognised in the Emperor a universal power, and that such recognition is in violent contrast to the main theme of the treatise—the "si fuerit" merely shows that John of Paris is well aware of this.

So long, in fact, as Christendom was considered by the political thinker as one body, and the necessity for one spiritual head was conceded, it was impossible to carry out a consistent theory of the non-necessity of temporal unity. The theory of the State as a secular and non-universal institution was never achieved in the Middle Ages. The Middle Ages laid the foundations of the theory, but the theory was not achieved until, as a result of the Reformation, the spiritual unity of Christendom was no longer an axiom of political thought.

There was, however, a solution of many, if not all, of the difficulties with which these writers had to cope. That solution we have already considered in Bartolus himself. Bartolus, we saw, never gave up the de jure universal lordship of the Emperor, but he was willing to recognise de facto independence, wherever he found it, and to consider such de facto independent powers as Empires in themselves, as having the same power

within their limited boundaries, as the Emperor had de jure in the world. Bartolus never applied this solution to the Regnum. But the phrase which became current by the middle of the fourteenth century—"Rex in regno suo est Imperator regni sui"—is nothing more than the solution, which he applied only to the Civitas, put in a short and epigrammatic form, and applied to the Regnum. The phrase, as applied to the king of France, would still leave open the question of the de jure universality of the Empire, but it would mean that all arguments adduced for the Emperor would apply "ipso facto" to the king of France, within his own kingdom, and that, in appealing to Roman Law[1], the appeal would not be to the law of a foreign Emperor, but, within the boundaries of France, to its own and native Emperor.

The solution and this phrase itself are not to be found in the literature, with which we have been concerned, with the exception of the *Quaestio in Utramque Partem*. The author of this treatise has set out to prove that the two powers are distinct, and that the Pope has not the "dominium omnium temporalium." This he does by arguments of four kinds—physical (i.e. from Aristotle), theological, from the Canon Law, and from the Civil Law[2]—in other words, from all three of the fundamental materials, upon which medieval political theory was built. When he comes to the Civil Law, he quotes from the *Novels*

[1] This latter point is clearly brought out by Chénon, "Le Droit Romain à la Curia Regis de Philippe-Auguste à Philippe-le-Bel" (in *Mélanges Fitting*, vol. I.).

[2] p. 96.

and from the Gloss to prove the independence of the two powers, each in its own and proper sphere[1]. "Si dicas," he continues, "quod rationes et auctoritates praemissae videntur facere magis pro imperatore quam pro rege Franciae; et si quaeras quare sint hic inductae; respondeo, ad probandum jurisdictiones esse distinctas, quarum una est penes papam et judices ecclesiasticos et alia penes imperatorem et reges. Omnia enim quae pro imperatore faciunt, valent nihilominus pro rege Franciae, qui imperator est in regno suo." He then proceeds to give further reasons to prove that the king of France is not subject to the Pope "in temporalibus," as well as to show that the king of France is "par imperatori quantum ad libertatem suae jurisdictionis[2]."

So far we have treated this work as unquestionably belonging to the period of the struggle between Philip and Boniface. That the evidence as a whole inclines decidedly to that conclusion is certain. It was published by Goldast as the work of Egidius Romanus. Nothing could be more improbable, since Egidius, in all his known works, is the most absolute of Papalists.

[1] p. 98. From the *Novels* he quotes the passage in *Nov.* VI. Praefat. (Quomodo oporteat episcopus). The glosses which he quotes are on the words "maxima" and "conferens."

[2] The following in particular is noteworthy. Having referred to the Decretal *Per Venerabilem*, where the Pope, he holds, said expressly that the king of France recognises no superior "in temporalibus," he adds—"Si dicas, prout dicit Glossa, verum est de facto, sed non de jure, quia de jure debet recognoscere imperatorem, ut patet....Respondeo: illud factum versum esse in consuetudinem, quae dat jurisdictionem....Quia ista etiam consuetudo est approbata et hactenus observata pacifice; nec a papa nec ab imperatore impugnata, imo juramentis et pactionibus foederata, et ex longissimis temporibus jam praescripta."

Riezler[1] pointed out that the treatise is the Latin original of the French treatise by Raoul de Prelles, which Goldast printed in the same collection—his *Monarchia S. Romani Imperii*[2]. Raoul's work professes to be a translation, and Riezler suggested that he might be translating a work written by himself. At any rate, while admitting that the question remained open, he inclined to date this treatise between the years 1364–80. Against this suggestion, however, are very weighty objections. It has been pointed out that the author speaks of the canonisation of S. Lewis as taking place "diebus nostris[3]": S. Lewis was canonised in 1297. Again, he speaks of the *Sext* as newly published and not yet approved by the king of France[4]: the *Sext* was published in 1298. Consequently a modern authority, Professor Scholz[5], who produces further evidence, is inclined to date the treatise in the beginning of the year 1302, and to see in it the model of the, in his opinion, later treatises—the *De Potestate Regali et Sacerdotali* of John of Paris, and the *Quaestio de Potestate Papae*. One must disagree with great diffidence; but we are bound to do so, when Prof. Scholz says that the contents of the treatise do not contradict his hypothesis. For it is just the very presence of this phrase, which seems to argue as decisively against the earlier, as the arguments brought forward by Dr Scholz do against the later, date. For if we turn to the later date, we

[1] *Die literarischen Widersacher der Päpste zur Zeit Ludwig des Baiers*, pp. 139–41.

[2] Vol. I. pp. 39–57.

[3] p. 102. [4] p. 106.

[5] His work to which we have referred more than once—*Die Publizistik zur Zeit Philipps des Schönen*, etc.

find that the phrase, and the solution of so many difficulties which the phrase carries with it, is as conspicuously present, as it is absent at the earlier date[1]. If the treatise is really the model of the treatise of John of Paris and of the *Quaestio de Potestate Papae*, how is it that neither of these have borrowed the phrase along with their other borrowings? That question must surely be answered, before we can assign the earlier date to the work, granting, as we do, that otherwise the evidence is decisively for it.

We are here only incidentally concerned with the date of this treatise. But the phrase, which has led us to doubt the early date given to the treatise by Dr Scholz, has concerned us so closely during a great part of this essay, that it will be a proper conclusion to this chapter, if we attempt some inquiry into its history.

Bartolus himself, we have seen, is not concerned with the Regna, but strictly comparable with his "Civitas sibi princeps" is the phraseology of some older lawyers. In his master, Cino da Pistoia, we find it said that any lord (dominus) "qui non recognoscit

[1] The "Somnium Viridarii," which is generally considered to be by Philip de Mezières, though it used to be ascribed to Raoul de Prelles himself, excellently illustrates this. Vide Part II. chap. CLX. p. 173 (in Goldast, *Monarchia*): "Imperator fuit judex ordinarius sancti Petri: ergo est judex ordinarius papae, qui est Christi vicarius...Nam ad Caesarem tanquam ad suum superiorem appellavit: ergo beatus Petrus fuit subjectus eidem: per consequens et papa eadem ratione et regi Franciae, qui est imperator in regno suo, nec superiorem recognoscit in terris." Compare this with John of Paris, chap. XIX. and we see the immense importance of this phrase. Cf. also chap. CCXCIII. p. 189 and Part I. chap. XXXVI. p. 70 of the "Somnium Viridarii," which should be compared with the similar passage in the *Disputatio inter Militem et Clericum*.

superiorem est princeps in terra sua de facto[1]." Similarly, Andreas de Isernia, a writer on feudal law of a yet earlier generation, mentions the "princeps et rex in regno suo qui habet tantam vel majorem potestatem, quantam imperator in imperio[2]"; and Durandus says that the king of France "princeps est in regno suo, utpote qui in illo in temporalibus superiorem non recognoscat[3]."

The lawyers to whom, in this connexion, we would most naturally turn, are the French civilians of the thirteenth and fourteenth centuries, those "Ultramontani," whose influence both on the thought and method of the Italian schools is known to have been very great. Unfortunately their works are very difficult of access. A great part, even the greater part, has never been printed; in some cases, even where printed, the books are of the utmost rarity. We should naturally expect the French lawyers to be closely concerned with the relations of the king of France with the Empire; if we could believe a sixteenth century Orleans professor, Johannes Igneus, it was they who consistently

[1] Vide *Comment. on Codex* (C. v. 17. 26), p. 317, and (C. IV. 6. 3), p. 186.

