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"ELVENCEDOR EDICIONES"

A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST

A. J. CARLYLE

PREFACE

In bringing out the first volume of a History of Mediaeval Political Theory, it may be well to indicate briefly the character of the work which we hope to carry out. In this volume we deal with the elements out of which the more developed theory of the Middle Ages arose; we hope to carry on the work to the political theorists of the sixteenth and early seventeenth centuries—that is, to the time when, as it is thought, the specific characteristics of modern political theory began to take shape.

The subject with which we are endeavouring to deal is strictly a history of theory, not of institutions. We believe, indeed, that in the Middle Ages, as at other times, the two things are closely related to each other,—that theory never moves very far away from the actual conditions of public life; but yet the two things are distinct, if not separate. The principles which lie behind the development of political institutions are sometimes the subject of careful reflection, sometimes are hardly apprehended; but in either case they are to be distinguished from any particular concrete forms in which they may be embodied. We have, indeed, been compelled frequently to examine the institutions of the Middle Ages, but we have done this only in order to draw out more clearly the character of the theories which were actually current among those who reflected on the nature of political life.

We are very conscious of the fact that in the attempt to deal with a subject which extends over so many centuries it is probable that we have made many mistakes, and have been guilty of many omissions. We can scarcely hope that we have succeeded in discovering or understanding every important reference to political theory, and we shall be very grateful to any one who may enable us to supplement or correct our judgment upon any aspect of the subject.

A. J. CARLYLE.

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PART I
INTRODUCTION

CHAPTER I
THE POLITICAL THEORY OF CICERO

Between the active and profound political thought of Plato and Aristotle and the energetic political speculation of modern times there lies a great interval of time and an almost equally great interval of character. It has often been thought that between these periods there was no such thing as a living and active political theory. It has been thought that with the disappearance of the free Greek communities political speculation became wholly abstract and lifeless; that the freedom of men's political thought was first crushed by the weight of the great empires, and then lost in the confusion of the barbaric invasions in which the ancient civilisation perished, and that in the sixteenth century political theory arose suddenly and without any immediate antecedents, being grounded in part upon original reflection, abstract or related to actual political conditions, and in part on the recovery of ancient philosophy.

Such judgments, we are aware, have long ceased to be held by those who have any acquaintance with the characteristics of mediaeval thought, and have been corrected by the work of several writers, especially in England by Mr R. L. Poole in his 'Illustrations of Medieval Thought'; but they still continue to affect the judgment of many, and even those who are aware that in the Middle Ages political thought was both active and closely related to the actual conditions of society have yet no very clear conception of the relations of the mediaeval theory to the ancient, or of the dependence of modern theory upon the mediaeval.

We think that the conception of the disappearance of a living political theory in the Middle Ages is fundamentally wrong, and that the more closely the political conceptions of the Middle Ages are examined, the more clear will it become that there is no such gulf between ancient and modern political thought as has been imagined. There are, no doubt, profound differences between the ancient mode of thought and the modern,—the civilisation of the ancient world is very different from that of the modern; but, just as it is now recognised that modern civilisation has grown out of the ancient, even so we think it will be found that modern political theory has arisen by a slow process of development out of the political theory of the ancient world,—that, at least from the lawyers of the second century to the theorists of the French Revolution, the history of political thought is continuous, changing in form, modified in content, but still the same in its fundamental conceptions.

We are indeed conscious of the fact that between Aristotle and the Roman Lawyers there are profound differences, and we would suggest that if there did exist anywhere a real break in the continuity of political thought, it would be found to lie here. We feel, indeed, that the inquiry on which we are setting out should have begun with the successors of Aristotle and Plato, and that there is thus an important omission in our discussion. But the subject of the later forms of Greek Philosophy is one which can only be adequately handled by those who are intimately acquainted with the greater philosophic literature of Greece, and we can scarcely pretend to this knowledge. We hope that some philosophic scholar will before long undertake this task; and we anticipate that under such a careful investigation much which is at present obscure in the transitions of thought will be explained, and that, while the fact of a great change in political theory during these centuries will remain clear, the process of thought by which these 'changes came about will be found capable of explanation.

The political theory of the Middle Ages is founded upon the theory represented by the Roman Lawyers from the second to the sixth century, and by the Christian Fathers from the second to the seventh century, while it is modified by the constitutional traditions and customs of the Teutonic races. We therefore have to begin our work with an examination of the political theory of the Roman Lawyers. We shall next consider the political theory of the Fathers, endeavouring to estimate the influence of distinctively Christian conceptions upon this. But before dealing with these subjects we must make some inquiry as to the antecedents of these political conceptions. A complete examination of these would involve that careful study of the character of the post-Aristotelian philosophy of which we have spoken. In the absence of this we must content ourselves with an examination of one or two Latin writers in whom we can, as it appears to us, trace the development of a good many of the characteristic conceptions of the Lawyers and the Fathers. Cicero has left to us in the fragments of the 'De Republica' and in his treatise 'De Legibus' a very interesting and significant account of the political theory fashionable in the first century before our era; while Seneca's writings serve to illustrate some general tendencies of political thought one hundred years later. With the assistance of these writers we can in some measure reconstruct the general outlines of the political conceptions which influenced the Lawyers and the Fathers. We can at least learn from them the commonplaces of political philosophy in their days, the notions current among the educated men of the period.

Cicero is a political writer of great interest, not because he possesses any great originality of mind, or any great power of political analysis, but rather because, in the eclectic fashion of an amateur philosopher, he sums up the commonplaces of the political theory of his time. We feel in reading him that, while lie has no special contribution of his own to make to philosophy, he is really as interesting to us as if he had been able to do this. For, when we read him, we feel that we learn not so much what Cicero thought as what was generally current in his time; we learn how the honourable and right-minded and reasonably intelligent politician of his time tended to think, what were the conceptions which the public of that time would have applauded as being just and edifying with regard to the nature of society and the principles underlying social relations. We find these ideas expressed not in any very profound fashion, but with grace, with considerable clearness at least on the surface, and with an abundant and often impressive rhetorical eloquence.

Among the fragments of Cicero's 'Republic' which St Augustine has preserved for us in the 'De Civitate Dei' none is more important than a passage which comes, he says, from the end of the second book of the 'Republic.' He tells us that in Cicero's Dialogue Philus requests that the subject of justice should be carefully discussed, especially because it was a common saying of the time that injustice was necessarily involved in the administration of the commonwealth. Scipio agrees to do this, and lays it down that no progress can be made with the discussion of the nature of the State until it is recognised, not only that the popular saying is false, but rather that the truth is that it is impossible for the State to have any existence at all unless it is founded upon and represents the highest justice. It is this conception which is expressed in the definition of the State propounded by Scipio: "Res publica, res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis juris consensu et utilitatis communione sociatus". The commonwealth is the affair of the people, but the people is not any assemblage of men, gathered together in any fashion, but a gathering of the multitude united together under a common law and in the enjoyment of a common wellbeing.

Augustine in another passage comments on this definition, and asserts that Cicero defines the meaning of "juris consensu" when he says that the State cannot exist without justice: where there is no justice there can be no jus, and therefore no *populus*, but only a multitude which is not worthy of the name of *populus*. On these grounds, he elsewhere says, Cicero maintained that when the

government is unjust, whether a tyranny, an oligarchy, or a democracy, there is no *res publica* at all; an unjust government is not merely evil and injurious, but destroys the very being of the State.

Justice is, then, the foundation of law and of organised society, and Cicero is concerned to explain that he means by justice something which is wholly independent in its character of the consent of man. Cicero appears to have cited Carneades as maintaining that laws only arise out of the experience of utility, and that thus they continually vary in different places and times; that there is no such thing as *jus naturale*; that, properly speaking, there is no such thing as justice, or else that justice is mere foolishness, and the only source of virtue is human agreement. Cicero is as much shocked at these sentiments as any modern politician of respectable character would be, and denounces the theory of utility as the foundation of justice with much warmth and eloquence. It is not utility but nature which is the source of justice and law. Cicero is clearly maintaining the same view of justice as that of Chrysippus and the other Stoics as cited by Stobaeus and Plutarch, in opposition to the theory of Epicurus and such thinkers as Carneades, who maintained that justice was the name for a convention devised among men for the advancement of their own utility.

Justice is a principle of nature, a principle which lies behind all the order of the world, the expression of a universal principle or law of nature—the ultimate principle behind all law. Lactantius has preserved for us a passage from the 'De Republica,' in which Cicero has with some real eloquence described this. There is a law which is the same as true reason accordant with nature, a law which is constant and eternal, which calls and commands to duty, which warns and terrifies men from the practice of deceit. This law is not one thing at Rome, another at Athens, but is eternal and immutable, the expression of the command and sovereignty of God. In his treatise on laws, Cicero carefully points out that all civil law is but the expression or application of this eternal law of nature. That which is not derived from it may have the formal character of law but not its true character. The people or the prince may make laws, but they have not the true character of *jus* unless they are derived from the ultimate law. The original source and the foundation of *jus* must be studied in that supreme law which came into being ages before any State existed.

It is important, we think, to observe with some care this emphatic exposition of the principle and character of the law of nature. Cicero's treatment may leave a good deal to be desired in point of clear analysis,—we may indeed doubt whether Cicero had himself a clear conception of the subject with which he is dealing. But we think that we have said enough to show both the importance of the theory of natural law in the current philosophical system with which Cicero was in sympathy, and also the close relation of this conception to the theory of justice. The theory of natural law is to Cicero the form of the theory of justice in society, and it is also the groundwork upon which the whole, structure of human society rests. Human society is founded upon nature; its cause is "naturalis quaedam hominum quasi congregatio."

We may feel that while Cicero's treatment of the law of nature represents a stronger emphasis upon the conception than that which is characteristic of older thinkers, he does not do much more than develop conceptions which belonged to them. It is very different with the subject which we must next consider, Cicero's theory of human nature and its relation to the institutions of society.

There is no conception which is more fundamental to the Aristotelian theory of society than the notion of the natural inequality of human nature. Upon this turns not only his theory of slavery but also his theory of Government. To Aristotle the institution of slavery is a necessary condition of civilised life and of a civilised social order, and it is natural, because there are some men so inferior to their fellows as to be naturally servile. And again, to Aristotle the government of civilised society is always the expression of the superiority of some men over others. The most ideal government is that of the best man over his inferiors, next to that is the government of the aristocracy; but even his ideal commonwealth is the rule of a small body of citizens, approximately equal in capacity and education, over a great unenfranchised multitude of inferiors, mechanical persons and slaves. It is a

presupposition of his commonwealth that there should be a reasonable equality of virtue and capacity among all the citizens, or at least such a measure of it as, under a careful system of public education, will render every citizen moderately competent for the discharge of public duties. But this equality is confined to the small body of the citizens: the great majority of the persons included in the commonwealth are wholly inferior to the citizens and incompetent for the responsibilities of public duty. By nature some men are fit for rule, others only for subjection. There is a naturally servile class, possessing only a small share of reason, enough only to render obedience to the developed reason of others. True excellence or virtue is not within the reach of all, but belongs only to a few.

These presuppositions of the Aristotelian theory arose naturally from the circumstances of Greek civilisation, though they had been questioned by some writers before Aristotle. In general culture, and perhaps even more in political culture, the Greek belonged to a different world from the races which surrounded him. The distinction between the Greek and the barbarian might be exaggerated by the Greek, but the difference was real and profound. In art, in letters, in philosophy the Greek was not merely different from those who surrounded him, but belonged to another order. And in political matters the subjects of the barbaric despotisms of the East might well seem to the Greek citizen to confess their naturally servile character, for they did not even possess or desire to possess the political responsibility of the Greek citizen. Centuries afterwards we find a citizen of the Roman Commonwealth laying it down that the Roman Emperor was the lord of free men, while the barbarian ruler was the master of slaves. What Gregory the Great could say in the decline of the Roman Empire with truth of sentiment the citizen of the free Greek state felt as true in every fibre of his being.

There is no change in political theory so startling in its completeness as the change from the theory of Aristotle to the later philosophical view represented by Cicero and Seneca. Over against Aristotle's view of the natural inequality of human nature we find set out the theory of the natural equality of human nature. There is no resemblance in nature so great as that between man and man, there is no equality so complete. There is only one possible definition for all mankind, reason is common to all; men differ indeed in learning, but are equal in the capacity for learning. There is no race which under the guidance of nature cannot attain to virtue. The same virtues are pleasing, the same vices are detestable to all nations; all men can be made better by learning the true conception of life. It is only the perversions which depraved habit and foolish conceptions have brought, which cause men to differ so much from each other. Nature has given to all men reason, that is, true reason, and therefore the true law, which is right reason commanding and forbidding. We shall see later how these sweeping generalisations recur in Seneca, and it can scarcely be doubted that we have here presented to us the foundation of those dogmatic statements of the lawyers like Ulpian and Florentinus, in which all men are presented to us as being by nature free, by nature equal. We are indeed at the beginnings of a theory of human nature and society of which the "Liberty Equality, and Fraternity" of the French Revolution is only the present-day expression. To complete the parallelism of the conception, we may observe that the "Fraternity" of the Revolution is only a later form of Cicero's phrase, "By nature we are disposed to love men; this is the foundation of law."

We have ventured to suggest that the dividing-line between the ancient and the modern political theory must be sought; if anywhere, in the period between Aristotle and Cicero. We think that this cannot be better exemplified than with regard to the theory of the equality of human nature. Further on we shall have occasion to examine the relation of Christianity to this conception, but in the meanwhile it must be noticed that the appearance of this conception is not consequent upon Christianity, however true it may be that the progressive translation of this great abstract conception into such measure of practical reality as it may now possess has been largely carried out under its influence.

Cicero already speaks with the cosmopolitan accent of modern civilisation; to him the older conception of an absolute natural difference between the civilised man and the barbarian has become impossible. It is not difficult to recognise the historical circumstances which probably were in the main instrumental in producing this change. With the rise of the Macedonian Empire, the intense but restricted culture of the Greeks became the culture of the world, losing much no doubt in intensity as it gained in expansion. The Greek went out into the world, and found that the barbarian whom he had thought to be incapable of rational cultivation was at least capable of reproducing his own culture. The conquest of the world by Hellenism had the necessary effect of changing the Hellenic conception of the world. The literature, the art, the philosophy of the Hellenic world might be on a lower plane than that of the Hellenic city, but it was Hellenic. If the Greek himself was thus compelled to admit that the barbarian was capable of entering into the commonwealth of Greek civilisation, if the Macedonian Empire convinced the philosophers of the homogeneity of the human race, this was necessarily and even more definitely the consequence of the Roman Empire. The Latin conqueror indeed was himself, to the Greek, one of the barbarians, and more or less the Latin recognised this,—more or less he was compelled to recognise that his intellectual and artistic culture came to him from the Greek. The Latin brought indeed, in his genius for law and administration, his own contribution to the cosmopolitan culture of the world, but that was all he brought. It was impossible for him to imagine himself to be the man possessed of reason and capable of virtue and to deny these qualities to others. The Roman Empire continued and carried on the work of the Macedonian Empire in welding the countries of the Mediterranean basin into one homogeneous whole. The homogeneity of the human race was in the Roman Empire no mere theory of the philosophers, but an actual fact of experience, a reality in political and social conditions. If the philosopher had learned to believe in the homogeneity of mankind under the Macedonian Empire, he was confirmed and strengthened in his belief by the experience of the Roman.

When we turn to Cicero's theory of government we may find what we think are indications of the influence of this conception. In the meantime, we may point out that while in Cicero's writings the relation between the theory of equality and the theory of slavery is not drawn out, it is still worth noting that in one passage at least Cicero refers to the condition of the slave in a fashion different, at least in some respects, from earlier writers. We must, he says, act justly even to those of the lowest condition—that is, the slaves—of whom it has been well said that they should be treated as hired labourers; they should be required to work, but should receive just treatment. The suggestion that the slave should be regarded in the same light as a hired labourer comes from the Stoic Chrysippus, and suggests an important contrast with Aristotle's conception of the inferiority of the position of the mercenary labourer as compared with that of the slave. It is certainly worth noting that the slave is recognised to have his just rights; he is looked upon as a man with some independent personality. When we turn to Seneca we shall find that the relations of the theory of human equality to the independent personality of the slave is more fully drawn out.

There are indeed two fragments of the 'De Republica' which would seem to represent a somewhat different attitude to slavery from that which we have described. In the first of these, described by St Augustine, the question is raised as to the justice of the conquest of one nation by another, and, as St Augustine reports, it is maintained that such conquest is just because subjection (*servitus*) is useful for some men, as tending to check the tendency to licence. In the second passage, Cicero, as quoted by Nonius, seems to have been distinguishing between the unjust form of slavery, where those who are capable of being *sui* are *alterius*, and some just form, presumably when those are slaves who are incapable of governing themselves.