[2] Vide *Super usibus feudorum* (De vasal. decrepit. aetat., § Quidam vasal.) p. 41, § 3. Andreas lived, according to Savigny, circ. 1220–1316.

[3] Vide *Speculum Juris*, Lib. IV. Partic. 3, De Feudis, § Quoniam super hommagiis. Durandus lived, according to Savigny, 1237–96. It may be here worth while to refer to some words of Innocent IV., since later writers, when discussing the relations of the kings, and especially of the king of France, with the Empire, repeatedly appeal to them. Having maintained that none but the Pope and Emperor can create "tabelliones," Innocent adds—*Comment. on Decretals* (II. 22. 15), p. 280—"Credimus tamen quod alii reges qui habent supremam et merum imperium possent idem statuere de tabellionibus, si vellent."

maintained their king to be de jure independent, in opposition to the Italian "Citramontane" lawyers, who would allow him at most but a grudging de facto independence. But slight as our available sources are, they are sufficient to throw considerable doubt, to say the least, on the thesis of Johannes Igneus. In his disputation, *An Rex Franciae recognoscat Imperatorem*[1], which gained great celebrity, he maintains that the king of France has de jure no temporal superior, and that the French do not use the "leges imperiales"—"ut eas pro legibus habeant." On both of these points he insists that he is upholding the views of the Ultramontani, and above all of Petrus de Bella Pertica, against the views of the Citramontani, and especially of Bartolus and his followers[2]. He gives us several references to the commentaries of Jacobus de Ravanis, Petrus de Bella Pertica and Johannes Faber, in which he finds that they have maintained, in opposition to the Glosses to the Civil and Canon Laws and

[1] In *Commentaria Joannis Ignei...doctoris Aureliani in aliquot Constitutiones Principum, etc.*, pp. 61–79 verso.

[2] Vide p. 62: "Cum me legente lecturam ordinariam vespertinam in famoso studio Aurelianensi plerumque occurrerit annotatio illa scribentium legistarum et canonistarum, imperatorem universalem orbis dominum esse; quae nunquam visa est mihi vera in jure, praesertim in rege Franciae: curavi...multis additis conclusionibus de mente Petri de bellapertica doctoris Aurelianensis duas ex dictis suis in medium deducere et disputare, et pro viribus sustinere, quae omnino contradicunt dictis Bar. et omnium suorum sequacium idem tenentium cum eo quantum est respectu Christianissimi et invictissimi regis Franciae tenoris hujusmodi:

Rex Franciae neminem in temporalibus de jure habet superiorem pro Petro contra Bartolum et sequaces.

Galli legibus imperialibus non utuntur, ut eas pro legibus habeant, pro Pet. contra Bernardum, Bartolum et sequaces."

the "doctores citramontani," that the king of France does not recognise the Emperor de jure[1].

In the case of Jacobus de Ravanis, it is not possible to verify these references; in the case of Petrus de Bella Pertica we can do so for the law "Cunctos Populos," in the first title of the *Code*. Now so far is Petrus from maintaining the king of France's de jure independence of the Empire that, on the contrary, he can clearly conceive of no other than de facto independence[2]. And—what is still more perplexing—in another place Johannes Igneus expressly reprobates the view of Cino da Pistoia[3], noticed earlier in this

[1] Vide p. 63 § 8: "Reperio quod nostri doctores Aurelianenses et Ultramontani ubique contra sententiam glossarum juris civilis et canonici et doctores citramontanos tenuerunt quod rex Franciae non recognoscat imperatorem de jure: tenuerunt et presertim Jac. de Raven. Petr. et Joan. Fab. in d. l. 1. C. de summa trin. et fide cath. (C. I. 1. 1), per eosdem in § 1 Instit. de patria potest. (Inst. I. 9), per eosdem in prooe. Digestorum."

[2] Vide *Repetitiones in aliquot...Cod. Leges* (C. I. 1. 1), p. 8: "Ad legem istam opponitur duobus mediis. Lex ista dicit, Cunctos populos quos nostrae clementiae etc. Supponit ergo quod imperator non regit totum populum: contra, imperator mundi totius dominus est: ergo omnes populi reguntur imperio...Praeterea lex dicit, quod imperium de coelo processit, unde duo obtinent locum Dei in terris, imperator et papa. Papa locum Dei obtinet in spiritualibus et imperator in temporalibus etc. Deus est Dominus omnium, ergo sub imperio regi habent...Respondeo altero de duobus modis, uno modo sic ut legamus illam dictionem 'quos,' non restrictive, sed implicative, cunctos populos quos, scilicet cunctos populos: sic lex ipsa concordabit, quod mundi dominus est. Vel si velis, non legas implicative, sed restrictive, quos clementiae nostrae regit imperium, et tunc dicetis sic bene, verum est quod imperator de jure cunctorum est dominus... tamen de facto multi sunt populi, qui imperatorem non recognoscunt dominum, et ideo propter illos dixit, quos nostrae clementiae regit imperium, de facto." (Petrus died in 1308, according to Savigny.)

[3] Vide Johannes Igneus, op. cit. p. 62 verso, 5: "O insulse dictum, cum reverentia tanti viri dixerim, qui choleram taxare non

essay[1], that those who do not obey the Emperor are too "vile" to receive his laws, whereas we have seen that Cino has taken this view, and almost his wording of it, from Petrus himself in this very commentary on the law "Cunctos Populos."

We cannot, as we have said, verify the references to Jacobus de Ravanis[2], the founder of the Ultramontane school. His works have never been printed. But, fortunately, among the fragments which have appeared in a modern monograph[3] upon him, there is a passage[4] which may incline us to doubt whether Jacobus, any more than Petrus, held the views ascribed to him by Johannes Igneus. He asks whether, supposing a "comes in regno Franciae" rises against the king and summons his "fideles" to his aid, they are bound to obey. No, he answers, because their oath does not extend to what is unlawful: he then proceeds to show that he who rises against his superior is acting unlawfully. "Committit ille qui se elevat contra superiorem ut D. de cond. ind. l. Si procurator, § Celsus[5].... Et quod committant in lege Julia majestatis, probatur quod rex princeps est quia non recognoscit superiorem. Dico hoc est in principem, non sicut ipsi dicunt quod rex princeps est, sed quia committatur in magistratum principis...quia Francia et Yspania semel fuerunt sub

potuit." Johannes Igneus, it may be noted, treats his Italian opponents with great respect—"Quid dicendum post tantos viros qui nihil in jure ignoraverunt?" (Ibid. § 6.)

[1] Vide above, pp. 41–3.

[2] He lived circ. 1210–96, according to Savigny.

[3] Tourtoulon, *Les Œuvres de Jacques de Révigny*.

[4] Pp. 48–9.

[5] D. XII. 6. 6.

imperio, C. de off. pre Aff. l. 2[1] circa primum (sic) et imo sepe erant ut alias probavi...."

Then as to Johannes Faber[2]. We can, in his case, verify two of the references of Johannes Igneus. In his commentary on *Inst.* I. 9, § 2[3] Faber merely refers us, for the question whether the "Francigenae" are subject to the Empire, to his commentary on the law "Cunctos Populos" in the *Code*. His commentary on this law contains a detailed discussion, which may be said, on the whole, to substantiate, though not unhesitatingly, the contention of Johannes Igneus. Having, according to the dialectical manner, stated arguments in favour of the de jure universality of the Empire, and opposed these arguments with other arguments against it, Johannes Faber concludes[4]: "restat ergo non subesse vel de jure vel de facto." Yet he must confess that once the Emperor was "fundatus de jure communi in omni orbe." Only no longer—"nec crederem imperatorem fundatum esse de jure communi extra metas

[1] C. I. 27. 2.

[2] He lived in the first half of the fourteenth century.

[3] Not § 1, as is said in Johannes Igneus' treatise.

[4] Vide his *Breviarium Super Codice* (C. I. 1. 1): "Restat ergo non subesse vel de jure vel de facto. Et quidquid sit, apparet in illis qui resistunt de facto magnanimitas, in imperatoribus impotentia vel pusillanimitas, qui tantis temporibus ad subjectionem eos reducere non valuerunt, nec jus suum recuperare. Fateor tamen quod imperator fundatus erat olim de jure communi in omni orbe. Hodie vero cum divisum sit imperium dei permissione...et alii reges et principes per populos constituti, ad quos pertinet constitutio per predicta, et per consequens destitutio...nec crederem imperatorem fundatum esse de jure communi extra metas suas infra quas ei obeditur, quamvis Hostiensis contra...qui dicit quod imperator est fundatus de jure communi et nullus rex alius vel baro, ymmo nec persona aliqua ecclesiastica, nisi papa vel episcopus, ut ibi plene notat. Sed tu potes etc."

suas quas ei obeditur," though Hostiensis holds the contrary. "Tu potes dicere," he finally determines, "quod quilibet qui habet territorium limitatum ab antiquo sit fundatus de jure communi infra metas ejusdem, ad exercendum in qualibet parte jus quod in toto universali exercet."

Thus, with the possible exception of Johannes Faber, the difference between the hesitation of these Ultramontane civilians[1] and the decided attitude of the French publicists, whom we have already examined, is very striking. John of Paris never doubted for a moment that the king of France is de jure independent of the Empire; he only found himself in difficulties when he was compelled to adopt the Emperor as his ally. Doubtless these French publicists were well versed in law, but they were much beside lawyers. And so soon as they left Aristotle for the Law Books, there was danger of an adversary retorting on them that the Law Books were the law of an Emperor, not of a king. It is then that the importance of this phrase, with which we are

[1] Johannes Igneus did not mention Guillelmus de Cunio, along with the other Ultramontani, in the passage quoted above, though his influence was considerable. His works are very inaccessible. His *Commentary on the Codex* was printed at Lyons in 1513, but is of the utmost rarity—probably no copy exists in any public library in England: at least, I have not succeeded in finding one. Brandi, in his *Notizie intorno a Guillelmus de Cunio*, has printed a few fragments, among them a little "Tractatus de diversis officiis digesti veteris" (pp. 124–30). The following passage is for us important—vide p. 126: "In regno Francie potest sic equiparari propositus parisiensis (i.e. to the Prefectus Urbis), quia sicut erat in Roma princeps, ita rex Francie in Francia. Et idem in aliis regibus qui de facto non recognoscunt superiorem." We note that he evidently conceives this independence as merely de facto. Earlier in the treatise he has said that "hodie" kings can be compared with the Prefecti Pretorio (p. 125).

concerned, becomes evident. It was this phrase alone which could sever the connexion between the Empire and Imperial Law, and which could make arguments adduced for an Emperor applicable to other secular powers. At the same time it conveniently shelved the problem of de facto or de jure independence; grant that the Rex is "Imperator regni sui," and the question whether he be so de facto or de jure might be interesting, and even vital, to national pride, but was not of practical consequence. It was thus the lawyer's solution. It was the lawyer's final step in finding a solution of what Maitland called "the incongruously simple" theory of the Glossators, who, imposing a strict interpretation of their texts on the facts of the Middle Ages, had attempted to refuse sovereign independence to any but the one universal State, the Roman Empire. The Aristotelian had no need of such a solution, because he started from the Civitas as the State. The Aristotelian might work upwards on a series of more and more perfect and self-sufficient communities; but he started from the Civitas, as the perfect community, and was under no urgent necessity to go further. The lawyer, who started from the Imperium, was compelled to work downwards and to make room in his theories for more than one universal sovereign State. In making the Regnum or Civitas an Empire within its own boundaries, an Empire in miniature, the lawyer not only made possible the "Reception," but, in general, made possible the modern State. The part played by Roman Law at the Renaissance needs no explanation; and that part was only possible when it became quite certain that "the Prince," in appealing to and making

use of Roman Law, was not coming into contact with the law of the one universal Empire.

We see the lawyers gradually feeling their way towards the solution which this phrase implies; gradually the solution attains expressive form. In its final form—"Rex in regno suo est Imperator regni sui"—we have nothing more than the idea expressed in the "Civitas sibi princeps" of Bartolus, or the "Dominus princeps terrae suae" of Cino, put into the neat, epigrammatic form of an axiom. But in the history of thought the small step, which converts an idea from the stage of variable terminology into that of a quotation, is always of decisive importance and often the work of generations. This essay will venture on no dogmatic statement as to who it was that took this step. But, if we leave aside the *Quaestio in Utramque Partem* and the question of its date, we may perhaps suggest that the praise is due to Oldradus, one of the masters of Bartolus, rather than to his pupil, Baldus, who has sometimes been considered the author of the phrase[1]. The wording of the phrase as we find it in Oldradus[2]—"Quilibet rex de facto tenet locum Imperatoris in regno suo"—is almost identical with the phrase, as we find it in Baldus—"Rex in regno suo est Imperator regni sui." Albericus de Rosate[3], a contemporary of Bartolus, quotes the

[1] By Chénon, "Le Droit Romain à la Curia Regis de Philippe-Auguste à Philippe-le-Bel." Gierke, *Deutsche Genossenschaftsrecht*, vol. III. p. 639, refers to no lawyer of earlier date than Baldus.

[2] Vide *Quaest.* ccxxx. (De Donat. et Testament.): "Nisi forte quis non improbabiliter diceret hoc locum habere in donationibus communibus, secus autem in regalibus, quia cum quilibet rex de facto teneat locum imperatoris in regno suo, tales donationes legibus non subjiciuntur..."

[3] Vide *Comment. on Codex*, Part I. (C. I. 2. 19), p. 19, § 3:

phrase on the authority of, and in the form given to it by, Oldradus. Bodin[1], we may remember, called Oldradus "the first of his age" to maintain the de jure, as well as the de facto, independence of the king of France. The evidence is suggestive, but incomplete. This we may say: whoever it was, Oldradus or some other lawyer, who took the step, he did a work of the highest importance in the history of political thought and one deserving the highest praise—*teneat secum servetque sepulchro.*

And high praise, in this connexion, is also due to Bartolus. Certainly, Bartolus did not himself invent this solution, did not put it into its final, axiomatic form. But we are almost as certainly justified in saying that he was the first lawyer to adopt it fearlessly, consistently and generally. A man like Bartolus was admirably placed to solve the problems which the Empire presented for solution. He was, it is true, an Italian and not without some feeling of patriotism; it appears when he laments Italy "tota plena tyrannis," or discusses how it is that the Roman Emperor is in Germany, beyond the Alps. But these were exceptional moments, and in general, when commenting on his

"Quaero, utrum donatio regis non recognoscentis superiorem insinuatione indigeat: dom. Oldradus dicit quod non, quia secundum eum hodie de facto quilibet rex in regno suo tenet locum imperatoris: sed imperiales donationes ceteris non sunt equales quo ad insinuationem vel alia...Quod an sit verum," he adds, "dubito nisi propter auctoritatem dicentis."

[1] Vide Bodin, *De la République*, Book I. p. 139: "...Mais il y a un docteur Espagnol, qui dit que le Roy de France ne recognoist ny de fait, ny de droit prince du monde: comme aussi fait Oldrad, le premier de son aage." Bodin refers to Oldradus' very interesting *Quaestio* LXIX.

Roman Law, he was a citizen of the universal Roman Empire rather than an Italian patriot.

The life of such a man, wandering from independent city to city, until he found citizenship and a permanent abode at Perugia, was far more likely to bring vividly before his eyes the need of a "superioris copia" than to stimulate his patriotism for a hopelessly divided Italy. That the Emperor was de jure superior Bartolus never doubted. Only, with his unerring sense of practical needs, he recognised at once that, since the Emperor's de facto power could not make effective his de jure superiority, such de jure superiority was useless. Bartolus began by seeing a single universal Empire; he ended by recognising a miniature Empire in every de facto independent power.