There can be little doubt that in these passages we find Cicero to be speaking under the influence partly at least of the Aristotelian principle of the fundamental distinction in human nature; we find him thinking of mankind as capable of being divided into those who are able to govern

themselves and those who are not. But we venture to think that such passages do not in any serious measure weaken the effect of those which we have already discussed. It must be remembered that Cicero's eclecticism is in part the expression of a certain incoherence in his philosophical conceptions, and that it is not a matter for any great surprise that we should find him holding together opinions hardly capable of reconciliation.

It must be observed that the first quoted passage may also be taken as indicating a tendency to one particular solution of some of the difficulties of social theory, which became in the course of time of the greatest importance. It will be observed that Cicero speaks of subjection as being a remedy for the tendencies to licence and evil, and this conception may be connected with Cicero's theory of the actual condition of human nature. In a passage which we have already quoted, Cicero points out that men would all be like each other, were it not for the perversion caused by depraved habit and foolish thoughts. Cicero at the same moment that he dogmatically maintains the fundamental similarity of human nature, admits that this is affected by the fact that human nature is constantly corrupted,—that this corruption brings into human life conditions and distinctions which are not truly natural. Cicero, that is, draws a distinction between the true or ideal character of man and the actual. Human nature is actually often corrupt and depraved, the fire of life, of truth, is extinguished, and the contrary vices grow and flourish under the influence of evil custom. St Augustine represents Cicero as describing men as coming into being not only bare and fragile in body, but with a soul prone to terror, weak in will to labour, prone to lust, while yet a certain divine fire dwells in them. Cicero's treatment of the subjection of man to man seems to anticipate the attitude of Seneca and the Fathers to the institution of slavery and to the other institutions of civilised society. We can see the germs of a theory of human society which was ultimately to trace the great institutions of mankind to the necessity of checking the faults of human nature,—which would tend to look upon the organisation of the State as the necessary consequence of the depravity of human nature and as its true remedy. The inadequacy of this conception of the organisation of society is to our own mind sufficiently obvious, and indeed since the "Contrat Social" the tendency of political philosophy is obviously to return to the larger view of the great thinkers who look upon the organisation of society rather as the method of progress, both negative and positive, than as merely the barrier to vice and disorder. But for eighteen centuries political theorists were governed in large measure by this conception. Cicero, then, maintains the theory of natural human equality, but is partly conscious that this theory has to take account of the actual facts of human diversity and corruption.

We go on to consider his theory of the origin and character of the State. It would appear that Cicero was familiar with two theories: the one, that men were by nature solitary and had no inclination to the society of their fellows, but were driven by the dangers of life to seek each other out and to join together for mutual defence; the other, which Cicero puts in the mouth of Scipio Africanus, who emphatically repudiates this conception, and maintains that men are naturally inclined to the society of each other. We shall probably not be far wrong in supposing that the first view had been maintained by Carueades and probably by the Epicureans, while the view of Cicero himself is that of Aristotle and of the Stoics. We shall see that Seneca illustrates very clearly a great divergence between the attitude of the Stoics and the Epicureans towards the State.

Society to Cicero is a natural institution, and the organisation of society in the State is the greatest work to which a man can set his hand: human excellence never comes so near to the divine as when it applies itself to the foundation or preservation of states. Man is naturally made for society, and the great society of the State has grown up gradually on the foundation of the elementary form of human association, the family. Cicero evidently follows the same tradition as Aristotle. We also find in him a conception of the development of the State which is worthy of notice, though its importance in political theory was scarcely perceived until the historical movement at the end of the eighteenth

century, when Burke recognised its profound significance. We mean the conception of the constitution of a State as an organic growth in contradistinction to the conception of it as a mechanical product. At the beginning of the second book of the 'Republic' Cicero says that he will rather discuss the actual constitution of the Roman Commonwealth than create one out of his own imagination, and mentions with approbation the opinion of Cato that the reason why the Roman constitution was superior to all others was that it had not been devised by one man's wisdom or created by one man's labours, but rather by the wisdom and efforts of many generations. It is interesting to observe this judgment, though it does not appear that it had any direct and immediate results in political thought.

Cicero, then, conceives of the State as being the natural method of human life. But he is careful to point out with all the emphasis that he can command that the State is not any chance association of men, whatever the methods and objects of the association. The State to be a State must be founded upon justice, upon law, and it must exist for the promotion of the common wellbeing of all its citizens. This is the significance of that definition of the State which we have already quoted. The Commonwealth is the affair of all the people, but the people is not any assembly of men gathered together in any fashion, but is a gathering of the multitude associated together under a common law and in the enjoyment of a common wellbeing. The form of the government may vary, but the foundation of the State is always this bond of justice and the common good. There must be government that the State may have continuance, but this government must always be founded upon, and express, the first principles of the association. Government may be in the hands either of one person or of a chosen few or of the whole people, and it will be legitimate if that first bond of association is preserved, the bond of justice and the common good, if the State is well and justly governed. But if the government is unjust, whether it is that of the king or of the few or of the people, then Cicero maintains that the State is not to be called corrupt, but rather that it is no State at all. Who can call that a commonwealth (*res publica*) where all are oppressed by the authority of one, and where there is no bond of law, no true agreement and union? So far Cicero would seem to follow the same general line of thought as Aristotle, the legitimacy of a form of government is determined by its end; so long as this is the wellbeing of all, the form of the government is comparatively immaterial. But we find also in Cicero traces of a conception not perhaps strictly new, but receiving a new emphasis. The three forms of government, he says, are only tolerable; he is not really satisfied with any of them. The least satisfactory form to him is that in which the whole power is in the hands of the people. The very equality of this is, in his judgment, unjust, since there are no grades of dignity. But he is equally dissatisfied with the mere aristocracy or monarchy; and it is here that his conception assumes a new significance. The most just aristocracy, such as that of the Massilians, or the most just monarchy, such as that of Cyrus, is to him unsatisfactory, for under such forms of government there is at least an appearance of slavery, and the multitude in such a State can scarcely possess liberty.

Cicero's identification of liberty with a share in political power is another of the indications of the essentially modern character of his political thought. We seem to be at the commencement of that mode of thought which has been so characteristic of modern democracy, that political liberty is identical with the possession of the franchise, that even the best government is unsatisfactory which is not directly controlled by the people as a whole. We are not here discussing the value of this conception in political philosophy, but it is interesting to observe its appearance in Cicero. When we go on to consider the theories of the Roman Lawyers, we shall have to observe the fact that they knew of no other foundation of political authority than the consent of the whole people, and we shall have to consider the relation of this to the development of the theory of consent or contract as the foundation of the State. The conceptions of the Roman Lawyers and of Cicero are both related to the traditions of the Roman Government, to the constitutional theory which had grown up under the

Republic; but we think that they are also related to that conception of the natural equality of men with which we have already dealt. Indeed it is obvious enough that Cicero's objection to monarchy and aristocracy rests upon this basis, that every citizen has in him some capacity for political authority, some capacity which ought to find a means of expression. Cicero is, in truth, dissatisfied with all the three simple forms of government, both on account of their inherent character and because they all have a dangerous tendency to perversion: monarchy easily passes into tyranny, aristocracy into oligarchy, and democracy into the rule of the mob. He is therefore himself in favour of a fourth form of government, compounded of the three simple elements, possessing some of the virtues of each, and possessing in greater degree the quality of stability. His conception of this is, we have little doubt, in large measure drawn from the history of Rome, and it is not very materially different from that of earlier writers.

Cicero, then, looks upon the true order of the State as being founded upon the principle of justice, which is expressed in the law, and secures the common wellbeing. It should give to every citizen some share in the control of the public life, and provide room for the exercise and recognition of the varying qualities and capacities of the citizens. The commonwealth is an organic development out of the natural association of the family, and at the same time it is the expression of the common will and consent, for every citizen has his share in its control. There is one passage in the 'De Republica' in which this conception seems to be drawn out in a manner which nearly approaches the theory of a contract. This judgment seems to be placed in the mouth of a defender of that theory, which, as we have said, reduced justice and virtue to a matter of agreement. It is, however, interesting to observe the presence of this conception in the political theory of the time; it has antecedents in such a description of the contract as that which Plato gives in the "Laws".

We have thus seen how important in the political theory of Cicero are the three related conceptions of natural law, natural equality, and the natural society of men in the State. Nature is the test of truth and validity in law, in social order, in organised society. We do not mean that Cicero has a very clear and precise conception of the meaning of nature; generally he seems to use it as expressing the true order of things, though once at least he seems to use it as equivalent to the primitive, undeveloped order. But generally his conception of natural law is sufficiently distinct. Behind all actual laws and customs of men there exists a supreme and permanent law, to which all human order, if it is to have any truth or validity, must conform. This ultimate principle is the law and will of the power which lies behind all the external forms of the universe, and it is by it that all things live, while it also manifests itself, at least in part, to the rational consciousness of men. His conception of natural equality is clear enough. All men have reason, all men are capable of virtue. His conception is clear, but the relation of his conception to actual social conditions is not developed. He has repudiated the traditional philosophical justification of slavery, but he has not considered the consequences of his own judgment. He has not drawn out in this connexion that distinction between the original condition of things and the conventions of human society which is, as we venture to think, the first meaning of the distinction made by Ulpian and the other lawyers of his school between the *jus naturale* and the *jus gentium*. On the other hand, his conception of organised society in relation to nature is well developed and clearly applied. He conceives of society as being natural to man, and of social organisation as needing to conform itself to certain principles of justice and certain characteristics of human nature, if it is to be legitimate. The State must be just and must also provide for liberty.

Cicero's conception of nature and natural law has then its ambiguities and perhaps its incoherencies, but it is evident that it is round this conception of nature that his philosophy of society revolves. "Ex natura vivere summum bonum", to live according to nature is the highest good, he says; nature is the guide of man, the true test of justice and goodness. But nature is not found by man in solitude or in misanthropy, but in the society and the love of his fellow-man.

CHAPTER II
THE POLITICAL THEORY OF SENECA

When we turn from Cicero to Seneca we find ourselves in an atmosphere of a somewhat new kind. The change from the Republic to the Empire necessarily brought with it certain changes in the idea of the State, but, what is perhaps more than this, we find in Seneca a professed philosopher of one definite school, who tries to adjust his views of life and of society to the general conceptions of that school. Seneca may not be a very profound philosopher; it is very possible to feel that he often mistakes rhetorical sentiment for profound ethical emotion, and that he has little of that power of critical analysis which might have given seriousness and force to his opinions: he is too much pleased with the fine sound of his own sentiments to examine them very carefully, and carry them out to their conclusions. But still, he does represent to us in a literary form, always interesting and sometimes forcible, the theory of life and society of the Stoic schools of his time, and he presents them with a certain coherence and consequence which differs not a little from Cicero's expression of the preferences of a well-mannered and honourable-minded philosophical amateur. And yet, after all, while there are important differences between Cicero and Seneca in political theory, we think that they are governed by the same general conceptions, that they illustrate different forms of the same attitude to the theory of society.

It is somewhat curious to find that Seneca rarely if at all refers to natural law, that he nowhere discusses the conception of law as related to some general principle of life and the world. We think that this does not mean that he has a conception of things different in this respect from Cicero. For while he does not use the phrase "natural law", the phrase "nature" seems to occupy much the same place in his mind. To live according to his nature is the command of reason to man. It is nature which teaches a man the true method of life. Anger is foolish, for it is not natural. Nature is the test of goodness, everything which is good is according to nature, though there may be things in nature too trifling to deserve the name of good. Nature is that which is perpetual, unchanging: that which is variable cannot be truly natural.

We may at least gather from these phrases that Seneca looks upon nature as being or containing a principle which is the test of truth and goodness, to which man must conform himself if he would find the true method and quality of life. In the main he seems to conceive of it as the permanent principle and end of life, not as identical with its primitive forms. We shall have to consider the question presently in relation to his conception of the primitive character of society, and we shall see then that while he may occasionally at least use the word "nature" as representing the primitive, yet his general tendency is to look upon the completest perfection of human nature in a developed society as being the true "nature" in man.

The conception of human nature in Seneca's writings is very similar to that which we have studied in Cicero. The conception of the equality of human nature is continued and developed in greater detail, but on the same lines as in Cicero's writings. The slave is of the same nature as his master, Seneca says, and he draws out this theory with real eloquence in the *De Beneticiis*. Some, he says, have denied that a slave can confer a benefit upon his master. Those who think thus are ignorant of the true principles of human nature. It is a man's intention, not his position, which gives the quality of a benefit to his action. Virtue can be attained by all, the free, the freedman, the slave, the king, the exile: virtue cares nothing for house or fortune, but only seeks the man. A slave can be just, brave, magnanimous. Again, we all have the same beginnings, the same origin; no one is in truth nobler than another, except so far as his temper is more upright, his capacities better developed. We are all descended from one common parent, the world; to this we must all trace our origin, whether by splendid or by humble steps. It is fortune that makes a man a slave. Slavery is hateful to

all men; the kindliness of a slave towards his master is therefore only the more admirable. And, finally, slavery is after all only external, only affects the body of a man: he errs greatly who thinks that the condition of slavery affects the whole man; his better part has nothing to do with it. The body may belong to a master, the mind is its own (*sui juris*): it cannot be given into slavery.

These phrases may no doubt be said to be rhetorical, and it would be foolish to overpress their practical significance, but at the same time they seem to complete the impression which Cicero's writings have given to us, of the great change which had come over the philosophical conception of human nature. It may indeed be urged that Aristotle not only indicates that, even in his time, a conception of the unnatural character of slavery was already current, but even that Aristotle himself is somewhat uneasy in his judgment as to the institution. Still, Aristotle's conception of the profound differences in human nature had, as we have said, its basis in what might well appear to the Greek mind the actual facts of life. Seneca's treatment of human nature shows us again how completely the Aristotelian view had gone; his view of human nature is in all essentials the view of modern times. Nothing indeed could be more significant than the stress Seneca lays upon the freedom of the soul. It is just where Aristotle found the ground and justification of slavery that Seneca finds the place of unconquerable freedom; the body may be enslaved, the soul is free.

It must not be thought that this speculation upon slavery is wholly abstract, and has no practical significance. When we consider the theories of the lawyers, we shall have occasion to compare the development of their theory with the actual legal modifications of the condition of the slave. It is worth while to compare Seneca's theory of slavery with his conception of the relations of master and slave in actual life. In one of his letters he deals with the question in detail. He represents himself as having heard with pleasure from his friend that he lived on intimate terms with his slaves: he finds that such conduct is eminently worthy of his good sense and learning. He bids him remember that if they are slaves, they are humble friends, nay, rather, they are fellow slaves. This man whom you call your slave is sprung from the same source, dwells under and rejoices in the same heaven, breathes the same air, lives the same life, dies the same death as you: you might be the slave, he the freeman. He is a slave, but perchance he is free in his soul. Who is not a slave? one man is in bondage to his lusts, another to avarice, another to ambition, all men to their fears. Live with your slaves kindly and courteously, admit them to your conversation, to your counsels, to your meals; let your slave reverence you rather than fear you. Some may argue that your slaves will become your clients rather than slaves, that the masters will lose their dignity; surely it is enough that the master should receive the same honour as God, who is reverenced and loved. We may find much of merely rhetorical sentiment in all this, but sentiment is only the reflection of the actual conditions and tendencies of life. It has often been observed that, as Homan society lost its primitive vigour and moral quality, it also grew more humane. Certainly the development of the humane sentiment is very clear. Seneca then looks upon human nature as fundamentally the same in all: we again find that we are close to the legal theory of the original and natural equality and liberty of men.

So far Seneca illustrates the same position as Cicero. But in his case these conceptions are related to others, which Cicero either passes over or rejects. Behind the conventional institutions of society there lay a condition in which these institutions had no place. Before the existing age there was an age when men lived under other conditions, in other circumstances, an age which was called the golden. In this primitive age men lived in happiness and in the enjoyment of each other's society. They were uncorrupt in nature, innocent, though not wise. They were lofty of soul, newly sprung from the gods, but they were not perfect or completely developed in mind and soul. They were innocent, but their innocence was rather the result of ignorance than of virtue; they had the material out of which virtue could grow rather than virtue itself, for this properly only belongs to the soul trained and taught and practised: men are born to virtue but not in possession of it. It is important to notice these points in Seneca's theory, for they serve to differentiate his position from that of some

later theorists of the state of nature. In this primitive state men lived together in peace and happiness, having all things in common; there was no private property. We may infer that there could have been no slavery, and there was no coercive government. Order there was and that of the best kind, for men followed nature without fail, and the best and wisest men were their rulers. They guided and directed men for their good, and were gladly obeyed, as they commanded wisely and justly. The heaviest punishment they could threaten was expulsion from their territories.