Bartolus was able to do this, because the motive which prompted all his political thought was utility—the desire to accommodate law to facts. We have attempted to show in this chapter that the problems before Bartolus faced the political thinker and publicist no less than the lawyer, and that the solutions of this problem offered by the former were largely influenced by a number of considerations—in particular by patriotic sentiment and by the material or materials, with which each writer worked. It would be a great mistake to think that in the Middle Ages there was a simple antagonism between the universal Roman Empire and national particularism. Each nation, as it grew more and more distinct, viewed the Empire in the light of its particular history, and championed it or opposed it according to circumstances—"appropriated" it or "opposed" it, as Dante said of the Ghibellines and Guelphs. Many

of the lawyers also were swayed by patriotic motives, but Bartolus, at any rate, was swayed far more by the sense of political needs. His Empire was the Empire which the Glossators had derived from the Roman Law Books; and while most of the politicians and publicists whom we have examined, ended either in throwing over the Empire altogether or in setting it up again in its universality, to the interest of this or that nation, Bartolus was able to leave his de jure Empire intact, and at the same time, step by step, to build up political powers, themselves within their particular limits invested de facto with all the peculiar marks and privileges of the one universal Empire. The modern State, let us remember, is not only the self-sufficing πόλις, it is also "Imperial"—and it was the lawyers, not the political philosophers, who transformed the universal Empire into a system of "Imperial" States. Among the lawyers, no one, in this regard, played a more prominent part than Bartolus.

CHAPTER IV

CONCLUSION

THE two distinguished scholars, who alone have examined the political thought of Bartolus in any detail, have arrived at very different judgments as to its value. To Dr Figgis[1], Bartolus "is one of those minds which help to carry over to one age the thoughts of another and transmit by transmuting them the intellectual heritage of their day." To Dr Chiapelli[2] he is one who, though the contemporary of Petrarch, never freed himself from the company of medieval thinkers, one who consistently adopted the political conceptions of the Middle Ages,

[1] Vide *Bartolus and the development of European Political Ideas*, pp. 166–8.

[2] Vide "Le Idee Politiche del Bartolo" (in *Archivio Giuridico*, vol. XXVII. 1881), pp. 433–9. Vide pp. 433–4: "Il Bartolo, quantunque vivesse nell' età del Petrarca e del Boccaccio, all' albeggiare cioè del Rinascimento, allorchè molte nuove vie si aprivano al pensiero umano, e benche aggiungesse alla vecchia cultura alcuni elementi della nuova, poiche le sue opere ci rivelano un conoscitore dell' Ebraico e della Geometria, pur non ostante non si staccò della schiera dei pensatori della età di mezzo. Continuava a far proprio il concetto politico del medioevo, e seguiva constantemente come i suoi predecessori i due grandi luminari di ogni sapere di quella epoca, la Bibbia, il fondamento di ogni verità, ed Aristotele, il gran maestro delle scuole."

and, like his predecessors, followed unfalteringly the two great luminaries of all medieval knowledge, the Bible and Aristotle. Dr Chiapelli's name is one that carries great weight in the study of the medieval history of Roman Law; yet, *salva reverentia*, this essay must venture to disagree fundamentally with his judgment on the political thought of Bartolus. Even more fundamentally must we disagree with Dr Chiapelli's statement of the position which Bartolus occupies in the history of political thought.

What is the evidence for his supposed dependence upon Aristotle[1]? The scholastic form of his commentaries proves nothing; moreover, Savigny pointed out long ago that Bartolus was by no means the first lawyer, whose work bore this characteristic[2]. However, all that here concerns us is his dependence on Aristotle in the sphere of Politics. Let us turn back, therefore, to the two[3] occasions, on which we have found Aristotle mentioned by him.

[1] As regards his dependence upon the Bible, few words are necessary. Of course the Bible was authoritative for Bartolus—it represented the Divine Law of Revelation. But it was equally authoritative for every other medieval thinker, for Marsiglio and Occam, for S. Bernard and Aquinas—just as it was, we may add, for Luther, Calvin, Hooker and Johannes Althusius.

[2] Vide Savigny, vol. VI. Chap. 53, p. 155: "So wird ihm nicht selten die erste Einfuhrung der Scholastik in unsere Exegese zugeschrieben: ganz mit unrecht, wie schon oben gezeigt worden ist. Allerdings findet sich bei ihm, wie bei mehreren Vorgängern und Zeitgenossen, eine sichtbare Neigung zur Dialectik; allein nicht bei ihm zuerst, oder mit besonderer Uebertreibung und Verkehrheit. Im Gegentheil weiss er diese Methode, die bei den Meisten nur als geistloser und unfruchtbarer Schulzwang erscheint, mit Verstand anzuwenden."

[3] I can remember no other occasions but these, on which Bartolus mentions Aristotle.

On the first of these[1], he mentioned the works of Aristotle, along with those of Hippocrates, as an example of "scripturae, quae tamquam authenticae in studiis servantur," and are therefore authoritative. Now, of course, there is no doubt that had Bartolus been asked whether Aristotle was authoritative, he would have answered, yes. But that he himself was a profound student of Aristotle, or that he was profoundly influenced by Aristotle's political thought, is quite a different matter. Aristotle is generally authoritative, because in the particular Studium, over which he presides, he is considered as such; but he himself no more presides over the lawyer's Studium than does Hippocrates. Hippocrates is equally authoritative in his particular Studium, but no one will suggest that therefore Bartolus himself was either a profound student of Hippocrates or profoundly influenced by him.

That Bartolus considered Aristotle as generally authoritative, but not in any sense a particular authority in the lawyer's Studium, comes out clearly in his *Tract. de Regimine Civitatis.* We need add little to what we have said above[2]. Bartolus, in mentioning Aristotle, was evidently mentioning an authority by no means familiar to his legal readers: Aristotle's words would mean little to them—"juristis quibus loquor non saperent." Moreover, when Bartolus tells us that Egidius Romanus investigates the best form of polity "clarius" than Aristotle, we might be

[1] Vide above, p. 8.

[2] Vide above, pp. 174 and ff. The continual antithesis between "Aristotles" and "nos" in this treatise should be particularly noted. Vide a particularly good example, above, p. 179, n. 1.

inclined to suspect that he has not got his knowledge of Aristotle at first hand, but rather from Egidius himself. Be that, however, as it may, the authority to which Bartolus primarily turns, here as elsewhere, is not Aristotle, but "leges nostrae." The history of Rome, with references to the Law Books, is made to illustrate the comparative value of the different forms of polity. His references to Aristotle or Egidius merely show the breadth of his learning, which we are very far from wishing to deny, but they in no way prove the dependence of his political thought on Aristotle or his medieval exponents.

The foundations of the political thought of Bartolus were the political conceptions which the Bolognese Glossators, a century at least before Aquinas and the revived influence of Aristotle's *Politics*, had derived from the texts of the Law Books literally interpreted. Where Bartolus went beyond the Glossators, he did so, not because he was influenced by the new Aristotelian political theories, but because his object, unlike that of the Glossators, was to evolve from his texts a law rather practically acceptable than scientifically correct. "Fuit vir multum adhaerens practicae[1]." Bartolus started from the political conceptions of the Glossators; he might develop them upon lines which the Glossators themselves had already, though hesitatingly, pointed out, or he might give them an entirely new direction —but, in either case, it was from them that he started. It is, then, to the Glossators and their texts, not to Aristotle, that we have to go back in tracing the filiation of his political thought.

[1] Vide Savigny, vol. VI. Chap. 53, p. 139, Zeugniss 4.

If there is a "dualism[1]" in the thought of Bartolus, it is to be accounted for, not by the fusion of two principles of thought—one medieval and the other antique—but to the distinction between right and fact, which dominated all his thought. De jure Bartolus never gave up the old political ideas of the Glossators; de jure the Emperor was still lord of the world, the Empire still the one universal State. It is easy for us, on this side of the Renaissance and Reformation[2], to see that Bartolus was wrong and that the day of the Empire was over. Bartolus lived in the first half of the fourteenth century: Frederick II had not been dead a century; Sigismund was yet to come, and Charles V. No one can say what Charles V might have made of the Empire—and we know how ardently he desired the Imperial crown—if his hands had not been tied during the whole of his reign by the religious troubles in Germany. But the important point is that the retention, de jure, of the Empire in the full extent of its pristine power and claims, in no way prevented Bartolus from developing theories to fit a world in which fact and right no longer coincided. The political thought of Bartolus had two sides—on the one a theory of a single World-state, the Imperium Romanum; on the reverse a theory of a world of States. There was no real confusion. Bartolus did not pass from one to

[1] Vide Chiapelli, op. cit. pp. 434–5.

[2] It is interesting to note how Christian Europe, even after the Reformation, owing to the territorial position of the Hapsburg Empire, finds in the Emperor its leader against the Turk. Thus a very Protestant Englishman, Sir Edwin Sandys, can talk at the end of the sixteenth century of "our Christian Emperor." Vide his very interesting *Europae Speculum* ("Of Germany," p. 196).

the other without giving due warning. We have only to remember that the legend on one side was "de jure," and on the other "de facto," in order to see that his political thought was really consistent. It is true, there was one exception. But Dr Chiapelli, we would suggest, has made far too much of the theories of Bartolus on the relations between the temporal and spiritual powers[1]. We must take account of them, if we wish to estimate his honesty; if we mean to judge his place in the history of thought, they need not detain us. They are not really an integral part of his thought—almost, in so many words, he has told us that he was not saying what he meant. How little stress his contemporaries laid on his supposed Papalism may be gauged by the charge which his great pupil Baldus, a real Papalist, made against him—"semper tenebat opiniones multum placentes laicis: et hoc facit opinionibus suis multum honorem[2]."

Moreover, if we are to judge Bartolus at his correct value, we must not think of him in isolation. Indeed, this is true, up to a point, of every thinker. How often can we point to any single thinker, as the actual author of any single idea or theory? "Ideas," as Lord Acton said[3], "have a radiation and development of their own, in which men play the part of godfathers and godmothers more than that of legitimate parents." This is especially true of a thinker like Bartolus. We must consider him as one of the long series of medieval civilians and canonists. He was

[1] Chiapelli, op. cit. pp. 435–6.

[2] Quoted by Savigny, vol. VI. chap. 53, p. 149, note c.

[3] Vide *Letters to Mary, daughter of Rt. Hon. W. E. Gladstone*, pp. 6–7.

perhaps the greatest, he was certainly the most famous of them, and it is as such that we must judge him.

The work of the medieval lawyers was, not so much to elaborate ready-made political theories, as to forge and sharpen many of the tools, with which the political philosophy of the modern world was to work[1]. Dr Gierke has shown how the elaboration by the civilians and canonists of their doctrine of the corporation has reacted on political thought. Thus the very democratic theories of Bartolus on the internal government of the Civitas take on a new and far more significant meaning, when we remember that the theories, which he has elaborated for the "universitas civitatis," may be adapted to serve world-wide "universitates," the Imperium or the Ecclesia, in the likeness, and on the foundations, of which political philosophy was to establish the modern State.

Whether Bartolus was a profound or an original thinker[2] we need not ask; that he is an important one in the history of political thought is the main point. It is not merely useful, it is essential, to study Bartolus, as illustrating the tendencies of the medieval jurists: it is essential to the full understanding alike of medieval and of modern thought.

Bartolus, Dr Chiapelli says, had never freed himself

[1] Vide Maitland, Introd. to Gierke, *Pol. Theories of the Middle Age*, p. viii.

[2] Vide Chiapelli, op. cit., pp. 438–9: "...Non crediamo, che si possa considerare come un profondo ed originale pensatore nella politica. Le sue dottrine in questo proposito non hanno moltissima importanza scientificamente; soltanto meritano un esame accurato per conoscere profondamente le tendenze delle scuole giuridiche, e dei grandi giureconsulti del secolo XIV, e la influenza che poterono esercitare sulla società, tanto più che il Bartolo fu il primo legista che scrisse dei veri e proprii trattati politici."

from the company of medieval thinkers. Rightly or wrongly, we have attempted in this essay to give the term "medieval" a purely chronological meaning. "Medieval political thought" has meant all such political thought as was produced in the odd thousand years known as the Middle Ages. The political theories of Gregory VII, or of Aquinas, or of Bartolus, or of Petrarch have for us been all equally "medieval."

The truth is that, though in certain regards the Middle Ages are a single period, within that period there are divisions, which cannot be disregarded. Not only in the Middle Ages, as indeed in all other ages, were actual political conditions continually changing the matter and direction of political thought, but, further, both the matter and the manner of political thought were being continually changed by an influx of new material for thought. In the early Middle Ages, the so-called Dark Ages, the one material was theology —the dominating influence was that of S. Augustine. But from the end of the eleventh century to the close of the thirteenth century, the history of political thought is marked first by the Bolognese revival of Roman Law, and secondly by the reintroduction of Aristotle's *Politics* into western Europe; it has been one of the main theses of this essay that, in the later Middle Ages, we have to distinguish those political conceptions and theories which are based on Justinian's Law Books from those which are based on Aristotle's *Politics*. To understand the modern State it is not enough to go back to Aristotle's πόλις; we have to go back to the theologian's "Civitas Dei" and to the lawyer's "Civitas sibi princeps." The English

crown, it is well to remember, was "Imperial" long before we had a colonial Empire; the idea of the State as containing many churches and religions is so new, as to be still unacceptable to many. To understand the modern State the Middle Ages must surely receive as ample and detailed a study, as the ancient world or the modern world itself. And to understand how the modern State has become "Imperial," and what that signifies, we must go back to the medieval civilian and his "Civitas" or "Rex sibi princeps."

The Renaissance brought with it new ideals and new methods, and it is because we are still under their fast fading, but still living, influence, that it is by no means easy for us to do justice to a man like Bartolus. We too, like Laurentius Valla, must feel a little contempt for any man who wrote such very bad Latin. The ideal of our education is still, to a great extent, Colet's "good literature, both Latin and Greek"—

Choice Latin, picked phrase, Tully's every word—

and it would be pedantic to pretend that our attitude is altogether wrong. The style and method of Bartolus are, it may be owned, to a great extent barbarous; only, barbarous or not, he is important and is influencing our thought and our lives at this moment. Bartolus, it is true, ceased at the Renaissance to be the unquestioned "princeps jurisconsultorum"; for the people, who cared for letters, he was merely one of those "old mastiffs who never understood the least law of the Pandects[1]." But there were many, then as now, who cared little for letters. Bartolus did not lose his hold on the courts. The Roman Law which

[1] Vide Rabelais, II. 10, p. 220 (Urquart's transl.).

Germany "received," was the law which Bartolus and his followers, the Bartolists, had evolved. Moreover, among those who cared for letters, there were some who thought differently from Cujas and Rabelais. Both Albericus Gentilis and Bodin were Bartolists. Albericus wrote a special work to defend the Bartolists against the "Novitii[1]." Bodin, in attacking Cujas, tells us that he too, when he only taught, despised the Bartolist tradition, but that he learned to think differently after the experience of practical work:— "Fuit enim tempus illud, cum Populi Romani jura publice apud Tolosates docerem, ac valde sapiens mihi ipsi viderer in adolescentium corona: illos autem juris scientiae principes, Bartolum inquam, Baldum...nihil aut parum admodum sapere arbitrarer: postea vero quam in foro jurisprudentiae sacrae initiatus, ac diurno rerum agendarum usu confirmatus sum, tandem aliquando intellexi non in scholastico pulvere, sed in acie forensi, non in syllabarum momentis, sed in aequitatis ac justitiae ponderibus veram ac solidam juris sapientiam positam esse[2]."

[1] Vide his *De Juris Interpretibus Dialogi Sex*. Throughout he recognises that the chief ground of attack against the Bartolists is humanistic: he allows the superiority of the Novitii as humanists. Vide Dialogus II. p. 23: "Vix tamen est, ut in hoc interpretationis genere, quod analogicum dicunt, novitii Bartolum lacessant, sed in etymologico: bonarum litterarum rudem clamant." Again on p. 24 verso: "Modo etiam dicebamus, in etymologica interpretatione novitios interpretes valere plurimum; in analogica, quae propria nostra est, minimum."

[2] Vide the Introductory Latin letter to the *De La République*. It is interesting to note, at the same time, how Bodin turns the tables on Cujas. Cujas is accused of preferring Apuleius to Cicero— Apuleius "qui primus foeda barbarie Latini sermonis puritatem... conspurcavit."

The fact that these two thinkers, whose influence will not easily be overrated, are here, in the early years of the history of modern thought, definitely inscribing themselves as "Bartolists," is of immense significance.