We have here a statement of that theory of the state of nature, which was to exercise a great influence upon the whole character of political thought for nearly eighteen centuries. It is true that the conception of the state of nature in Seneca is not the same as in some other writers; but the importance of the theory for our inquiry lies not so much in the particular forms in which men held it, as in the fact that in all forms it assumed a distinction between primitive and conventional institutions which largely influenced the ideal and sometimes even the practical tendency of men's thoughts.

Seneca does not regard this primitive condition as one of perfection, rather as one of innocence—we may say that he regards it as representing the undeveloped, not the developed, "nature" of man—and he is thus in sharp contradiction to those who look upon this as the "natural" condition in the full sense of the word. But still it was a state of happiness, of at least negative virtue and goodness. Men passed out of it, not through the instinct of progress, but through the growth of vice. As time passed, the primitive innocence disappeared; men became avaricious, and, dissatisfied with the common enjoyment of the good things of the world, desired to hold them in their private possession. Avarice rent the first happy society asunder. It resulted that even those who were made wealthy became poor; for desiring to possess things for their own, they ceased to possess all things. The rulers grew dissatisfied with their paternal rule; the lust of authority seized upon them, and the kingship of the wise gave place to tyranny, so that men had to create laws which should control the rulers.

Seneca thus looked upon the institutions of society as being the results of vice, of the corruption of human nature: they are conventional institutions made necessary by the actual defects of human nature rather than the natural conditions of ideal progress. This point is so important in relation to later theory that it will be well to notice his conception of human nature somewhat more fully. In another of his letters he discusses the proper characteristics of human nature. Man, he says, is a rational animal; that is his peculiar quality, and reason bids man live according to this his true nature, a thing which ought to be most easy, but is made difficult by that universal madness which possesses mankind. And in another letter we find him carrying out this idea in sentences which remind us forcibly of Christian theology. It was a true judgment, he says, of Epicurus, that the beginning of salvation (*salutis*) is the recognition of sin. If a man does not recognise his faults, he will not be corrected; it is idle to think of improvement while a man confuses his evil with good. Therefore let a man accuse himself, judge himself.

We have already seen in Cicero some traces of this theory of the corruption or faultiness of human nature; in Seneca it is more clearly and explicitly drawn out. And if we now put this together with his theory of primitive human life, we see that Seneca's view is, in all important points, the same as that of the Christian Fathers, that man was once innocent and happy, but has grown corrupt. And, further, we find that what Cicero only suggests as the cause of the subjection of man to man, Seneca holds of the great institutions of society, property and coercive government, namely, that they are the consequences of and the remedies for vice. Private property is a necessary condition of a social order in which few men can rival Diogenes in his contempt for all wealth, and the best thing is that a man should have enough to keep him from poverty, but not so much as to remove him far from it. And in the same way organised government and law is a necessary protection against tyranny. Seneca, that is, seems clearly to draw a sharp distinction between the conditions suitable to man, had

he continued innocent, and those which are adapted to the actual facts of the perversion and corruption of human nature. The great institutions of organised society are conventions adapted to the latter conditions, good as remedies, but not properly to be called good in themselves. The coercive state is a great institution to which, as we shall presently see, men owe their service; but its actual form is not so much a consequence of man's true nature as a remedy for his corrupted nature.

So far Seneca's view is on the whole clear, perplexed only by the intrusion of the perpetual paradox of the promotion of good through evil; for it must be carefully borne in mind that Seneca's primitive man, though innocent and happy, had no true virtue, while man as we know him is oppressed by vice and misery, but is yet capable of virtue. But here we come to a point in Seneca's theory which requires careful notice, if we are not to misapprehend him, and in which also we find interesting matter for comparison with certain tendencies in the theory and practice of Christianity. Seneca uses phrases of great force and plainness to emphasise the conception of the self-sufficiency of the truly wise man. No one can either injure or benefit the wise man; there is nothing which the wise man would care to receive. Just as the divine order can neither, be helped nor injured, so is it with the wise man: the wise man is, except for his mortality, like to God Himself. It is only in some general, outward, and loose sense that it may be said that the wise man can receive a benefit.

The conception of the self-sufficiency of the wise man had apparently developed in the later schools of philosophy, and at first sight it would seem as though this conception would necessarily greatly affect the conception of the relation of the individual to society. It seems clear that Epicurus and his school had applied it so as to destroy the notion of the necessary duty of the individual to society; but it is also quite clear that the Stoic writers had very clearly and emphatically repudiated the Epicurean view upon the latter point, and that, while generally maintaining the conception that the philosopher was independent of the help of society, they taught the imperative duty of serving society.

We should venture to suggest that this fact is closely connected with the character of the Stoic ethical ideas, at least as they are represented by Seneca. In one of his letters Seneca, discussing the nature of liberal studies, seems to deny any value to those which are not related to the moral life;3 his tone indeed is curiously like that of many religious writers on education. Seneca seems undoubtedly to look upon knowledge as advantageous only so far as it tends to make man better. He looks upon the philosophic life of meditation as the highest life; but he justifies the view by the argument that in the long-run it is the philosopher with his contemplation of nature and goodness who does most for the service of mankind. Nature, he says, meant that man should both act and contemplate, and indeed men do both, for there is no contemplation without action.

The wise man, therefore, in Seneca's view may give his time to contemplation, but this does not mean that he is exempt from the obligation to the service of society. There is in Seneca's mind no real inconsistency between his view of the self-sufficiency of the wise man and his general theory of the relation of man to society. He has given ample expression to this theory in several treatises. Man is by nature drawn to love his fellow-man: man is born to mutual service or helpfulness. The Stoic doctrine is that man is a social animal, born to serve the common good; and in his definition of the highest good in his treatise on the Blessed Life it is interesting to observe that the temper of mind which constitutes this includes the qualities of humanity and helpfulness. The highest good is a temper which despises the accidents of life, which rejoices in virtue, or, the unconquerable temper of a man experienced in life, tranquil in action, of a great humanity and care for those with whom he is concerned. Seneca is clear in maintaining that man is born to live in society and to serve it: his necessities may not drive him to this, but the true disposition of soul will do so.

The wise man, therefore, is driven to take his share in the work of society and, if it is possible, of the State. Part of a treatise which he devoted to this subject, the 'De Otio', has come down to us, and furnishes us with a fairly complete picture of the current opinions on the subject. There was

evidently a very clear difference between the Stoics and Epicureans upon the subject. Epicurus had said, "The wise man will not take part in the business of the commonwealth, unless some special cause should arise". Zeno, on the other hand, had said, "The wise man should take part in the business of the commonwealth, unless some special cause should prevent him". Seneca admits that there may be conditions of public life which make it impossible for the wise man to do any good in public affairs, and in such a case he will withdraw from them. But even this does not mean that he will cease to serve the State. The philosopher and moral teacher serve the commonwealth as well as the politician; even under the thirty tyrants Socrates was able to be of use to the Republic. The true rule of man's life is that he should be of use to his fellow-men, if possible to many; if this cannot be, then to a few at least of his neighbours. If even this is impossible, then let a man improve himself, for in doing this he is really working for the public good, for just as a man who depraves himself defrauds others of the good he might have done them, so a man who studies his own improvement really serves others, because he is rendering himself capable of being of use to them.

Seneca then clearly maintains that the wise man is constantly bound to the service of society, and even if possible to that of the State. But he bids men remember, if it seems impossible to serve the State, that there are after all two commonwealths, the one that of the State in which we are born, the other the greater commonwealth of which the gods are members as well as men, a commonwealth whose bounds are only to be measured with the circuit of the sun; and he doubts whether the greater commonwealth may not be best served in retirement, in philosophic meditation upon virtue, upon God and the world. Such philosophic meditation is itself action; nature calls us both to act and to contemplate, and this contemplation cannot be without action. Zeno and Chrysippus worked more for mankind than if they had led the armies of a nation or held its offices or made its laws: they made laws not for one state but for mankind. This conception of the universal commonwealth is interesting and suggestive, in its relation to the theory of human nature, which we have already considered. We may perhaps feel that Seneca's mode of handling the subject suggests to our minds some doubt whether his hold upon the conception of the organic relation of human nature and progress to the organised society of the State is quite certain. Had the materials been more abundant, it would have been interesting to consider its relation to such a conception as that of Origen, who defends the Christians against Celsus, who blamed them for their reluctance to take office and bear arms: he urges that they are members of another society, and that their service in the Church of God is directed towards the salvation of mankind. There have, no doubt, been always traceable in the political theory of mediaeval and modern times two tendencies of thought, the one national, the other cosmopolitan, and though it is perfectly true that these ideas are not incompatible with each other, yet historically they have sometimes come into conflict.

Seneca, then, has a very clear general view as to the necessity of the State, of its fundamental importance in human life: he is even anxious to clear the philosophers of his time of the charge which seems to have been commonly made against them, that they were disloyal, or at least indifferent, to the State; he urges that no men are more grateful to the State than the philosophers, for it is under its protection that they are able to enjoy leisure for philosophic meditation. He fully recognises that the State is necessary under the actual conditions of human nature, if only as a remedy for the corruption of human nature.

With regard to the conception of liberty and the best form of government Seneca seems to waver and hesitate. If Lactantius is correct in attributing to Seneca a fragment which he has preserved, he gives an account of the expulsion of the Tarquins, representing it as due to the hatred of slavery, and says that the Roman people determined to make the law rather than the king supreme. The Roman Commonwealth reached its maturity under this free government; but at last, when it had conquered the world, it turned its arms upon itself and finally returned as to a second childhood under the rule of one man. Rome lost its liberty, and its old age was so infirm that it could not stand

without the support of a master. The same conception of the end of the Republic is presented in another place, where Seneca praises Cato, who, when his sword could not give his country liberty, turned it upon himself and so liberated himself; and again, when he speaks of the same Cato as having struggled to maintain the tottering commonwealth, and when it fell, as falling with it—for Cato did not survive liberty, nor liberty Cato. In these passages Seneca seems to think of liberty as being related to a certain form of government, and that this government is the only one suited to the character of a mature nation.

But in another treatise Seneca's tone is markedly different. He speaks indeed in praise and admiration of Brutus; but adds that in slaying Caesar he greatly erred, both as a philosopher and as a practical statesman. Brutus had forgotten the Stoic doctrine when he allowed himself to be terrified by the mere name of king, for the best form of State is the just monarchy. And he showed himself a man of little insight into the actual conditions of Roman Society, when he refused to recognise that the ancient character of the Roman people was gone, and that men were contending not as to whether they should be subjected to some one man, but only as to whom they should serve. Seneca gives us to understand that the technical Stoic doctrine of government, like the Aristotelian, treated the form of government as being a matter of indifference so long as its end was just; and the contrast with Cicero's view is at least worth noting.

His acquiescence in the practical necessities of Roman life is also worth observing, and we may reasonably connect with this a very interesting treatment of the place of the Emperor in the State, which we find in the 'De Clementia'. Seneca is recommending clemency to the Emperor, and appeals to his sense of responsibility, to the magnanimity of soul which so great an office requires. The Prince should show himself such towards his subjects as he would wish the gods to be towards himself. He should remember that he out of all mankind has been chosen to act in the place of the gods: the life and death, the fate and lot, of all men are in his hands. He is the source of the laws which he has drawn out of darkness and obscurity, and he will keep himself as though he were to render an account to those laws. The ruler, whether he is called prince or king, or by whatever other name he is known, is the very soul and life of the commonwealth. He is the bond which keeps the State together, and to his protection, therefore, all the people will devote themselves. Nothing can check his anger, not even those who suffer under his sentences will resist; how great then will be his magnanimity if he restrains himself and uses his power well and gently.

These phrases are evidently rhetorical, and it would be unwise to insist too much upon them; but their recognition of absolutism, and their tendency to think of this as resting in some sense upon the divine providence, are at least worth noticing. When we come to discuss the theories of the Christian Fathers, we shall have to consider very carefully this theory of the divine source of government and the divine authority of the ruler. It would be going too far to say that Seneca has any clearly defined conception of this kind in his mind; but it is at least interesting to observe his tendency towards this, and it may very well be compared with a similar tendency in Pliny's Panegyricus.

When we look back and try to sum up the general results of our examination of Seneca's political theory, we see that the most important difference between him and Cicero is to be found in his developed theory of the primitive state of innocence, the state before the conventional institutions of society existed, and the consequent theory that these institutions are only the results of, and the remedies for, the vices of human nature. In the course of our investigation we shall have to consider the history of this theory, to pursue it through many forms. We must again observe that, in Seneca's judgment, the fact that the innocent and unconventional state was primitive does not at all mean that it was the complete expression of the true nature of man; on the contrary, while we must admit such an occasional ambiguity in his use of the phrase "nature" as we have pointed out, it is quite evident that Seneca conceived of the primitive state as being one in which man was yet undeveloped and

imperfect, and that, while the actually existing conditions of society may be unnatural in so far as they arise from the vices and perversions of human nature, yet they are natural in so far as they are the methods by which man may, under the actual conditions of life, go forward and advance towards perfection.

PART II
THE POLITICAL THEORY OF THE ROMAN LAWYERS

CHAPTER III
THE THEORY OF THE LAW OF NATURE

We have in the previous chapters attempted to examine the general character of political theory in the first century before Christ, and the first century after, in order that we may be better able to understand the historical position and significance of the conceptions of the Roman Lawyers of the Digest and the Institutes of Justinian, and the Christian Fathers from the first to the seventh century. It will not be doubted by any one who is acquainted with the political theory of the mediaeval writers that their conceptions are based in large measure upon the Lawyers and the Fathers. They may often cite these in a very external and mechanical fashion, and, as we hope to show later, their political theory is as much affected by, and as closely related to, the actual conditions of their own times, as any other living system of political thought, yet the descent of their theories from those of the Lawyers and Fathers is unmistakable.

In this section of our work we propose to examine the general character of the political theory of the lawyers. We cannot usefully approach the Fathers until we have done this, for it is clear that the theory of the Fathers is primarily derived from that current in their time. We shall have to consider how far these general conceptions of their time are modified under the influence of strictly Christian or Jewish conceptions, but we think it is certain that the general structure of their theory is in no way original. How much they may have derived directly from the lawyers it may be difficult to say, but we must study the lawyers in order that we may come to some conclusion as to the general character of the political theory of the Empire apart from Christian influence. The Digest and the Institutes of Gaius and Justinian are the best guides which we have for this inquiry, while it may be true that there are a good many points in which the Fathers may be thought to be nearer the general opinion of their time than the lawyers.

It has been sometimes supposed that the jurists are in the main disciples of one philosophical school—that they do more or less consistently adhere to the Stoic tradition. We venture to think that there is no sufficient evidence for such a judgment, that there is no sufficient reason for saying of the lawyers as a body that they belong quite distinctively to any one philosophical school. It is indeed possible that some of the lawyers came nearer to this position than others; the obvious divergence among the lawyers on the great question of the jus naturals may have some relation to disputes which are rather philosophical than legal. But in the main it would seem that it is best to regard the lawyers not as professed philosophers but rather as intelligent and able men, who when they turned from the sufficiently engrossing practical work of the interpretation and application of law to the changing conditions of Roman Society and speculated upon the foundations of Society and social life, took up the conceptions current among educated men without very carefully inquiring how far these were the doctrines of one school of philosophers rather than of another. Indeed one is more than half disposed to think that Ulpian, who, if any jurist, might be thought to show a speculative turn, intends to depreciate philosophy, when he somewhat pointedly contrasts the true philosophy of the lawyer as such, the study of justice, of the lawful and the unlawful, of the method of deterring men from evil and drawing them to good, with some feigned and presumably unprofitable system, which he does not further define. At the same time, it is true that in some very important points the Jurists seem to follow a tradition which is the same as that of the Stoics, that their conception of justice and of the

nature of law is obviously related to that of the Stoics and opposed to such views as those of Epicurus and the later Academics.

The lawyers, then, are not, properly speaking, philosophers, or even political philosophers. There is little or no trace in their work of original reflection upon the nature of Society and its institutions; they seem to use the commonplaces of the political thought of their time just as any intelligent man might use those of the present day: natural law and natural equality do not perhaps mean much more to them than evolution or progress mean to the modern politician. But it must at the same time be recognised that the use which they made of certain conceptions not only serves to show us the general tendencies of political thought in their time, but did much to give those conceptions a clearness and precision which hitherto they had scarcely possessed.