But the influence of Bartolus has not been restricted to those who consciously accepted him. Bartolus is important, not because of the direct influence[1] which he has exerted over this or that thinker, but because the doctrines which he, and the medieval lawyers in general, had evolved in expounding their law, passed into general currency through the works of political thinkers proper. Our world is little like the world of the medieval civilian; but he has played no small part in forming it.

[1] With the exception perhaps of the *Tract. de Tyrannia*, on which vide Figgis, *Bartolus and the Development of European Political Ideas*, pp. 162–3. Salvimeni, in his *La Teoria di Bartolo da Sassoferrato sulle Costituzioni Politiche*, points out that Bartolus in his *Tract. de Reg. Civ.* forestalls Montesquieu's theory of the relative value of the different forms of polity. He will not decide, however, whether there is any direct connexion. It certainly seems improbable. As a matter of fact, Bartolus is not the only thinker before Montesquieu to maintain this theory. Dr Figgis mentions Savonarola (op. cit. p. 161). Vide also John of Paris (above, p. 351), and Gierke, *Johannes Althusius*, p. 61, note 21.

APPENDIX A

I have attempted to collect here one or two points in the life of Bartolus, wherein Savigny needs either correction or amplification.

(1) According to Savigny, following Pellini and Vermiglioli, the family of Bartolus had originally been called Severi, the name being altered to Alfani, in honour of a nephew of Bartolus, one Alfanus, a man, it appears, of some importance. Rossi[1], however (vol. VI. p. 239), shows that the family name was originally Bentivogli—"il merito di questa scoperta," he says, "devesi ad Antonio Brandimarte minor conventuale, che nel 1827 scrisse al gonfaloniere di Sassoferrato di aver trovato nell' archivio notarile di detta terra fra i rogiti di Buzio Bondimandi, sotto il giorno 5 febbraio 1335 che 'N.N. fuerunt confessi recepisse in societatem a Cicco Bonacursii Bentevoli de Saxoferrato tres vaccas,' &c." Bernabei[2] says that this had already been noted by Sansovino. It was the mother of Bartolus, he maintains, who belonged to the Severi, and whose family changed their name to Alfani in the fifteenth century. Bartolus' will, in Rossi (VI. p. 49, No. 100), gives us a great deal of information about his family. Vide also Rossi VI. pp. 240–9 for some interesting particulars

[1] Vide p. 1, note 1 above.

[2] *Bartolo da Sassoferrato e la Scienza delle Leggi*, p. 17.

as to his houses and on the fate of his tomb in Perugia.

(2) The most disputable period in the life of Bartolus is between the date of his doctorate (Nov. 1334 according to the diploma, first printed by Lancellotti, *Vita Bartoli*) and the date of his first Professorship, at Pisa, which Savigny shows to have begun in 1339. We know, to begin with, that Bartolus was Assessor both at Todi and Pisa[1], before he began to teach at Pisa; while he is further reported to have been Assessor at Cagli and to have taught at Padua and Bologna. Finally, the "magnum tempus," which Bartolus records that he spent near Bologna at S. Victor—probably, as Savigny says, in a religious house—"ad studendum et revidendum libros per meipsum," must also fall within this period.

Fable has explained this retreat as a forced retirement in consequence, either of an unjust sentence of death, or the over-torture of a young man, for which Bartolus, as Assessor, was responsible. Savigny, and most modern writers, reject this, and rightly so far as concerns the period of seclusion, which we have no evidence to think anything but voluntary. But that Bartolus had been guilty of over-severity in torture is but too true, and rests on the unimpeachable evidence of the following passage from his *Comment. on the Dig. Nov.* Part II.[2]—"Sed quid si judex torsit aliquem tantum quod mortuus est?...Videtur dicendum judicem teneri. Breviter dico sic. Si judex excessit modum consuetum et modum qui debebat adhiberi secundum qualitatem personae torsae, tenetur, alias secus. Hoc incidit mihi, quia dum viderem juvenem

[1] Vide above, chap. I., p. 3. [2] (D. XLVIII. 18. 7) p. 536.

robustum, torsi illum, et statim fere mortuus est, et ideo inspiciendum est an possit judici imputari culpa et similia." This passage is clearly the origin of the whole story; and so far as it goes, it cannot be denied. But it gives us no warrant for connecting the period of solitude with this incident, nor does Bartolus tell us whether it had any consequences as regards himself —whether it ended his Assessorship, or whether it happened at Pisa or at Todi[1].

We cannot fix the dates of the period of retreat or of the Assessorships at Pisa and Todi exactly, but we may confidently place all these events within the period Nov. 1334–39. Further, they are the only events of which we can be certain within those dates.

The Assessorship at Cagli is reported by Mazzuchelli (*Scrittori d'Italia*, s.v. Bartolo, p. 461, note 10) on the strength of a document, according to which Bartolus, it seems, is named as Assessor there in 1340. This date seems almost impossible, if Bartolus began to teach in 1339 at Pisa; but, on the other hand, an Assessorship at Cagli is not impossible in itself; and one very interesting passage in his works points to his having had some first-hand knowledge of the place[2].

[1] It is worth noting that in his *Comment. on Dig. Nov.* Part II. (D. XLVIII. 18. 15), p. 542, Bartolus supports the Gloss, in opposition to Azo, in maintaining that "liberi homines viles, ut artifices facientes viles artes, obscuri et ignoti forsan," *can* give evidence without torture, and in his *Comment. on D.* XLVIII. 8. 1, he says that "potestates et rectores terrarum, qui cogunt testes per tormenta, ut dicant falsum," are amenable to this Lex Cornelia (p. 490).

[2] *Comment. on Dig. Nov.* Part I. (D. XLIII. 10. 1), p. 434: "Quandoque est deterius viam esse multum amplam. Ita vides hic...In quo autem ista deterioratio fit, si est magis ampla, cogitabitis: tamen dico vobis quod ego vidi in quadam civitate: cum

The Professorship at Padua has no evidence whatever to support it, and seems to rest on a single statement of Caccialupus, a fifteenth-century writer. I have found no evidence in Bartolus to corroborate it in any degree.

The Professorship at Bologna was accepted by Savigny, though he acknowledged the difficulties in the way of doing so. Bartolus is supposed to have succeeded his master, Raynerius Forlivensis, at Bologna, and to have been bitterly attacked by Raynerius for controverting his opinions[1]. Now, Bartolus was the colleague of Raynerius at Pisa, and there, we know, was on good terms with him[2]; and it has, in fact, been shown conclusively by Lattes, *Un Punto Controverso nella Biographia di Bartolo*[3], that

ibi essent multae viae amplae, posita fuit necessitas hominibus circumhabitantibus occupandi et restringendi eas. Ratio, quia quando tumultus erat in civitate propter viarum latitudinem, civitas reddebatur debilior ad defendendum, et hoc fuit in civitate Calii." Cagli is mentioned again in *Comment. on Dig. Nov.* Part II. (D. L. 1. 27, § Celsus), p. 653, § 4..."In civitate Calii, quae fuit destructa in uno loco et reposita in alio ejusdem territorii."

[1] Lancellotti, *Vita Bartoli*, pp. 73 and ff., we may perhaps note here, has exposed the fable of the supposed quarrel between Bartolus and Baldus. Renan, *Averroès et l'Averroïsme*, p. 33, compares it with the fable of the quarrel between Avicenna and Averroës.

[2] Vide *Comment. on Dig. Nov.* Part II. (D. XLV. 1. 73, § Stichii), p. 84: "Et hoc tenent omnes doctores excepto do. Ray. et magno tempore tenuit istam; postea mutavit opinionem...Postquam dixi sibi istud, cum semel Pisis legeremus; ipse respondit...Sed dum legebam Pisis, sequendo Cassium, qui sententiam magistri sui bene excusat, dixi eum bene dicere."

[3] Turin 1898. We may quote the conclusion of his pamphlet (p. 12): "Da questi fatti si può concludere che le parole ingiuriose e le critiche acerbe contenute negli ultimi paragrafi della *repetitio* di Ranieri sulla l. *Omnes Populi* non si riferiscono a Bartolo, sebbene la maggior parte di quello scritto sia rivolta contro di lui: Ranieri

the "Repetitio" on the law "Caesar," the doctrines of which Raynerius attacks with especial bitterness, was not composed by Bartolus at all, but is to be ascribed to Signorolus de Homodeis, a Milanese contemporary, also a pupil of Raynerius; and that it was he, not Bartolus, who succeeded Raynerius at Bologna. There can be little doubt that Lattes is correct—neither Bartolus nor Baldus mention this Professorship, nor have I found any incidental references to it[1].

(3) In the printed editions of Bartolus the "Repetitio" on the law, D. XXXI. 1. 66, § Duorum (*Comment. on Infort.*, Part II.), is subscribed as follows:—"Hic § fuit repetitus per me Bartolum de Saxoferrato minimum inter legum doctores nunc infortiatum legentem in alma civitate Pisarum sub anno Domini 1351 de mense Junii." If this subscription were correct, it would mean that Bartolus returned to Pisa some time before 1351—and such an hypothesis has been adopted[2]. But Savigny rightly saw that this was unlikely, and noted that either the date or the name of the town must be wrong—which, he did not decide. The evidence of such MSS., as I have been able to see, points

prese di mira Signorolo Omodei, vero autore della *repetitio* sulla l. *Caesar*, e che veramente successe al maestro nello studio di Bologna, cosicchè anche l' unico argomento, che poteva tuttavia addursi intorno all' insegnamento di Bartolo in quell' università, apparisce al tutto infondato." The doctrines of Bartolus which Raynerius attacks—but without bitterness—are in his Repetitio on the law "Omnes Populi" (D. I. 1. 9).

[1] In *Comment. on Infort.* Part I. (D. XXVII. 9. 3, § Si pupillus), p. 248, Bartolus says: "Et induxi istum § in prima vice quando redii de Bononia, in argumentum ad quaestionem...," but this can refer, of course, to his return after taking his doctor's degree.

[2] By Bernabei, e.g. op. cit. p. 32.

undoubtedly to the conclusion that the date is wrong, and that it ought to be 1341. All the MSS. agree in having Pisa as the name of the place; in a MS. of the British Museum (Add. 34,748), the "Repetitio" is subscribed as follows—"Repetitio predicta facta fuit per me Bartollum de sasso ferrato minimum inter legum doctores nunc infortiatum legentem in alma civitate pisarum sub anno domini mcccxlj de mense Junii" (fol. 139 verso). This MS., it may be added, is exceedingly good authority, since it was completed in 1378, that is to say, scarcely more than twenty years after the death of Bartolus; but its evidence is balanced by that of another fourteenth-century MS., at Peterhouse, Cambridge, where the subscription runs:—"Hic § fuit repetitus per me Bar. de saxofer. minimum inter legum doctores nunc infortiatum legentem in alma civitate pisarum sub anno mcccli de mense Junii" (fol. 28 of Part II. The MS. is no. 36 in Dr James' *Catalogue*). It is, however, far more probable that an "x" has slipped out than in—and this is borne out by the evidence of a fifteenth-century MS. at Pembroke College, Cambridge (No. 138 of Dr James' *Catalogue*). Here the subscription runs—"Hic § fuit repetitus per me Bartholum de Saxo ferrato minimum inter doctores nunc infortiatum legentem in civitate pisarum sub anno Mccc et hoc de mense Junii" (fol. 72 verso). Now it is clear that the date Mccc is wrong and that "et hoc" has no meaning whatever[1]; and

[1] Similarly in a fifteenth-century MS. at Venice (Bibl. Naz. Cod. CCIII. Bess.), fol. 66, we read: "Hic § fuit repetitus per me Bar. de saxoferrato minimum inter legum doctores nunc inforciatum legentem in alma civitate pisarum sub anno M° hoc de mense Junii." In a Florence MS. (Bibl. Naz. MSS. Magl. XXIX. 25), fol. 173, the

Mr Minns, librarian of Pembroke, who kindly showed me the MS., suggested to me that the "et hoc" was nothing more than a misreading by the copyist of "xlj." We may therefore say that the date of the "Repetitio" should probably be, as in the British Museum MS., 1341, and that Bartolus did not go as Professor a second time to Pisa, the only evidence for the second Professorship being the subscription to this "Repetitio," as printed.

(4) Savigny's list (in op. cit. vol. VI., Anhang III.) of the dates of the Professorships held by Bartolus may be supplemented as follows:—

1341—The subscription of the "Repetitio" on D. XXXI. 1. 66, § Duorum, which we have just been considering.

1342—"Deo Gratias, repetitus fuit praesens § per me Barto. de Saxoferrato in civitate felici Pisarum 1342 die 15 mensis Novembris" ("Repetitio" on D. XLV. 1. 4, § Cato, p. 23).

1343—"Repetita fuit per me Bart. minimum juris doctorem in felici civitate Perusii a. d. 1343 die 29 Mar. quae mea dicta cujuslibet melius sententientis correctioni submitto" ("Repetitio" on D. XVI. 3. 32, p. 326).

1344—As regards the "Repetitiones" mentioned by Savigny under this date, on the authority of Bini and Merkel, vide Rossi, vol. v. p. 306, who says—"è il mio debito notare che nessuno dei molti scritti di Bartolo raccolti nei codici della Communale di Perugia ...reca la data del 1344."

1345—"Repetita per me Bar. de Saxoferrato...in

"Repetitio" is signed—"Repetitus per me Bartolum de Saxoferrato"—but undated.

felicissima civitate Perusii Anno Domini 1345 die Mercurii mensis Martii" ("Repetitio" on C. VIII. 14. 3)[1].

1346—A "Repetitio" of this date mentioned by Rossi (vol. v. p. 306) as existing at Perugia. He adds —"Il Savigny è stato tratto in inganno dal Bini, quando fidandosi di lui, ha citato le *Repetitiones* di detto codice per l' anno 1347."

1351—Document no. 89 in Rossi (vol. v. p. 366), which he dates 1351, Oct. 20th.

1354—Savigny mentions, on the authority of Diplovatacius, a "Repetitio" on D. XII. 31 for this year. The "Repetitio" is undated in the editions which I have seen, but in a MS. of the *Digestum Vetus*, in the Peterhouse Library (No. 28 of Dr James' *Catalogue*), it is subscribed as follows, thus confirming the statement of Diplovatacius—"Repetita fuit hec l. per dominum Bar. Anno domini Mcccliiii deo gratias[2]."

APPENDIX B

As regards Bartolus and the canonists, we saw in the first chapter that Bartolus considered the Canon Law as "vidua" without the Civil Law, and maintained that there could be no justice in the clerical courts, if the "civilis sapientia" were rejected. This is not

[1] Venice ed. (1596), p. 98 verso: there is no subscription in the Bâle ed.

[2] So in a MS. at Venice (Bibl. Naz. Cod. CCI. Bess.), fol. 245—"Repetita fuit hec lex per dominum Bartolum Anno domini Mcccliiii deo gratias."

inconsistent with his submissive attitude towards Canon Law in its own domain. Bartolus was quite ready to criticise the Canon Law and the canonists, but not in spiritual matters—there, in general, he accepted their word as final. On the one side we may note passages like the following—"Canonistae tamen videntur aliter sentire, licet credam eos non bene dicere," in *Comment. on Codex*, Part I. (C. II. 53. 7) p. 285, § 8; "Non obstat quod canonistae dicant," in *Comment. on Infort.* Part II. (D. XXXIV. 9. 25) p. 331, § 10. On the other side we may take as examples *Comment. on Dig. Vet.* Part I. (D. IV. 4. 7) p. 432: "Quaeritur...utrum in spiritualibus minor possit restitui...Glossa tangit istam quaestionem, sed quaestio pertinet ad canonistas." So *Comment. on Codex*, Part I. (C. V. 4. 6) p. 522, discussing whether the son of a clerk and his concubine can be legitimated—"standum est determinationi canonistarum." Again, *Comment. on Infort.* Part I. (D. XXIX. 2. 93) p. 500: "Quaero utrum per pactum posset renunciari successioni viventis...Non procedit de jure canonico, cui in hoc est standum." In other cases he is ready to stand by the opinion of the theologians—*Comment. on Infort.* Part II. (D. XXXIV. 9. 25) p. 330, § 9: "Puto, salva ratione theologorum, etc." *Comment. on Codex*, Part I. (C. II. 3. 30) p. 164, § 6: "Hoc dico salvo judicio et determinatione canonica et theologorum." *Comment. on Infort.* Part II. (D. XXX. 1. 5) p. 8, § 3: "De hoc interrogavi plures magistros et baccalaureos in theologia."