We are fortunate in being able to examine the political theory of the Roman Lawyers at two distinct periods, widely separated from each other in time. In Justinian's Digest are preserved fragments of the work of the great lawyers of the second and the early years of the third century, and in the Institutes of Justinian we have a handbook of law drawn up by the lawyers of Justinian's Court in the sixth century. In the Code we have a collection of the most important Imperial constitutions belonging to the period from Hadrian to Justinian, which serve in some measure to illustrate the principles of law expounded in the Digest and Institutes. We are thus able to study the political theory of the lawyers, not as a thing fixed and unalterable, but as living and changing; we are able to some extent to discover which of the various legal theories of the second century did as a matter of fact dominate the general course of thought: for though it is true that the writers of the Institutes seem almost nervously anxious to combine the most divergent views of the great lawyers of the second and third centuries into one whole, yet they are unable to prevent us from concluding with some reasonable confidence as to the character of their own opinions. We are also able within the second and third centuries to trace in some measure the course of political theory and to study the conflict of opinion between various legal schools. The selections of which the Digest is made up are fortunately always cited with the names of the authors, and though Justinian warns us that by his authority the compilers of the Digest were empowered to omit, and even alter, anything that seemed to them unwise or erroneous in the ancient writers, yet we have no reason to think that this power was very largely exercised. We are able in a few cases, especially in that of Gaius, whose Institutes have been preserved for us, to compare the original work of the great lawyers with the selections of the Digest; and though, as we shall have occasion to notice, some changes seem to have been made, yet our impression is that the compilers of the Digest did not avail themselves greatly of this authority to alter the selections which they made, at least on those matters with which we are here concerned.

The first subject which requires our attention when we approach the political theory of the lawyers is their theory of natural law, its relation to the law of nations and to the civil law. The subject is certainly perplexed and difficult, for we may doubt whether any of the lawyers had very clear conceptions upon the matter, and it has been rendered even more obscure by the attempt of the compilers of Justinian's Institutes to combine conceptions of the subject which are really incoherent, if not contradictory. There is no doubt that we find in the great lawyers of the second and third centuries not one view, but two. There can be no reasonable doubt that Gaius in the middle of the second century recognised no opposition between the *jus naturale* and the *jus gentium*; while Ulpian at the end of the second century sharply distinguishes the one from the other. We shall endeavour to point out what we think to be the significance of this change of view and the reasons which convince us that the view of Ulpian is that which ultimately prevailed and so became the foundation of the mediaeval theory upon the subject.

We cannot approach the subject better than by examining the views of Gaius upon the *jus gentium*. In the first words of his Institutes, which are also embodied in the Digest, there are two

propositions which are of the greatest importance: the first, that the *jus gentium* is universal, embodies principles which are recognised by all mankind; the second, that these principles have been taught men by *naturalis ratio*. We must turn to other passages for additional details with regard to the *jus gentium*. In a section of the Digest taken from a work of Gaius which has not been preserved, and in which Gaius discussed the origin of property in various things, we have the important statement that the *jus gentium* is coeval with the human race,—embodies those principles which from the first beginnings of human life were taught to mankind by their natural reason. In a third passage Gaius connects with the *jus gentium* another quality of great importance. Property by "tradition", he says, belongs to the *jus gentium*, and is clearly consistent with natural equity.

When we put together these various conceptions which Gaius connects with the *jus gentium*, we see that he conceives of it as that body of principles or laws which men have always learned from their reason to recognise as useful and just. The *jus gentium* is primitive, universal, rational, and equitable.

Gaius does not often use the phrase *jus naturale*, but from those passages in his writings where it occurs we conclude that it has much the same meaning to him as *ratio naturalis*. In his Institutes he speaks in one sentence of property as being alienated and transferred by "tradition" under the *jus naturale*, and in the next, refers to this as agreeable to *naturalis ratio*. There is no trace in any writing of Gaius which has survived to us of any opposition between the *jus gentium* and the *jus naturale*; such an opposition would indeed seem to be wholly incompatible with: the character of the *jus gentium* as he conceives it.

It would seem, then, that the *jus gentium* of Gaius is not greatly different from natural law as we have seen that Cicero understood it, except that, as we may perhaps say, Cicero is thinking of this as a part of the eternal law of God, while Gaius is only thinking of law in relation to the world. But they agree in thinking of law as a rational and just principle of life which is not enacted by men, but is the expression of the universal and natural reason and sense of justice. The theory of law which is held by Gaius, then, is not limited to the conception of the positive law of any one state, but is founded upon a conception of law, universal, primitive, and rational. We shall see later that the civil law of any particular state is at least in some measure dominated by this general principle of law.

We may infer that Gaius is, like Cicero, a follower of the Stoic theory of law and justice, regarding them not as something which men create for their own utility, but as something which they learn. Law in its general sense does not express the will of man, but is rather that which he rationally apprehends and obeys. The conception of the *jus gentium* which we derive from an examination of these passages of Gaius is the same as that expressed in the definition of the *jus naturale*, which Paulus, a lawyer of somewhat later date, gives us. We have no reason to think that Paulus drew any distinction between the *jus naturale* and the *jus gentium*,—we have no evidence that he did so; and in any case this definition does not seem to take any such distinction into account, and indeed seems clearly, at least for the purpose in hand, to exclude it.

Gaius then recognises no distinction between the *jus naturale* and the *jus gentium*. In the beginning of the third century we find three lawyers who do clearly oppose the *jus gentium* to the *jus naturale* or *natum*. Tryphoninus says that liberty belongs to the *jus naturale*, and that lordship was introduced from the *jus gentium*. Florentinus asserts that slavery is an institution of the *jus gentium*, by which one man is, contrary to nature, subjected to another. Ulpian expresses the same opposition when he says that the manumission of slaves belongs to the *jus gentium*, for by the *jus naturale* all men were born free and slavery was unknown; but when slavery came in by the *jus gentium*, then manumission also came in. Ulpian has also drawn out the distinction between the *jus gentium* and the *jus naturale* in set terms. Private law, he says, is tripartite—it is gathered from natural precepts, or those of nations, or civil laws; there are three kinds of jus, the *jus naturale*, the *jus gentium*, and the *jus civile*. And he goes on to define their several characters. The *jus naturale* is that which nature has

taught all animals; it is not peculiar to the human race, but belongs to all animals. From this law springs the union of male and female, the procreation and bringing up of children. The *jus gentium*, on the other hand, is that law which the nations of mankind observe: this is different from natural law, inasmuch as that belongs to all animals, while this is peculiar to men.

In considering this subject we must be careful to keep clearly apart the two points suggested by these phrases of Ulpian: first, the definite separation of the *jus naturale* from the *jus gentium*, which is common to the three jurists; and secondly, Ulpian's definition of the *jus naturale*, which is peculiar to himself. The first is clear and distinct; whatever may be the character of the difference, the fact of the difference is something quite unambiguous. We cannot say the same with regard to his definition of the *jus naturale*.

As Ulpian presents this here, the *jus naturale* would seem to be something of the nature of the general instinct of animals, not properly speaking rational or ethical; while he does not actually contrast the rational character of the *jus gentium* with the irrational instinct of the *jus naturale*, at least he says that it is peculiar to men. To consider the definition fully, we must notice Ulpian's use of the phrases Natural Law and Nature in other places. The first passage where the phrase recurs is that to which we have already referred, in which he tells us that manumission is an institution of the *jus gentium*, for by natural law all men were born free. Another passage which may very well be compared with this we find in the fiftieth book of the Digest. In this Ulpian says, that as far as concerns the civil law slaves are held *pro nullis*; but this is not so by natural law, for as far as natural law is concerned all men are equal. In another place he says that a man seems "naturaliter" to possess that of which he has the usufruct; and again, that nothing is so natural as that an agreement should be dissolved by the same method as that by which it was made; and in another passage still he says that it is by nature just that a man should enjoy another man's liberality only so long as the donor wishes.

We do not feel very clear as to the judgment which ought to be pronounced on the meaning of natural law and nature in these passages: they are not perhaps absolutely inconsistent with the character of the precise definition we have already quoted, but yet they leave with us the impression that they do not quite correspond with it. When Ulpian says that by natural law men were once free and are still equal, it scarcely seems adequate to explain this as meaning that as far as their animal instinct was concerned they were free and equal, but by a rational system of order they are unequal and some are slaves of others. We doubt whether Ulpian had really arrived at a complete and coherent conception of the law of nature: it would rather seem that he had for some reason judged that some distinction between the law of nature and the law of nations should be made, but that he was not very clear as to the nature of the distinction.

We do not get much help towards understanding this distinction from the other jurists. We have seen that Florentinus and Tryphoninus make the same distinction as Ulpian, but we do not possess any definition either of the *jus naturale* or the *jus gentium* written by them. We can only say that the character of the opposition between the *jus gentium* and the *jus naturale* or *natura*, as they present it, does not suggest that they understood *jus naturale* or *natura* to be equivalent to an animal instinct. Of the other jurists of the second century, as far as the fragments of their work enable us to judge, some appear to make no distinction between the *jus naturale* and the *jus gentium*, while others give us no indication of their view. Marcianus and Paulus seem to know nothing of the distinction; Pomponius uses the phrase *jus naturae*, but does not define it.

So far, then, as the lawyers of the second and third centuries are concerned, we cannot say that we can get a clear light upon the nature of the distinction between the Law of Nature and the Law of Nations: the fact of the distinction is clear, the ground of the distinction remains somewhat uncertain. We think that we can find an explanation of this with the help of a passage cited in the Digest from the writings of a jurist of the fourth century, a passage in the Institutes of Justinian, and the definition

of the *jus naturale* and the *jus gentium*, given by St Isidore of Seville, a Christian writer of the beginning of the seventh century.

There is preserved in the Digest a passage from the writings of Hermogenianus, a jurist of the time of Constantine, which is undoubtedly interesting, though not free from ambiguities. We have here a list of institutions which come under the *jus gentium*, and we have the strong impression that Hermogenianus is contrasting these with other institutions which belong to the *jus naturale* or giving an account of the origin of institutions which had no existence under the *jus naturale*. This impression is difficult to resist when we compare with Hermogenianus the other passages to which we have just referred.

In the first of these the compilers of the Institutes, after giving an account of the *jus naturale*, the *jus gentium*, and the *jus civile*, come back to the subject of the *jus gentium* and explain that it is a system of law common to all mankind and represents the experience of the human race, for in process of time wars, captivities, and slavery arose, and these are contrary to the *jus naturale*. We cannot say that the writers of the Institutes had the passage of Hermogenianus immediately before them, but there is certainly a considerable correspondence of thought between their words and his.

St Isidore also defines the *jus naturale* and the *jus civile*, and then comes to the *jus gentium*, and gives us a list of the institutions which belong to this, such as wars, captivities, slavery, treaties of peace, &c. Again, we cannot say that St Isidore's definition is founded upon the passage from Hermogenianus, but at least it seems to us clearly to belong to the same tradition and to be closely related to the passage in the Institutes.

The impression which these passages leave upon us is this: that the writers have present to their minds some primitive circumstances, some primeval or natural institutions of the human race, as distinguished from even the oldest and most universal conventional institutions of human society. St Isidore indeed describes the *jus naturale* as that which is held "instinctu naturæ, non constitutione aliqua." We think that the position of Ulpian, Florentinus, and Tryphoninus may legitimately be interpreted with their assistance. We should suggest that the cause which produced the theory of a law behind the universal law of all nations was a judgment, that some at least of the institutions which were as a matter of fact universal, and were reckoned to belong to the *jus gentium*, could not be looked upon as, properly speaking, primitive or natural in the full sense of the word. We venture to think that here we trace the influence of that mode of thought about the primitive conditions of human life which we have seen in Seneca, and which we may gather was representative of the general character of at least some Stoic theories.

Ulpian clearly conceived of man as having originally been free, and maintained that slavery only came in later. That is, with respect at least to the institution of slavery he has in his mind some primitive state, before this conventional institution was introduced. Florentinus and Tryphoninus do not throw any clear light on the subject, but they seem to agree with Ulpian. There are no direct references, so far as we have been able to see, in the lawyers of the Digest to a primitive state of nature; but we think that this is really implied in the attitude of Ulpian, Florentinus, and Tryphoninus to slavery. We should suggest that it is in connexion with this that the distinction between the *jus naturale* and the *jus gentium* arose. The passage from Hermogenianus which we have already cited seems to us to belong to a further development of the same theory. We shall see in a later chapter that there can be no doubt that the Christian Fathers generally accept the theory of the primitive state of nature in which the conventional institutions of society did not yet exist, while they give this theory a peculiar turn by bringing it into connexion with the theory of the fall.

We think therefore that the distinction made by Ulpian between the *jus naturale* and the *jus gentium* is really connected, though Ulpian may not have been fully conscious of the fact, with a tendency to conceive of some state of nature as lying behind the actual conditions of human life. Ulpian's definition of the *jus naturale* is not governed by this mode of thought; but we would

suggest that this should be taken mainly as illustrating the fact that he had not arrived at any very clear conception of the whole subject. At least, whatever doubt we may continue to feel as to the true significance of Ulpian's distinction and definition, there can be little doubt that the tendency of legal theory was towards the distinction between the primitive and the conventional of which we have spoken. The Institutes of Justinian not only reproduce Ulpian's tripartite definition of jus, but in the passage we have already cited they more or less definitely give us an account of the process through which the institutions of the *jus gentium* came into existence.

What the ultimate significance of this theory of natural law, as embodying the primitive principles of human life, was to be, we shall have occasion to consider later: we shall see in the Christian Fathers that the natural law represents a body of principles more or less ideal and adapted to a state of innocence, but not therefore related to the actually existing condition of imperfection.

CHAPTER IV
SLAVERY AND PROPERTY

In considering the subject of natural law and the law of nations we have cited many of the passages which relate to the theory of slavery and equality. But the subject is one of such importance that even at the risk of some repetition we must examine some of these over again. We have seen that there is no point in which the Aristotelian mode of thought is more sharply contrasted with that of Cicero and Seneca than in the treatment of the equality of human nature. We have suggested that this change in the conception of the actual conditions of human nature can be accounted for in large measure by the new experience of the cosmopolitan Empires, by the fact that the Greeks in impressing their culture upon the countries of the Mediterranean seaboard discovered that after all the barbarian was possessed of reason and capable of virtue and of culture. However the change of conception may have taken place, there is no doubt that it did come about, there is no doubt that both Cicero and Seneca bear evidence to the fact that the older view was disappearing. It is of great importance to make ourselves clear upon the position of the Roman lawyers with regard to this matter: we may well imagine that the technical lawyers would be the last to yield to the new views, the most conservative of conceptions relating to so great and fundamental a social institution as that of slavery.

When we examine the writers of the 'Digest' in their chronological order, we discover that the appearance of the distinction, which we have been considering, between the natural law and the law of nations corresponds in point of time with the appearance of certain new phrases about human nature, with the dogmatic assertion of natural liberty and equality. It must not be supposed, however, that the older jurists of the Digest show us any trace of a belief that slavery is founded upon natural inequality. If they are silent on the theory of natural equality, they are equally silent, so far as we have found, on the opposite theory.

Gaius nowhere gives us any complete account of the origin of slavery. He assumes the distinction between the slave and the freeman as being one of primary importance in the classification of the law of persons, and he gives us an account of the legal position of the slave and says that the slave is *in potestate*, and that this condition of slavery exists under the *jus gentium*, that everywhere the masters have the power of life and death over their slaves, and that whatever the slave acquires belongs to his master. In another passage of the Digest he is cited as laying it down that slavery arises from capture in war. This is the only explanation of the origin of slavery which Gaius gave, so far at least as the evidence of his remains goes. Marcianus, a later jurist, is cited in the Digest as laying it down that slaves come into our possession by the *jus gentium* when they are captured in war or are born of our slave women. We may conjecture that his statement would represent the views of Gaius as well as of himself. These jurists then look upon slavery as an institution of the *jus gentium*, and taking into account what Gaius meant by the *jus gentium*, we infer that they looked upon the institution as rational and just; but they must not therefore be understood to hold the same views with regard to the inequality of human nature as Aristotle. Indeed it is noticeable enough that they have no explanation to offer of the origin of the institution, except as connected with war.