In one interesting case, however, and only one, so far as I know, does Bartolus break through his usual reverence into something like contempt for a canonist and his Law—this canonist was perhaps his colleague.

Vide *Comment. on Infort.* Part II. (D. XXXVIII. 11. 6) p. 539: "Item habes quod per sola sponsalia contrahitur affinitas...et ibi quod nuptiae debent esse nuptiae licitae...ut excludant conjunctiones illicitas et nefarias... Et hoc de jure civili. De jure canonico est totum contrarium...Et pro hoc fuit quaestio. Hic est statutum quod non potest aliquis esse potestas vel capitaneus, qui esset affinis alicujus nobilis: modo fuit electus quidam dominus de Guido Faventia potestas hujus civitatis, qui contraxit sponsalia cum quadam nobili. Quaerebatur an esset affinis. Dominus Recuperatus, quia ego non eram hic, dixit quod de jure suo, affinitas non contrahebatur nisi per copulam carnalem: tamen bene dixit de jure suo, quia potuit dicere quidquid voluit de jure suo, etc." Bartolus mentions this Recuperatus or Recuperus on at least two other occasions: once as having given a "consilium" "bene"—"et ita sensimus nos omnes," vide *Comment. on Codex*, Part II. (C. VI. 25. 2) p. 55—and on the other occasion as having given a "consilium" along with Bartolus himself[1] and Franciscus de Tigrinis, vide *Comment. on Infort.* Part II. (D. XXXI. 1. 89, § Imperator) p. 139, § 11. This seems to show that Recuperatus was a colleague of Bartolus. He must have been considerably older than Bartolus, since he was also a colleague of Cino; two "consilia" printed by Rossi—vide vol. V. p. 312 and documents no. 56 (pp. 121–2) and 57 (pp. 123–4)—are signed by Cino, Recuperatus and another. Bini,

[1] Among the additional Consilia, first printed, as far as I know, in the Venice ed. of Bartolus (1596), occurs one (no. XXI. p. 188 verso) subscribed both by a "Recuperius de Sancto Miniato" and by Bartolus.

Memorie Istoriche della Perugina Università, Vol. I. Part I. p. 181, mentions him as becoming Professor of Canon Law in 1322, and as going in the same capacity to Florence in 1334. Bartolus came to Perugia in 1343. There is no difficulty as regards the first reference above, since Bartolus' words "non eram hic" would well accord with these dates, but the other two references look as if Recuperatus and Bartolus were colleagues. Perhaps Recuperatus had returned to Perugia.

APPENDIX C

The following passage from the *Comment. on the Digest of Bartolus* will illustrate the relations of Jurisdictio and Imperium. "Quaero," says Bartolus[1], "utrum imperium merum et mixtum comprehendantur sub hoc genere, quod est jurisdictio? Quidam dicunt quod non per hanc legem (D. II. 1. 3). Ponuntur enim hic ut species separatae, jurisdictio ab imperio. Glossa tenet contrarium et bene...Est ergo jurisdictio genus. Item quaero, quot species contineat sub se jurisdictio, prout est genus. Respondit glossa, quatuor—merum et mixtum imperium, coercitationem modicam et simplicem jurisdictionem, et sub his omnes comprehenduntur. Et hoc modo dividit Jac. de Arena; et Gul. de Cunio ponit coercitationem modicam sub mero imperio, et sic ponit tres species tantum. Certe ista non videntur vera: nam merum et mixtum imperium non sunt species

[1] *Comment. on Dig. Vet.* Part I. (D. II. 1. 3), p. 164, § 4. Cf. *Tract. de Jurisdictione*, §§ 34–5, p. 396.

jurisdictionis immediate. Non enim jurisdictio dividitur in merum et mixtum imperium, sed imperium simpliciter sumptum dividitur in merum et mixtum. Dic ergo, secundum Petrum, quod jurisdictio in genere sumpta dividitur in duas species, scilicet in imperium simpliciter sumptum et in speciem quae est jurisdictio...Item imperium subdividitur in merum et mixtum." But perhaps the clearest way to illustrate this will be by a diagram: it will have the additional advantage of showing, by its subdivisions, the exact contents of Merum et Mixtum Imperium. Instead, therefore, of reproducing the long discussion by Bartolus on these points, we shall condense the whole into one diagram, referring generally to his *Commentary on D.* II. 1. 3[1]. His definitions and distinctions, based upon those of Petrus de Bella Pertica, became the generally accepted treatment of the matter; though in certain details corrections were made by Jason Maynus, one of the most famous of the later Bartolists.

[1] Pp. 163–6. In most editions, at the beginning of this second book of the *Digest*, there is a useful abstract, entitled "Divisiones et Declarationes Jurisdictionum," compiled from Bartolus' commentary and the corrections of Jason. Some editions also give an "Arbor" or diagram, which, however, is merely a skeleton with no details. The following diagram I have based in part upon the abstract; but as that frequently does not reproduce the exact words of Bartolus, I have throughout quoted direct from his commentary, and referred to the pages and paragraphs, from which the quotations are taken.

Jurisdictio in genere = "potestas de jure publico introducta, cum necessitate juris dicendi et aequitatis, tamquam a persona publica, statuendae" (p. 157, § 3).

Imperium = "jurisdictio quae officio judicis nobili expeditur" (p. 164, § 5).

Merum Imperium = "jurisdictio quae officio judicis nobili expeditur vel per accusationem, publicam utilitatem respiciens principaliter" (p. 164, § 6).

Divided into:

(1) *Mernm Imp. Maximum* = "habere potestatem condendi legem; quod competit soli Principi et Senatui" (p. 164, § 8).

(2) *Majus* = "habere potestatem animadvertendi in facinorosos homines" (p. 164, § 8).

(3) *Magnum* = "ut quando perditur civitas tantum," i.e. banishment (p. 165, § 9).

(4) *Parvum* = "ut relegare aliquem" (p. 165, § 10).

(5) *Minus* = "ut modica coercitatio corporis; et ista competit omnibus magistratibus" (p. 165, § 11).

(6) *Minimum* = "levis mulcta" (p. 165, § 12).

Mixtum Imperium = "jurisdictio quae offic. judic. nob. expeditur, privatam respiciens utilitatem" (p. 165, § 15).

Divided into:

(1) *Mixtum Imp. Maximum* = "quod non potest expediri nisi per solum Principem, ut dare veniam aetatis" (p. 165, § 17).

(2) *Majus* = "ut cognoscere circa sententiam ex supplicatione, quae competit soli Principi et praef. praetorio" (p. 165, § 18).

(3) *Magnum* = "ut in danda restitutione in integrum, etc." (p. 165, § 19).

(4) *Parvum* = "ut dare bonorum possessionem, etc." (p. 165, § 20).

(5) *Minus* = "ut quae judic. officio nobili expediuntur et summariam cognitionem requirunt" (p. 165, § 21).

(6) *Minimum* = "ut quae expediuntur off. jud. nobili absque causae cognitione" (p. 165, § 22).

Jurisdictio Simplex or *stricte sumpta* = "jurisdictio quae officio judicis mercenario expeditur, privatam respiciens utilitatem" (p. 166, § 23).

Divided into:

(1) *Maxima* = "in qua vertitur res maximi praejudicii, ut causae liberales, etc." (p. 166, § 24).

(2) *Major* = "ut in casibus in quibus ex vigore sententiae latae...potest venire ad cruciationem" (p. 166, § 25).

(3) *Magna* = "ut quae ascendit summam trecentorum aureorum: ista non competit nisi majoribus judicibus" (p. 166, § 26).

(4) *Parva* = "ut illa quae est infra trecentos aureos" (p. 166, § 25).

(5) *Minor* (no example given by Bartolus, vide p. 166, § 26).

(6) *Minima* = "ut illa quae consistit in causis centum aureorum et infra" (p. 166, § 26).

Those bracketed together are so arranged by Jason Maynus, who thus has only four divisions of *Merum* and *Mixtum Imperium* and three of *Jurisdictio Simplex*.

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