When we come to Ulpian, Tryphoninus, and Florentinus at the close of the second century, we find that remarkable turn of theory whose expression we have already noticed in considering the meaning of "natural law." It will be as well to put together these phrases in this new connexion. In the first place we may perhaps put the famous phrase of Ulpian: "Quod ad jus naturale attinet, omnes homines sequales sunt." It is just possible that this phrase is a little more technical than might at first

sight appear, for Ulpian is evidently discussing the legal position of the slave, and the equality of which he speaks may conceivably have had primarily a technical signification, as equal in position before the law. Still, the phrase is very noteworthy in its bold and direct character. The impression it makes is not weakened but rather confirmed when we turn to his equally famous phrase, "cum jure naturali omnes liberi nascerentur." Slavery had no place under the *jus naturale*, but came in under the *jus gentium*. By the law of nature men were free and equal.

When we turn to Florentinus we feel that this conception of the natural freedom of man is again confirmed. Slavery is an institution of the *jus gentium* and contrary to nature. We even seem to trace a half-apologetic tone in the famous explanation of the name "servus" which Florentinus adds. The slave is called so because he is preserved alive and not slain as he might be by the laws of war. Tryphoninus, again, expresses the same judgment with great clearness, when he says that liberty belongs to natural law, lordship was introduced by the *jus gentium*.

It may be urged that these are meaningless phrases, illustrating only the progress of an unpractical, sentimental speculation, which had no relation to the actual conditions of life. We think that this would be an exaggerated mode of speaking. These sentiments, just as those of Cicero and Seneca, were indeed held by men of whom we may fairly say that they never dreamed of overturning the actually existing conditions of society which were founded upon the institution of slavery, but that is not the same thing as to say that their phrases were meaningless and had no relation to the actual facts of life. We have seen that the sentiment of human equality was the result of the actual experience of the Mediterranean world,—that it only represents in theory an experience in fact. We venture to think that the theory of equality could not but react upon the theory of slavery, could not but alter the judgment of men as to its origin; and when we turn to examine the actual conditions of slavery as they are illustrated in the Roman Jurisprudence, we see that the change of theory was at least parallel with a change in the conditions of slavery.

If we turn back to that phrase of Gaius in which, as we have already seen, he describes the legal condition of the slave, we shall find it useful to notice that the words to which we have referred are followed by a sentence in which he tells us that the unrestricted power of the master over his slave, of which he has just spoken, did not any longer exist within the Roman Empire, and that all excessive cruelty on the part of the master was prohibited. In the Digest, where these words are quoted, the compilers seem to have inserted "legibus cognita" after "sine causa" and to have read "puniri" for "teneri", changes which are interesting as exhibiting the tendency to a growing strictness.

It is certainly worth noticing that the Roman Law had thus begun to limit the strict rights of the master and to interfere in the condition of the slave. In other references in the Digest we can trace this tendency back to the middle of the first century. Modestinus tells us that, by an edict of the Emperor Claudius, if a slave were deserted by his master on account of his suffering from severe illness, he was to receive his freedom; and that Vespasian decreed the liberation of slave women whose masters prostituted them, when they had been sold under the condition that they should not be prostituted. Ulpian says that Hadrian had banished for five years a certain lady, who on the very slightest grounds had outrageously ill-treated her slave women.

Ulpian gives us at length a rescript of Antoninus Pius which, as he understands it, defines the law in the case of a master outrageously ill-treating his slaves or driving them to unchastity. The Emperor is anxious not to interfere with the rights of masters, but he judges that it is to their interest that those who are unjustly ill-treated should be protected, and he therefore, in a particular case referred to, orders that the slaves who had fled to the Emperor's statue—if it was found that they had been treated with greater severity than was just, or had been infamously injured—should be sold, and not restored to their masters.

It is natural and reasonable to connect these tendencies of the Roman jurisprudence to regulate and ameliorate the condition of the slave with that great change in the conception of human nature of which we have spoken. It will be remembered that Cicero urges that the slave should be treated with justice, and that Seneca exhorts men to live with their slaves as friends and companions: the tendency of the Roman law to recognise certain elementary claims of humanity is naturally to be related to the recognition of the fact that the slave was essentially of the same nature and possessed of the same powers of reason and virtue as his master. We are well aware that the great changes in the position of the slave and the gradual disappearance of slavery in Europe must be traced in large measure to the operation of economic forces, just as is the case with the disappearance of villeinage in later times; but it is not therefore necessary to overlook the influence of the sentiment of human nature on social conditions. The economic and ethical foundations of society are not to be separated from each other, nor will historical truth be best served by insisting exclusively on one aspect of human life alone.

Whatever may be our judgment upon the matter, it is at least of importance to observe the fact that the lawyers, as well as those writers whom we have already examined, clearly indicate that the theory of natural inequality had disappeared, and that at least by the end of the second century the theory of a natural equality and natural liberty of human nature was firmly established. In later chapters we shall have to consider the relation of these theories to Christianity, but in the meantime we must make it clear to ourselves that Christianity did not produce these theories of human nature, but rather brought the same theories with it, whether derived from the same general sources or having antecedents of their own we shall have to consider. It may with much force be urged that in this matter Christianity turned what was to some extent an abstract theory into something which is continually tending to make itself real in outward fact; but when this is urged, those practical tendencies of the Roman Jurisprudence, of which we have spoken, must not be overlooked.

Our examination of the theory of slavery has then resulted in our finding that at least with regard to this institution we may very well conjecture that the tendency of Ulpian, Tryphoninus, and Florentinus is to contrast the actual conditions of society with some primitive state in which such an institution did not exist. We have seen that in Seneca's theory this primitive condition is contrasted with the actual, with special reference to the absence of the institutions of property and coercive government. With regard to that particular form of property called slavery, we may feel that Ulpian, Tryphoninus, and Florentinus tend to the same opinion.

We must now consider the legal view of the origin of the institution of private property. We do not discuss the legal conception of property,—such a discussion would take us far away from our subject,—and we endeavour to confine ourselves to an inquiry into the view of the jurists as to the origin of property and its relation to natural law.

The earliest writers whom we have observed to be cited in the Digest on the subject are Labeo and Nerva Filius, two jurists of the first century. Paulus quotes both these writers, and we gather that Labeo and Nerva Filius treat of property as arising naturally from the occupation or capture of that which previously had belonged to no one. We may compare a passage from Neratius, a jurist of the time of Trajan, from which we gather that some things are brought forth by nature which are not in the dominion of any one, and that these, as fishes and wild beasts, become the property of any one who captures them. This is the foundation of the treatment of the origin of property by Gaius. In that passage to which we have already referred this is drawn out with much detail. It is by the law of nations that we acquire the possession of many things, such as wild animals and the property of our enemies; and it is by the same law of nations that we acquire things by "tradition": other things we acquire by the civil law.

If we turn now to Marcianus we find that he maintains the same view and tells us in set terms that some things are by natural law common to all, some are private property. We have already seen

that the *jus naturale* of this passage seems to be the same as the *jus gentium* of other passages from Marcianus,—that he does not distinguish between the two. Paulus also tells us that certain methods of acquiring private property belong to the law of nations and are natural. It would seem clear, then, that those writers who make no distinction between the *jus naturale* and *the jus gentium* looked upon the institution of private property as being primitive, rational, and equitable.

We turn now to those writers who make this distinction. It must be observed that we have very little information as to their conception of the origin of the institution of property. We have only noticed two passages from their writings which seem to bear on this. The first of these is contained in a definition of Precarium by Ulpian. This definition does not help us very much ; it would be quite improper to conclude from it that he looked upon all forms of private property as belonging to the *jus gentium*. The other passage, which is from Florentinus, seems to show that his general theory of the origin of private property was much the same as that of the writers whom we have before examined. We should conjecture that Florentinus is describing one of the forms of appropriation of things which were before *nullius*. However this may be, one thing is clear, that Florentinus treats of one form of private property as belonging to the *jus naturale*. The institution of private property, then, to Florentinus is primitive and natural, and not like that of slavery, which is contrary to nature. So far then as our evidence goes, we can only say that Florentinus agrees with the other writers in looking upon property as a natural institution, even though he differs from them on the relation of the *jus gentium* to nature; and that with respect to the position of Ulpian we have no information.

It only remains again to consider that passage from Hermogenianus which we have already had occasion to examine in connexion with the question of the contrast between the institutions of the *jus gentium* and those of the *jus naturale*. Again we have to lament our ignorance of the general position of Hermogenianus. We cannot but retain the impression that he is contrasting these institutions with others which belong to the *jus naturale* or to the *jus civile*. We have at least to notice the description of the *dominia distincta* as belonging to the *jus gentium*, and we have the impression that he looks upon this form of property as belonging to a condition of things not perhaps entirely primitive. Our interpretation of Hermogenianus is naturally affected, as we have already said, by a comparison with the Institutes of Justinian and the Etymologies of St Isidore; but we have already cited these and we need not again go over the ground.

Our examination of the Roman Lawyers with regard to the origin and character of private property has yielded us the following results. Those lawyers who, like Gaius, make no distinction between the *jus naturale* and the *jus gentium* clearly look upon the institution of private property as rational, just, and primitive. They know nothing of any condition of human life where private property did not exist. It is likewise clear that Florentinus, although he distinguishes between nature and the *jus gentium*, also holds that private property is natural, belonging to the *jus naturale*, and therefore primitive as well as rational. The position of Ulpian and Hermogenianus is uncertain. We have no means of arriving at any confident conclusion with regard to their views, although we may incline to think that Hermogenianus very possibly reckoned private property as belonging to the *jus gentium* and not to the *jus naturale*.

The Lawyers, then, do not, so far as the theory of property is concerned, give us much help in studying the development of the theory of a state or condition of nature. We have seen that with regard to the institution of slavery Ulpian, Tryphoninus, and Florentinus certainly seem to incline to contrast the primitive with the actual, but there is no evidence of any tendency to develop this with reference to other institutions. We have seen that this theory was current among the Stoic thinkers; we shall find it again in the Fathers, and we shall see that Ulpian's distinction of the *jus naturale* from the *jus gentium* is one of the conceptions which ultimately gave it clearness and precision. But, except with reference to slavery, it does not appear that even the school (if we may call it so) of Ulpian developed the theory of the state of nature with any clearness, or indeed that the conception is

very distinctly present to their minds at all, for even their treatment of slavery tends rather to fall in with such a theory than to be definitely and consciously, by them, related to it.

CHAPTER V
THE THEORY OF THE CIVIL LAW

We have seen with what emphasis Cicero maintains that all law is derived from the one eternal law of God, which is the same as the principle of justice and reason in man's heart; we have seen how indignantly and scornfully he repudiates the notion that unjust laws are true laws (*jura*), how emphatically he maintains that neither kings nor people can make that to be law which is not the expression of the eternal principles of justice. We have now to consider what is the principle and definition of the civil law in the great jurists. We must adopt the chronological method in examining our subject, for though, as we think, there is little trace of variation among the lawyers on this subject, yet we cannot but recognise the fact that there are some ambiguities in their statements, and at any rate we cannot arrive at the same certainty with regard to some of them as with regard to others.

We commence our inquiry with Gaius, and, indeed, a sentence of his Institutes indicates the legal conception of the relation between the positive law of the State and the principles of reason, as clearly as any passage we can find. He is speaking of the guardianship or tutelage of those who are under age, and says it ought to be a principle of the law of every State that those under age should be under guardianship, for this is agreeable to natural reason. Natural reason is the guide and director of all civil legislation; this natural reason is itself the source of the *jus gentium*, and therefore controls both the general law of mankind and the particular law of any one State. The conception of law as necessarily conformed to some general principle apart from the caprice of any individual or group of individuals is sufficiently indicated in this phrase.

The matter is, however, much more completely developed by Marcianus early in the third century. He cites two most important Greek definitions of law, whose significance for our purpose is very great. He first cites a definition of law put forward by Demosthenes and then one of Chrysippus, whom he describes as "philosophus summae stoicae sapientiae". Marcianus makes no comment on these two definitions, and we may take it that he accepted them as representing his own conception of the subject. It is evident enough that the standpoint of the two writers is not by any means the same; but, at the same time, there is a very substantial agreement between them on some of the most important points of the conception of law. In the first place, they both of them regard law in the general sense as being something which is related to the divine or universal order as well as to the regulation of any particular State. Every law, Demosthenes says, is discovered and given by God; while Chrysippus treats law as the ruler of all things both divine and human. Law, according to Demosthenes, is intended for the correction of offences; while Chrysippus says that it is the norm or standard of things just and unjust. Both Demosthenes and Chrysippus bring their definitions into relation with civil law, by defining law, in the sense in which they are using the term, as being that which all in the State must obey and as belonging to all living creatures which are by nature political. To these more general conceptions Demosthenes adds certain specific conditions of the civil law—namely, that it should be set forth by the wise man, and should be agreed to by the whole State: to these we shall have to return when we consider the nature and source of authority in the State.

These definitions of Demosthenes and Chrysippus bring out very clearly what we have already seen is indicated by Gaius, that civil law is to be regarded, not primarily as expressing the will of any community or person in a community, but as the particular application in any community of the principles of the universal reason and justice. This is indeed substantially the same view as that of Cicero. We do not suggest that Marcianus is to be considered as a strict disciple of the Stoic school;

but clearly enough he, like Cicero, follows the Stoic conception of justice and law, as contrasted with that of the Epicureans or the later Academics.

So far we have examined the opinions of those to whom the distinction between the *jus naturale* and the *jus gentium* had no special meaning, and we have seen that this does not in the least affect their view of the relation between the civil law and the general or universal principles of justice. We turn to the view of Ulpian, as representing the new theory, and we find him maintaining the same view with greater detail, but on the same general lines.

The compilers of the Digest open that work with a very significant and important statement by Ulpian on this subject. Nothing could well be clearer than the general tendency of these sentences. The jurist must understand that law is the art of the good and just, that it is his duty to study the meaning of this, to distinguish the just from the unjust, to draw men to do what is good. The law, that is, which the jurist has to deal with, is not to be looked at simply as a series of positive regulations of any particular society, but rather as the expression of the perpetual principles of justice and goodness.

These views are further illustrated in the well-known phrases in which Ulpian attempts to define the nature of justice, the main principles of law (*jus*), and the true character of jurisprudence. These famous phrases, repeated constantly throughout the Middle Ages and later, may suggest to us that. Ulpian was rather a facile and rhetorical than a profound thinker upon law: we may feel that these sentences, for all their admirable sound, carry us little further, and that we do not know much more about the nature of justice than we did. But regarded historically, these words are of the greatest importance, not merely as assuring us of Ulpian's position, but as forming one of the most important links in the chain by which the theory of law of the ancient world was handed down to mediaeval and so to modern thinkers. The general view of Ulpian, then, is obviously the same as that of Marcianus and that which is indicated in the sentence of Gaius which we have already quoted.

We have, however, another statement of Ulpian's in which the relation between the civil law and the natural law is more specifically, but also more ambiguously, dealt with. We cannot but regret that the compilers of the Digest have not preserved for us a more detailed explanation of these somewhat ambiguous phrases. They are obviously capable of a meaning in harmony with the conclusions which we have drawn from the statements we have already examined, but they might also bear a somewhat different construction. It is easy enough to understand what Ulpian means when he speaks of the civil law as being something added to the *jus commune*, a phrase which seems to mean simply the *jus naturale* and *jus gentium*, as being universal in their application, but it is not so easy to understand what he means by the *jus civile* as something which may take away from the *jus commune*.

The first phrase which suggests itself as possibly furnishing us with the means of comment on Ulpian's words is that phrase of Florentinus which we have so frequently cited, slavery is an institution of the *jus gentium* and contrary to nature. It is true that Florentinus is here speaking of the relation of the *jus gentium* to nature, but it would seem that the words might be applied to the relation of the *jus civile* to nature. Ulpian has expressed the same opposition, with reference to the same institution. By the *jus naturale*, he says, men were born free; by the *jus gentium* they are enslaved; and in another place, as we have seen, he has contrasted the relation of the *jus civile* with that of the *jus naturale* on the subject of the equality of men.

We seem to find in these phrases of Florentinus and Ulpian illustrations of what Ulpian may mean by the civil law as taking away something from the *jus naturale*; but we are still far from clear as to how this is to be explained in conformity with the general conception of law which he seems to maintain. The word jus is, he has told us, taken from *justitia*; jus is the "ars boni et sequi"; of the lawyers he has said, "justitiam namque colimus et boni et sequi notitiam profitemur." Justice, then, must reside either in the *jus naturale* or the *jus gentium* or the *jus civile*, or in all of them. It is

possible to maintain that Ulpian does not connect it specially with the *jus naturale.* We have seen that his definition of that system of law leaves us very uncertain whether he had any clearness of conception about it; but it is very difficult to suppose that in that case he did not find justice in the *jus gentium,* where, as we have seen, it would appear that the lawyers who take the same view as Gaius, found it.

We should suggest that the explanation may again be found in the relation of the conceptions of Ulpian and Florentinus to the theory of a natural state antecedent to the conventions of organised society; and that, just as Seneca looks upon the institutions of property and organised government as the result of the progress of vice among men, and yet regards them as adapted to, and therefore justifiable under, the actual conditions of human life, so Ulpian and Florentinus may conceive of the *jus civile* as differing from the *jus naturale,* as the conditions of the conventional life differ from those of the natural, and yet as being just under the actual conditions of human life. We shall see that this is the explanation which the Christian Fathers furnish of the contrast between the primitive or natural conditions of human life and the actual; and the fact that in this matter Seneca seems to represent a current Stoic tradition encourages us to think that the lawyers, like Ulpian and Florentinus, may have been influenced by some such ideas, even though they were not very clearly conscious of their influence.

There remains to be considered a sentence of Paulus, a contemporary of Ulpian. We have already mentioned this phrase, and must now reconsider the passage with relation to the subject we have in hand. Paulus says that we may define law in different fashions: in one way when we speak of that which is always just and good, this is *jus naturale*; in another way when we speak of that which is useful to all or the majority in any State, this is *jus civile*. At first sight we seem here to have a frank recognition of the utilitarian and interested character of civil law, and might feel inclined to think that Paulus must represent that tradition which so much angered Cicero, that law is merely that which is convenient to those who have power in any State. It is of course possible, though not probable, that this may be the case. We do not know that there is any reason to maintain that such opinions were not current at the time when Paulus wrote, and that he might not have been influenced by them. At the same time, in the absence of any other clear trace of such-a view in the Digest and Institutes, we feel rather disposed to think that Paulus used these words without any great care, and that we therefore must not press their significance to those conclusions which might be drawn from them. We think that he very probably intended nothing more than a contrast between the perpetual principles of justice embodied in, or represented by, what he calls the *jus naturale,* and the temporary and changing application of those, principles as adapted to the varying circumstances and varying desires of the members of any State.

We have seen then, that, except so far as there may be some doubt about the position of Paulus, the Roman Jurists of the second century hold a clear view of the relation of the civil law to the principles of justice; whether these are looked upon as embodied in the *jus naturale* or the *jus gentium*. They hold with Cicero that the civil law is organically related to the ultimate law of reason and justice; that it is not merely the expression of the capricious will of the lawgiver, but constantly tends, at least, to embody, to apply to the actual conditions of life, principles which are of perpetual obligation. We have seen that it is possible that the judgment of some of these may have been perplexed by their own distinction between the *jus naturale* and the *jus gentium,* that they may have felt that actually existing or universal institutions could not be considered to belong to the primitive and perpetual principles of life, while they were not prepared to condemn them. This only illustrates a perplexity of mind, which was indeed a natural result of the perpetual ambiguity in the conception of social justice in relation to the ideal justice, whether this is regarded as belonging to the past or to the future. The regulations of society ought to be just, and yet we are constantly compelled to amend them. Their claim to the obedience of man is founded upon the fact that they represent justice, and

yet they never are in the complete sense of the word just. The perplexity with regard to the past found a solution for many centuries in the theory of a change in the condition of human nature, in the judgment that principles of perfect justice which were adapted to a condition of perfect innocence cannot well be adapted to a condition of vice and imperfection. In the eighteenth century, when many thinkers understood very imperfectly the social significance of the faultiness of human nature, the difficulty resulted in the revolutionary bias given to the conception of the return to nature. Gradually men have turned back to the conception of perfect justice as belonging to the future, as being the ideal towards which the institutions of society tend, the principle which governs their development; but the difficulties of the actual condition have not therefore been completely solved. It is a thing worthy of note how few have recognised the significance of the most resolute modern attempt to suggest a solution, the attempt made by Rousseau in his theory of the "General Will." In England Professor T. H. Green and, recently, Mr Bosanquet are among the very few who have recognised the real importance of that theory.

CHAPTER VI
THE SOURCE OF POLITICAL AUTHORITY

We have still to consider the theory of the Roman Lawyers with regard to one very important subject, the source of authority in the State. It will be remembered that we found in Cicero a very interesting tendency towards a conception of liberty, as identified with a share in the control of the State. The Roman Lawyers of the second century and onwards deal briefly indeed, but very distinctly, with the question of the ultimate source of authority in the State, and we think that, so far, they do very clearly carry on the tradition represented by Cicero. They do not conceive of the Roman citizen as having any direct share in the actual administration of the Commonwealth, but in their view the Roman citizens are the sole ultimate source of authority, whether legislative or administrative. The relation of their view to that of Cicero is interesting, but much more important is the connexion between their theory and the democratic theory of mediaeval and modern times. The mediaeval theory of the social contract, which, so far as we know, was first put forward definitely in the end of the eleventh century, may have relations with such ancient forms of the theory as are perhaps suggested by Cicero and had been developed by Plato, and perhaps by authors whose works have now disappeared. We shall see that the mediaeval theory is related primarily to the traditional ideas of the Teutonic races on government, and to the course of the history of the Teutonic empire and kingdoms. But at the same time, the theory of the Roman Lawyers with respect to the people as the sole ultimate source of authority in the State seems to us to be clearly an undeveloped form of the theory of contract. We might call it the theory of consent, which is not the same thing as the theory of contract in any of its forms, but is the germ out of which the theory of contract might very well grow. When we discuss the theories of the mediaeval writers in detail we shall have to consider what traces there are of the direct influence of this aspect of the legal view, we shall certainly recognise that they were acquainted with it. In the meanwhile we consider the Roman Lawyers as expressing one aspect of the theory out of which the mediaeval and modern democratic conception of the State has grown.

Few phrases in the Digest are more familiar than that of Ulpian, “Quod principi placuit, legis habet vigorem”; sometimes at least it has been forgotten that Ulpian continues, “utpote cum lege regia, quae de imperio ejus lata est, populus ei et in eum omne suum imperium et potestatem conferat”. Few phrases are more remarkable than this almost paradoxical description of an unlimited personal authority founded upon a purely democratic basis. The Emperor’s will is law, but only because the people choose to have it so. Ulpian’s words sum up in a single phrase the universal theory of the lawyers; so far as we have seen, there is no other view known to the Roman jurisprudence. From Julianus, in the earlier part of the second century, to Justinian himself in the sixth, the Emperor is the source of law, but only because the people by their own legislative act have made him so. The matter is of such importance that we must justify this judgment by an examination of all the writers of the Digest who, so far as we have found, refer to the question.

The earliest discussion, in the Digest, of the authority which lies behind the civil law of Rome is, so far as we have seen, contained in a citation from Julianus, a jurist of the period of Hadrian and the Antonines. He is cited to illustrate the place of custom in law, and says that custom has rightly the force of law, inasmuch as law derives its authority from the people, and it is immaterial whether the people declares its will by vote or by custom. It is certainly interesting to observe this uncompromising and dogmatic statement of the authority of the people in making and unmaking laws (*leges*). It might indeed be urged that *lex* is the distinctive name for the legislation of the *populus*, and that we must not therefore press the phrases of Julianus to mean that *leges* are the only forms of law. We shall presently see that Gaius, in his classification of law, distinguishes the *lex*

from other forms of law: whether this distinction is here present to the mind of Julianus may perhaps be doubted; but if it is, we shall also probably judge that Julianus, like Gaius, looks upon the *lex* of the whole people as the original form of law, from which all other forms are descended.

Gaius has furnished us with a general definition of the nature of the civil law in that passage which we have had occasion to quote several times. We must now examine the words with which he carries out the definition in detail, with regard to the Roman State. It might seem at first sight that there are here as many authorities as there are forms of law, but a closer observation shows us that ultimately these come back to the authority of the whole *populus*. It is they and they alone who have the power of making a *lex,* and all other authority is derived from this. Thus the *plebiscitum*, or law made by the plebs alone, without the other classes, only has the force of law because this was decreed by the *lex Hortensia*. The constitution of the prince, in the same way, has the force of law because the emperor receives his *imperium*, *per legem*. The magistrates have the *jus edicendi*, but this no doubt is derived from their election. The *Responsa Prudentium*, if they all agree, have the force of law, but this is because such an authority is given to the jurisconsults. The only form of law of which we cannot definitely conclude, from this statement of Gaius, that its authority can be traced back to the people, is the *Senatus consultum*. Gaius does not define the mode in which this form of law came to be recognised as such. Pomponius suggests that it was due to the growing difficulty of getting together the *populus* as the Roman population increased : both he and Gaius seem to look upon the legislative authority of the Senate as tacitly recognised, though, as Gaius seems to indicate, at first there was hesitation about it.

The same theory of the source of authority is put before us in that very interesting account of the origin and development of the Roman legal system, by Pomponius, a contemporary of Gaius, to which we have just referred. In this we have a succinct history of the Roman law from the time of Romulus down to the organisation of the Imperial system. The most important points in this are as follows. At first there was no certain *lex* or *jus* in the State, and all things were directed by the kings. Romulus first began to propose definite laws (*leges*) to the people. After the expulsion of the kings these laws went out of use, and for some time the Roman people was governed rather by uncertain usages and customs than by definite laws. At last ten men were appointed to procure laws from the Greek cities, that the State might be founded on laws (*leges*), and they were given supreme authority in the State for a year, to put these into order and to correct them if necessary, and to interpret them with such authority that there should be no appeal from them. These laws, to which the name of the laws of the Twelve Tables was given, were finally adopted. They needed to be interpreted by the great lawyers, and out of this interpretation grew up that form of jus connected with the *prudentes*, the *jus* which is "proprium jus civile, quod sine scripto in sola prudentium interpretatione consistit". Then on the basis of these laws were founded the "legis actiones". Later it came about that there was a dispute between the *plebs* and the *patres*, and the *plebs* made laws for themselves which were called *plebiscita*. When the *plebs* had been brought back and much discord had arisen with respect to these *plebiscita,* it was finally agreed that they should be recognised as *leges*, and this was sanctioned by the *lex Hortensia*. Then, the people growing so numerous that it was difficult to gather together the *populus*, or even the *plebs*, the very necessity of the case made it necessary that the Senate should be charged with the care of the State, and the Senate began to issue decrees: this form of law was known as *Senatus consultum*. At the same time the magistrates who declared the law issued their edicts, that the citizens might know exactly the jus under which cases would be decided. Finally it became necessary that one man should be charged with the care of the State; a prince was created, and he was given the authority, that whatever he should ordain should have the force of law.

It is interesting to observe the laborious care with which Pomponius explains each new development in the legal system. By his presentation of the subject we see again that, with the exception of the *Senatus consultum*, every form of law derives its authority ultimately from the

populus. This is especially important with respect to the Imperial power, and here indeed Pomponius's phrases are almost apologetic in their anxiety to account for the legislative authority of the Emperor. The historical value of Pomponius's account is of course a very different matter from its interest to us: so far, indeed, as we are concerned, this is quite immaterial; we are only concerned with his narrative as illustrating the political theory of the second century, and for that purpose it is invaluable.

Early in the third century we come to Marcianus, whose citations from Demosthenes and Chrysippus we have already examined in another connexion. We must return to the first of these in relation to our present inquiry. His words are as follows: "This is law which all men should obey for many reasons, and especially because every law is a thing found and given by God, a judgment (*dogma*) of wise men, a correction of voluntary and involuntary transgressions, a common agreement of the State, in accordance with which all those who are in the State should live". We have already discussed the significance of the first part of this definition: for our present purposes the important phrases are two—that a law is something decreed or advised by wise men, and something adopted by the common agreement of the State. This latter part of the definition is adopted by Papinian, a contemporary of Marcianus: his definition is, with slight modification, evidently taken from that of Demosthenes. In this definition, then, it is clear that the immediate source of the authority of the law of any State is the agreement of the whole State, and we may take it that it governs the short general description of the civil law given by Papinian in another place, where he deals with it in very much the same terms as Gaius: we are entitled to interpret this classification by the definition to which we have just referred.

We have, then, come down to the time of Ulpian, with whose sentence on the Imperial authority we commenced our inquiry. We are now in a position to recognise that his statement, that the authority of the prince is derived from the fact that the people have by the *lex regia* conferred on him all their authority, is strictly in harmony with the political theory of all the earlier jurists. But we can trace the same theory down to the time of Justinian himself. In a rescript of Theodosius and Valentinian of the year 429, the relation of the Imperial authority to the law is expressed in very clear and forcible terms. Theodosius and Valentinian say that the prince is bound by the laws, for his authority is drawn from the authority of the law. Nothing could well be plainer than this statement, nothing could show more clearly that the theory of Ulpian is still the theory of the fifth century. And, finally, in the rescript which is prefixed to the Digest, we find Justinian himself referring in explicit terms to the ancient law by which the Roman people transferred all their authority and power to the Emperor.

It is true that in Justinian we also find some trace of a conception out of which there grew another theory of the authority of the ruler. The first words of the rescript we have just quoted are, "Deo auctore nostrum gubernantes imperium, quod nobis a cselesti majestate traditum est". In another rescript, also prefixed to the Digest, we read, "quia ideo imperialem fortunam rebus humanis deus prseposuit, ut possit omnia quae noviter contingunt et emendare et componere et modis et regulis competentibus tradere". In another place still, he speaks of God subjecting all laws to the Emperor, whom He has given to men as a living law. These phrases may be compared with those of Seneca and Pliny, to which we have already referred, and with the patristic conception of the relation between God and the ruler, which we shall presently have to examine; but in themselves the words of Justinian can hardly be pressed to mean more than that the providence of God rules even over the matters of the State.

From the second century, then, to the sixth, we have seen that the Roman law knows one, and only one, ultimate source of political power, and that is the authority of the people. It may of course be said that this is the merest abstract theory, that during this time the Imperial power was obtained by every method, but never by that of popular appointment; that the legislative authority of the

people was only a name and a pretence, and it must be noticed that Justinian seems even to speak of the Emperor as the sole *legislator*, as though, in fact, the legislative action of the Roman *populus* had wholly ceased. But still the theory of the ultimate authority of the people subsisted, and so came down till it touched the new Teutonic theory of law and political authority, a theory which again knew nothing of any legislative authority in the State apart from the whole body of the State.

We think that the legal theory, that all political power is derived from the people, is at least one of the sources from which the theory of the social contract sprang. It is far from being the same theory, but it seems to us to represent an elementary form of the same conception. The Roman lawyers indeed usually deal with the matter only from the point of view of the Roman Commonwealth, but this is not always the case. Papinian, and Marcianus in his citation from Demosthenes, define law in terms of universal application. And, after all, the Empire was to the Roman much the same as the world. The principles which belonged to it were at least the principles of the civilised world, and their application to the conditions of the world at large was natural and easy.

CHAPTER VII
THE POLITICAL THEORY OF JUSTINIAN'S INSTITUTES

We have so far examined mainly the jurists of the second and third centuries, and have endeavoured to make ourselves clear as to the general character of the political theory which they represent. We have observed that their theory is not something fixed, but that we can trace the changes of legal opinion, in the course of these centuries, with regard at least to some subjects. It is for our purpose important that we are able to compare these views with those of the lawyers of the sixth century as embodied in the Institutes of Justinian. Prom such a comparison we are able to arrive at some conclusions with regard to the permanent tendencies of the legal traditions, to judge, with respect to certain of them, which ultimately tended to predominate. It must at the same time be confessed that the compilers of the Institutes were so anxious to express themselves in the phrases of the great lawyers of the second and third centuries that it is often difficult to be quite certain as to their own opinions. It is difficult to imagine that the compilers were not aware that the passages they quote from different writers often represent views inconsistent with each other, and yet they do actually sometimes join together in the same passage citations which are completely out of harmony.

This carelessness of construction is nowhere more noticeable than it is with reference to the theory of the law of nature. We think that the opinion of the authors of the Institutes on the subject is clear and distinct, but it must be admitted that occasionally they embody in their work phrases which belong to another view. Their general position will be sufficiently shown by a few sentences: "Dicendum est igitur de jure privato, quod est tripertitum; collectum est enim ex naturalibus praeceptis aut gentium aut civilibus". This dogmatic statement of the threefold character of law is followed by the definition of the *jus naturale* which is cited in the Digest from Ulpian, and then by the definition of the *jus gentium* from Gaius's Institutes, and a description of the jus civile; they add that account of the *jus gentium* which we have had occasion to notice before.

The fact that the compilers of the Institutes follow Ulpian in distinguishing the *jus gentium* from the *jus naturale* is certainly clear enough. It is true that the first two passages we have just mentioned are quoted directly from Ulpian, but the last mentioned is not taken from any known source (with the exception of the words, "Jure enim naturali ab initio," &c.) We have already suggested that it may be related to that passage from Hermogenianus which we have already mentioned, but the explanation of the origin of the institutions is not contained in the passage from Hermogenianus, as we have it in the Digest. At any rate, whether these phrases are wholly borrowed or partly original, they do very clearly show that the compilers of the Institutes distinguished between the *jus naturale* and the *jus gentium,* and the last passage gives us some indication of their conception of the nature of the distinction.

Before we discuss the meaning of the *jus naturale* in the Institutes, we must examine one passage which seems directly to contradict those which we have just considered. This passage is contained in the first title of the Second Book of the Institutes, a title which deals with certain general questions of property. This passage is evidently founded upon those words of Gaius's in the Digest, which we have already several times had occasion to quote, but the compilers of the Institutes have made several important changes. In the first place, they have substituted the words "jure naturali, quod sicut diximus appellatur jus gentium" for Gaius's words, "jure gentium, quod ratione naturali inter omnes homines perseque servatur." Next, they have written "Palam est autem vetustius esse naturale jus, quod cum ipso genere humano rerum natura prodidit" in place of Gaius's "Et quia antiquius jus gentium cum ipso genere humano rerum natura proditum est"; and finally, they have added the last clause. The two latter points are interesting, but the real difficulty is raised by the first sentence.

We have just seen that the authors of the Institutes separate the *jus naturale* from the *jus gentium*. It is difficult to understand what they can mean by saying that the law of nature is called the *jus gentium*: they not only say this, but add that they have said it already, while we can find no trace of any such statement in the earlier parts of the Institutes. The form of the statement suggests that we may have here a quotation from some otherwise unknown source. We can only conjecture either that this is the explanation of the phenomenon, or that this is to be found in the fact that the passage forms part of a title which deals with the theory of property, consisting for the most part of citations from Gaius, Marcianus, and other jurists who identify the *jus naturale* and the *jus gentium*, and that the editors have adapted their language to this fact. The statement is certainly perplexing, but it seems impossible to allow this phrase to change the conclusion which we derive from the clear and repeated statements which we have already examined. There can be no doubt that normally the authors of the Institutes did distinguish the *jus naturale* from *the jus gentium.*

Their formal definition of the jus naturale is, as we have seen, the same as that of Ulpian,—that is, they reproduce that definition which suggests that the *jus naturale* means little more than the instincts common to all animals. But whatever may be the case with Ulpian, this definition does not appear to present at all a complete account of the view of the authors of the Institutes. At the close of the same title they use phrases descriptive of the *jura naturalia* which seem to convey quite another conception, the conception of their divine and immutable character. The matter may be illustrated from other passages. In the Third Book of the Institutes we find a phrase of much significance. The "natural laws" here are equivalent to permanent and divine principles of life which are superior to the civil law, and to which the civil law ought to be conformed. In the same title we find the action of the praetor, in admitting emancipated children to a share in the inheritance of their parents, described as being due to the sense of "naturalis aquitas". Again, the same title and the next, in dealing with the changes of the law of succession in relation to females and their representatives, describe certain changes in the civil law as being due to the feeling that the old law was contrary to nature and to the inspiration of a humaner sense. Natural laws are divine and ought to govern and correct all other forms of law, for they represent the permanent principles of justice and humanity. This is evidently quite another view of the *jus naturale* from that which may seem to be expressed in the formal definition of Ulpian which the Institutes cite. It would appear, then, that whatever uncertainty we may feel as to the meaning attached to the *jus naturale* by Ulpian and his contemporaries, by the sixth century the phrase was certainly taking that meaning which it has throughout the Middle Ages and later—that is, that the *jus naturale* means that body of principles of justice and reason which men can rationally apprehend, and which forms the ideal norm or standard of right conduct and of the justice of social institutions.

We do not mean that the authors of the Institutes had arrived at any perfectly clear judgment on the matter,—on the contrary, the fact of their reproducing Ulpian's definition shows us sufficiently clearly that this was not the case,—but we think that the tendency of their thought is clear enough, that they show us the development of a conception which in the second century was still unformed and indistinct. We have seen that the *jus gentium* was by Gaius conceived as embodying the principles of justice and reason, that indeed the *jus gentium* in Gaius is practically the same thing as the *jus naturale* in Cicero. The conception, therefore, of a principle of law, apprehended by reason as lying behind all positive law and embodying the principles of justice and reason, was not new. The new thing was simply the distinction between this ultimate law and the *jus gentium*.

We have already considered the question of the causes which led to this distinction. We think that in the main it must have arisen from the judgment that certain institutions, which were actually universal, could not be looked upon as having been primitive or natural in the full sense of the word. It is round the question of slavery that this distinction, as far as our evidence goes, seems to take shape in the legal writings, and this, again, seems to be related to the question of natural equality. But

the conception could be extended easily to other conditions and circumstances of life. The distinction between the *jus naturale* and the *jus gentium* seems, then, to be very clearly related to the distinction between the primitive state of nature and the conventional organisation of society. The writers of the Institutes do not deal with this directly and explicitly, but in two passages at least they seem to come a good deal nearer to it than any writer cited in the Digest, with the possible exception of Hermogenianus. We have already quoted these passages, but must do so again. The first comes after the definition of the tripartite law, and resumes the description of the *jus gentium* which had been first given in the words of Gaius. This passage, which, as we have already mentioned, is not drawn from any known source, though it reminds us of Hermogenianus, seems quite clearly to imply a contrast between the primitive conditions of human life and the time when the conditions and institutions referred to came into existence. The other phrase comes at the end of that passage which we have already mentioned in discussing the relation of the *jus naturale* and the *jus gentium*. In this passage, as we have already seen, the authors of the Institutes have spoken of the *jus naturale* and the *jus gentium* as being identical, and therefore the primitive condition is not thought of under terms which belong in any exclusive sense to the *jus naturale*. But the writers of the Institutes do seem clearly to conceive of a time when States did not exist, nor magistrates, nor written laws. That is, they seem to contrast the primitive conditions of human life, in which such institutions as those mentioned did not exist, with the later time when they did.

The treatment of slavery in the Institutes is the same as that in Ulpian, Tryphoninus, and Florentinus; indeed, with the exception of the words, "bella etenim orta sunt, et captivitates secutæ, quæ sunt juri naturali contrariæ", they simply reproduce the phrases of Ulpian and Florentinus, "Jure enim naturali ab initio omnes homines liberi nascebantur", and " Servitus autem est constitutio juris gentium, qua quis dominio alieno contra naturam subjicitur."

We need not say anything as to the theory of property in the Institutes: it does not seem to differ in any way from that presented in the Digest. The compilers simply put together in shorter form the same views as those which we have seen to be generally held by the jurists of the second and third centuries. They throw no further light on that interesting passage from Hermogenianus on which we have commented.

And again we find the same thing to be the case with regard to the theory of the relation of the civil law to the general principles of law: the writers of the Institutes begin their own treatise with Ulpian's definition of justice and of the general character of jurisprudence, but they add nothing. And so, again, with regard to the source of the authority of the civil law. They define the varieties of the civil law and the source of their authority mainly in the words of Gaius and of Ulpian. They represent the same tradition which we have seen to be characteristic of all the legal theory of Rome from the second century to Justinian, that the Roman people are the ultimate source of the authority of the civil law of Rome.

The Institutes then furnish us with valuable information as to the development of the theories of natural law and the natural state between the second century and the sixth, and seem to show us that, with regard to the other subjects into which we have inquired, the legal theory continues during these centuries unchanged.

Looking back now on our examination of the political theory of the Roman lawyers, we feel it in the first place important to observe how very small a place such theory occupies in their work. We have been compelled to take up a considerable space in our discussion of this, but that is simply due to the fact that the subject is obscure, and that there are many points whose interpretation presents some difficulties. The references of the lawyers to the theory of politics are few in number, and somewhat slight, if not superficial, in character. We cannot pretend to think that the lawyers contributed much to the philosophy of the State by their own reflections, but in reproducing the theories current among intelligent men they probably did much to give them a precise and definite

character, and the mere fact of the embodiment of such theories in the technical law-books could not but give them a new importance and influence. The influence of the lawyers in the development of political theory was probably quite out of proportion to their actual capacity as political thinkers. Their importance for our purpose is obviously very great: the period to which they belong is one in which there seems to have been very little formal writing on political theory, or else the works which may have dealt with this have disappeared. The lawyers furnish us with the best materials for estimating what was the general tendency of political theory during these centuries, apart from the Christian influences. When we turn to the Christian Fathers we shall find that they provide us with much information on our subject, but if we were to go to them without first examining the views of the lawyers, we should have some difficulty in discriminating between conceptions which belong to the Christian tradition and those which were the common property of the Roman world. The influence of the jurists upon medieval political thought is very great, certainly very obvious, and while, as we shall see, the relations between medieval thought and the Roman jurisprudence may often be somewhat superficial, yet its influence is so constant, both directly and through the gradually growing and developing body of the Canon Law, that some study of the Roman law is necessary as a preliminary to any complete examination of medieval ideas.

If now we consider what are historically the most important elements in the political theory of the Roman lawyers, we shall be inclined to say that first in order of significance comes their contribution to the theory of the natural law and the natural state. We have seen how these conceptions take shape or are implied in the writings of the jurists of the second century, and are by them transmitted to those of the sixth. We have seen that these conceptions seem to be related to some judgment, instinctive perhaps rather than fully reasoned, that some actual institutions of society cannot be thought of as being strictly in harmony with the primitive conditions of human life, which are also conceived of as representing some ideal system of justice. We have seen that through Ulpian, Tryphoninus, and Florentinus the theory of the natural equality and liberty of mankind passed into the system of the Roman law, and it can hardly be doubted that this fact was not without a powerful influence upon the course of speculation on the theory of human institutions.

Secondly, we think it is probable that the influence of the lawyers on future times was greater than we might at first think with respect to the theory of the relation of law and the ultimate principle of justice. They contributed at least to fix for many centuries in the minds of men the conviction that the civil law of any State represents the practical application of the principles of justice and reason. Cicero and the Stoics indeed had maintained this view with clearness and conviction; but whether it would have become predominant apart from the influence of the jurists may perhaps be doubted. When we come to discuss the theory of St Augustine, we may have occasion to observe some signs of another view.

And, finally, we think that in the conception of the Roman lawyers as to the source of authority in the State we probably have one foundation of the mediaeval and modern theory of democracy. We shall have to study the immediate sources of this in later chapters of this volume, and in the next volume we shall have to examine the mediaeval conception in detail, and shall then be in a position to estimate more precisely the importance of the contribution of the Roman lawyers to the development of modern democratic theory. But in the meanwhile it is at least well worth observing that, if the ancient civilisation ended in a system of monarchical though legal absolutism, yet the theory of government which the jurists of the old world handed down to the new was a theory in which all authority in the State is conceived of as coming from the people.

PART III
THE POLITICAL THEORY OF THE NEW TESTAMENT AND THE FATHERS

CHAPTER VIII
THE POLITICAL THEORY OF THE NEW TESTAMENT

We have so far been engaged upon an inquiry into the political theory of the ancient world, in its last stages indeed, but as unaffected by any of those new conceptions which may have come into it with Judaism and Christianity. We have now to consider the leading features of the political theory of the West as we find it in the Christian writers of the first six centuries of our era. We have to consider what contributions the new mode of thought actually made to the general stream of political and social ideas, how far it simply coincided with these, how far it may have changed them, and how far, even when it did in the main correspond with them, it may have tended to give these ideas a new form or a new force.

Historians have often spoken in general terms of the far-reaching effects of Christianity in changing men's conceptions with regard to the character, the purpose, and the ruling principles of human society, and no doubt the influence of Christianity upon these has been profound and far-reaching, but we think that we have already said enough to show that if we are to arrive at any just and well-grounded judgment upon this question, we must be at pains to discriminate very carefully those elements of the theory of Christian writers which are really original to them, and those in which they do but reproduce the opinions already current in the civilised world. There are, no doubt, certain elements of political and social theory which are distinctive of the Christian writers, but we shall have to recognise a little more distinctly than has always been done that very often they are simply drawing from the common stock of ideas current in their times.

We must begin by considering the significance and scope of the references to the theory of human nature and society in the New Testament. But behind the New Testament there lies the literature of the Old Testament, whether belonging to the earlier history of Israel or to the period between the Exile and the advent of our Lord. It is especially in the literature, whether canonical or apocryphal, of this later period, that we have to look for the explanation of many of the phenomena of New Testament theory: unhappily the field is as yet but very imperfectly explored. The obscurity of the period indeed corresponds in time and in importance with the parallel obscurity of the period between Aristotle and Cicero, and until more light has been thrown upon these centuries, much in the New Testament will remain difficult to understand, and still more difficult to explain with reference to sources and origins. Among the many obscurities of our subject, perhaps the most obscure and perplexing are the questions which arise as to the contact between Jewish and Hellenic ideas, and the influence which the latter exercised upon the former. The importance of the subject has long been recognised with regard to the interpretation of St Paul's conception of religion and the world, but it may be much more important with regard to the whole of the New Testament than we yet understand.

We find in the New Testament matter of importance with regard to the theory of natural law, the theory of human equality, the theory of property, and the theory of government. We begin by examining the theory of natural law.

The references to this theory in the New Testament are very scanty—indeed we have not observed any distinct reference to the subject, except in one passage in St Paul's letter to the

Romans; but this reference is very clear and distinct, and may be taken as presenting a conception which is constantly assumed by St Paul as true and important. The passage occurs in a very important and indeed fundamental discussion of the relation to God of the Gentiles who have not received a revealed law from God: "For as many as have sinned without law shall also perish without law: and as many as have sinned under law shall be judged by law; for not the hearers of a law are just before God, but the doers of a law shall be justified: for when Gentiles which have no law do by nature the things of the law, these, having no law, are a law unto themselves; in that they show the work of the law written in their hearts, their conscience bearing witness therewith."

There can be little doubt that St Paul's words imply some conception analogous to the "natural law" in Cicero, a law written in men's hearts, recognised by man's reason, a law distinct from the positive law of any State, or from what St Paul recognised as the revealed law of God. It is in this sense that St Paul's words are taken by the Fathers of the fourth and fifth centuries like St Hilary of Poitiers, St Ambrose, and St Augustine, and there seems no reason to doubt the correctness of their interpretation. It would be an interesting question to discuss the source of this conception in St Paul; how far it came to him from the presumably Hellenic culture of his youth at Tarsus, how far from the general stock of ideas current among the more educated Jews. For our purpose it is sufficient to observe that we find the conception in the New Testament. We have already considered its character in the writings of Cicero, and the development of the conception among the jurists of the second and third centuries. We shall have to consider it again in the Christian Fathers.

We turn to the theory of human nature and equality in the New Testament, and first to this as presented in the teaching of our Lord in the Gospels. Whatever questions may be raised as to the universalist and particularist aspects of the Gospels, it will, we think, now be admitted by all critics that the doctrine of our Lord must have contained the germs of that universalism which ultimately predominated in the Christian Church. It is evident that more or less clearly our Lord must have taught the doctrine of the universal fatherhood of God, that in His eyes the distinctions of Jew and Gentile were not fundamental nor permanent. The Jewish people are warned that "many shall come from the east and from the west, and shall sit down in the kingdom of heaven with Abraham, and Isaac, and Jacob", while the children of the kingdom, the people of Israel, are shut out. This is only one example of a conception which is continually making itself felt in warnings to the Jews, and in the expression of the universal compassion and mercy of God.

The same conception is expressed in set terms by St Paul, "There can be neither Jew nor Greek, there can be neither bond nor free, there can be no male and female: for ye all are one man in Christ Jesus"; but this aspect of St Paul's teaching is too well known to need any detailed exposition. It is perhaps interesting and worthwhile to notice that the author of the Acts of the Apostles represents St Paul as expressing the conception of the universal fatherhood of God in the terms of a Stoic philosopher and poet, "For in him we live, and move, and have our being; as certain even of your own poets have said, For we are also his offspring." The doctrine of St Paul with regard to the common relation of all mankind to God is the same as that of the later philosophers.

We find, then, as characteristic of the Christian faith, that same conception of the identity of human nature over all the world which we have already considered in Cicero and Seneca. We cannot here enter into the question of the history of this conception in the later Judaism. We can see that among the Palestinian Jews there was still in St Paul's time a strong conservative party which looked upon these sentiments with suspicion. Apart from all the critical disputes as to the relation of St Paul to Jewish Christians, there can be little doubt that it was the form of his universalism which, more than any other cause, tended to concentrate upon him the anger of the Jews.

There are indeed traces in Hebrew literature from an early date of a tendency to transcend the national principle in religion. Both in the first and the second parts of Isaiah, in connection with the expectation of the deliverer and restorer, there is expressed, however vaguely, the sense that his work

will transcend the limits of the people of Israel, that it will be his work to establish righteousness and equity for all mankind, and to extend the knowledge of God over all the world. How far these ideas grew and developed during that most obscure period which followed the return from the great captivity, how far the nationalism of the Jews may have revived under the stress of the resistance to Hellenism under the Maccabees, how far the contact with Hellenism, even when resisted, may have yet actually tended to break down the Judaic isolation,—all this is a subject still obscure and perplexed. That our Lord took up again the tradition of the great prophets, and, translating it into a new form, gave it a profound and permanent life, seems clear, as is also the fact that St Paul carries on the doctrine of our Lord. The Christian Church then set out on its history with a conception of human nature which had outgrown the sense of national limitations, a conception which coincided very closely with the conception of the contemporary philosophy.

We shall therefore not be surprised to find that the treatment of slavery, and its relation to human nature, in the New Testament, is very closely analogous to that of the writers whom we have hitherto considered. We have a series of interesting passages which deal with the subject in St Paul's writings, and while these leave a good deal obscure, yet they enable us to form a fairly clear conception of the principles which from the first dominate the attitude of the Christian Church towards the institution of slavery.

The earliest reference to the subject by St Paul is contained in that passage which we have already considered, in which Paul speaks of the distinction between slave and freeman as one which has no meaning in relation to God. This evidently does not mean that Christianity has made the institution of slavery unlawful, but simply that it has no significance in God's sight,—that the slave, just as much as the freeman, is capable of the religious life, capable of knowing God and of the life of the child of God. We might translate St Paul's phrase into other terms,—the slave is possessed of reason and capable of virtue. St Paul would obviously have emphatically repudiated the notion that there is a natural or inherent distinction in human nature, which renders some men capable of the higher life, while others must remain upon a lower level. The passages in the Corinthian and Colossian letters to which we referred are strictly parallel, but add nothing further.

In the letter to Philemon we have a practical commentary on this conception, and we have a further development of St Paul's principles with regard to slavery. St Paul sends a certain Onesimus back to his master Philemon, from whom he had apparently escaped. He had fallen in with St Paul and been converted to Christianity. It is very noteworthy that St Paul felt it right to send Onesimus back to his master, and does not even suggest that Philemon should set him at liberty. On the other hand, St Paul expects Philemon to receive Onesimus not as a mere slave, a runaway to be punished, but as a beloved brother. The epistle seems to illustrate clearly two principles: that slavery is not in St Paul's mind unlawful, but that the condition of slavery is only external—that it has no existence in the moral and spiritual life.

We have another reference to the subject in the first letter to the Corinthians, which would be extremely interesting if we could be more confident as to its meaning: "Let each man abide in that calling wherein he was called. Wast thou called being a bond-servant? care not for it: but if thou canst become free, use it rather. For he that was called in the Lord, being a bond-servant, is the Lord's freedman: likewise he that was called, being free, is Christ's bond-servant. Ye were bought with a price; become not bond-servants of men. Brethren, let each man, wherein he was called, therein abide with God". One general conclusion can clearly enough be founded upon this passage, namely, that in relation to Christ it is completely indifferent whether a man is a slave or a freeman. But when we ask ourselves, Does St Paul in this passage advise a man to get his freedom if he can, or does he rather urge upon him that the whole thing is so unimportant that it is not worth while taking steps to obtain his freedom? we find ourselves in much uncertainty, and can hardly express any decided opinion.

Another aspect of St Paul's conception of slavery is presented to us in two passages, obviously parallel to each other, but not identical. We may take first that in the letter to the Ephesians : "Bond-servants, be obedient unto them that according to the flesh are your masters, with fear and trembling, in singleness of your heart, as unto Christ; not in the way of eye-service, as men-pleasers; but as bond-servants of Christ, doing the will of God from the heart; with good will doing service, as unto the Lord, and not unto men ... And, ye masters, do the same things unto them, and forbear threatening: knowing that both their Master and yours is in heaven, and there is no respect of persons with Him". St Paul's phrases are very general in their character, but three conclusions may be drawn from them. First, that he looks upon the performance of his work by the slave as a duty in the sight of God. Secondly, that before God the master and the slave are on the same level. Thirdly, it is probably safe to interpret St Paul's injunctions to the masters, "do the same things unto them", as meaning that they are to behave towards their slaves with fairness. Perhaps we may find the best commentary on these words in the parallel passage in the letter to the Colossians : "Bond-servants, obey in all things them that are your masters according to the flesh: not with eye-service, as men-pleasers, but in singleness of heart, fearing the Lord: whatsoever ye do, work heartily, as unto the Lord, and not unto men; knowing that from the Lord ye shall receive the recompense of the inheritance: ye serve the Lord Christ. For he that doeth wrong shall receive again for the wrong that he hath done: and there is no respect of persons. Masters, render unto your bond-servants that which is just and equal; knowing that ye also have a Master in heaven". The first part of this passage is substantially the same as that in the Ephesian letter, but in the last sentence there is a change of phrase of some interest. Instead of "Masters, do the same things unto them", we have, "Masters, render unto your bond-servants that which is just and equal". The words are a little vague, but at least they seem clearly to express the principle that justice and fairness is a quality which ought to belong to the relation of master and slave, that a man's actions in this relation ought to have the same quality as that which belongs to the other relations of life. We are reminded of Cicero's phrase, "Meminerimus autem etiam adversus infimos justitiam esse servandam. Est autem infima condicio et fortuna servorum."

St Paul's attitude to the question of slavery is obviously founded upon his conviction that all men are at least morally and spiritually equal in character. To him all men are in God's sight equal, distinctions of condition belong only to the outer man, men are to each other brothers. The conduct of masters towards their slaves must be governed by the same principles of equity and fairness as those which govern their relations to other men. We can hardly say that St Paul goes beyond the position of Cicero or Seneca as to the natural similarity and equality of human nature, or beyond Seneca in his judgment that slavery is a condition which only affects the outer character of the man. His theory of human nature is indeed very similar to theirs, and his attitude towards slavery is much the same. Seneca indeed goes somewhat further than St Paul when he recognises that slavery is to all men hateful and burdensome; as we have seen, St Paul's attitude towards the question of the advantages of emancipation is uncertain. If St Paul's conception of slavery was to have a greater influence on the future of that institution, we must probably conclude that this was due to the fact that St Paul's judgment dominated the thought and the practical tendencies of the Church, while Seneca's was but the sentiment of an individual, representative probably of a very general judgment, but not enforced by an organised common judgment.

There are two references to the subject of slavery in the "Pastoral" epistles, but they illustrate not so much the theory of slavery as the relation of the writers of the New Testament to anarchical and disorderly elements in the primitive Church, which were probably of much greater importance than we have hitherto recognised. We shall have to deal with the matter immediately in connection with the theory of government in the New Testament. The passages are in the first letter to Timothy, and in the letter to Titus. The writer of the letters exhorts the slaves to honour and obey their masters, and particularly not to despise their masters if they also were Christians. We may probably infer that

the writer felt that there was some danger lest the new sense of spiritual dignity, and of spiritual relation between Christians of all conditions, should tend violently to destroy the old social order: he is afraid lest the conduct of Christian men should bring discredit or suspicion upon the religion of Christ.

We turn to the theory of the institution of government, and here we find certain conceptions whose importance in the history of later political thought is very great indeed. The most important passage in the New Testament which is connected with this subject is that in the thirteenth chapter of St Paul's epistle to the Romans. "Let every soul be in subjection to the higher powers : for there is no power but of God; and the powers that be are ordained of God. Therefore he that resisteth the power withstandeth the ordinance of God: and they that withstand shall receive to themselves judgment. For rulers are not a terror to the good work, but to the evil. And wouldest thou have no fear of the power? do that which is good, and thou shalt have praise from the same: for he is a minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is a minister of God, an avenger for wrath to him that doeth evil. Wherefore ye must needs be in subjection, not only because of the wrath, but also for conscience' sake. For this cause ye pay tribute also; for they are the ministers of God's service, attending continually upon this very thing. Bender to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honour to whom honour.''

This passage, which is of the greatest importance throughout the whole course of mediaeval political thought, being indeed constantly quoted from the second century onwards, is indeed pregnant and significant in the highest degree. It defines in the profoundest way the Christian theory of the nature of political society, while it furnishes us with the most interesting evidence with regard to the condition of the Christian societies of the apostolic period.

St Paul's general meaning is plain and distinct. The order of civil government is of divine institution, a thing deriving its authority and sanction from God Himself; to refuse to submit to it is to refuse to submit to God; obedience to the State is not merely a political necessity, but a religious obligation. But, we may ask, why is this so? Why are we to take the civil order of the State to be a divine institution, to which we must render obedience as to God Himself? Here also St Paul's answer is clear and distinct; it is because the end and purpose of civil government is to repress the evil and to encourage the good. The civil ruler is God's servant for a good purpose; the good man need have no fear of the civil ruler, but only the evil man. To put this into the more technical phrases of political theory, St Paul means that we must obey the civil order, as having a divine authority, because it exists for the maintenance of justice. It is the just end of the civil State which gives it a sacred character.

There are some other passages of importance which should be considered along with this one. In the letter to Titus we have an exhortation in general terms to obedience to authorities, and in the first letter to Timothy Christian men are exhorted to pray "for kings and all that are in high place; that we may lead a tranquil and quiet life in all godliness and gravity". The position of the ruler is defined clearly, along with the ground of the attitude of Christian men towards him, namely, that it is his function to secure order and peace for society.

In the first letter of St Peter we have a more complete parallel to the phrases of St Paul in the Roman letter. "Be subject to every ordinance of man for the Lord's sake: whether it be to the king, as supreme; or unto governors, as sent by him for vengeance on evil-doers and for praise to them that do well. For so is the will of God, that by well-doing ye should put to silence the ignorance of foolish men: as free, and not using your freedom for a cloke of wickedness, but as bond-servants of God. Honour all men. Love the brotherhood. Fear God. Honour the king." We have here the same conception as that of St Paul, that the authority of the ruler is divine, that obedience is to be rendered to him for the Lord's sake; and the same explanation of this, as resting upon the fact that the function

of the ruler is to punish the evil and to reward the good. But the passage is also interesting as suggesting to us some explanation of the urgency with which St Paul and the writer of this letter deal with the matter: for our purposes it is immaterial whether the author is, as we should judge probable, St Peter, or some other and later writer.

We might very well at first sight wonder what it is that leads St Paul and St Peter to insist upon such an obvious truism as that the honest man should respect and obey the civil power. The first explanation which offers itself is, that they are anxious to counteract some Jewish antipathy to the Roman rule, and the explanation is consistent with the character of the persons to whom the letter to the Romans and the letter of St Peter are addressed. It is fairly clear that the Roman Church, when St Paul wrote, consisted partly of Jewish, partly of Gentile Christians, and it would seem that the letter of St Peter may be addressed mainly to Jewish Christians. It is indeed most probable that the Christian teachers were compelled at an early date to deal with this question of the relation of the Church to the Roman Government. The Jewish religious and political leaders had evidently tried to entangle our Lord in the difficult questions relating to the Jewish nationality and the Roman Empire. There can be no mistake about the purpose of the question with regard to paying tribute to Caesar; it was obviously intended to involve our Lord in a charge either of want of patriotism, or of disloyalty to the Roman Government. The apparent failure of the attempt evidently did not prevent the Jewish authorities from bringing the latter charge against our Lord. It is true that only St Luke's gospel actually records the definite form of the charge, "We found this man perverting our nation, and forbidding to give tribute to Caesar, and saying that he himself is Christ a king"; but it is clear from all the accounts of the trial before Pilate that some such charge must have been made. The common tradition of all the narratives represents Pilate as asking our Lord whether he claimed to be the King of the Jews, and there seems therefore to be nothing improbable in St John's statement that it was by pressing the charge of disloyalty that the Jewish leaders were able to coerce Pilate into ordering our Lord's crucifixion. Our judgment is confirmed by the account of the inscription placed upon the cross. There is some evidence that this same charge of disloyalty was brought against the Christians in the later part of the first century. According to the author of the Acts of the Apostles, the Jews at Thessalonica tried to embroil the newly founded Christian community in that city with the authorities, by bringing against them a charge closely connected with that brought against our Lord. "These that have turned the world upside down are come hither also; whom Jason hath received: and these all act contrary to the decrees of Caesar, saying that there is another king, one Jesus". There may be some trace of charges of the same kind in the narrative of the incidents at Philippi, and in the charges brought against St Paul at Caesarea.

The Apocalypse also furnishes us with clear evidence that, as a matter of fact, the Jewish hatred of the Roman Government was at one time, and in some circles, common among Christian men, when Rome first turned from its early indifference and careless protection, and became the violent enemy of the Christian societies. Without entering into any discussion of the interpretation of the Apocalypse as a whole, or any criticism of its sources, it is at least obvious that we have in it an expression of the most intense hatred of the Roman oppressor, which, even if it were Jewish in its original form, has been adopted by a Christian writer. It may of course be urged that this represents the feelings of one section only of the Christian community; but even if this is so, the fact that such sentiments were current in any section of the Christian societies must be taken into account in considering the position of their leaders.

It is thus very possible that these leaders were compelled at a very early date to deal with the question of the relation of their converts to the Roman Government, and the suggestion is a reasonable one, that we might interpret the passages whose significance we are discussing, as being primarily intended to check any tendency on the part of the members of the Christian communities to adopt the national Jewish attitude towards the Roman Government.

But we do not think that this explanation is really adequate to the interpretation of these passages. They seem to have some more general significance; there is no trace in them of any special reference to a Jewish attitude towards the Roman Government, such as we might reasonably expect to find were they intended primarily to detach Christian men from a Jewish nationalism. We think that the full explanation of these phrases must be found in a characteristic of the early Christian societies, of which there are numerous traces in the apostolic letters, and which St Peter seems to indicate in the passage we have quoted: "For so is the will of God, that with well-doing ye should put to silence the ignorance of foolish men: as free, and not using your liberty for a cloke of wickedness, but as bond-servants of God".

The freedom of the Christian man is one of the most important of the conceptions of St Paul: "With freedom did Christ set us free: stand fast therefore, and be not entangled again in a yoke of bondage." We have just seen that St Peter's epistles also recognise freedom as a true characteristic of the Christian. Even St James uses the name of freedom, whatever may be the precise meaning which he attaches to the phrase. But it is also evident that the doctrine of the freedom of the Christian man was attended in the primitive Church with the same difficulties as in later times; indeed we venture to think that it was precisely in primitive times that the difficulties and dangers attending upon the conception made themselves most urgently felt.

It requires only a slight study of the apostolic writings to perceive that if the early Christian teachers had hard work to overcome the traditional legalism of the Jew, they were confronted with an almost equally dangerous tendency to anarchism, especially no doubt among their Gentile converts. The tendency shows itself first in a disposition to slight the ordinary duties of life, to refuse submission to the discipline of the common life. "We exhort you, brethren," St Paul says in his first letter to the Thessalonians," that ye abound more and more [in works of love]; and that ye study to be quiet, and to do your own business, and to work with your own hands, even as we charged you." And again, "We exhort you, brethren, admonish the disorderly." And so again in the second letter, "Now we command you, brethren, in the name of our Lord Jesus Christ, that ye withdraw yourselves from every brother that walketh disorderly, and not after the tradition which they received of us. For yourselves know how ye ought to imitate us: for we behaved not ourselves disorderly among you; neither did we eat bread for nought at any man's hand, but in labour and travail, working night and day, that we might not be a burden to any of you ... For even when we were with you, this we commanded you, If any will not work, neither let him eat. For we hear of some that walk among you disorderly, that work not at all, but are busy bodies. Now them that are such we command and exhort in the Lord Jesus Christ, that with quietness they work, and eat their own bread". It would appear that in the Thessalonian church a number of persons had so interpreted the Christian spirit of freedom, and the Christian consciousness of the dignity of the spiritual relation of man to God, that they were disinclined to submit to the ordinary duties of life, and to any kind of human authority.

The same tendencies, if under slightly different forms, exhibit themselves in the Corinthian church. It is clear from any examination of the letters to this church that St Paul had a very real difficulty, especially with his own Gentile converts, to persuade them that the liberty of the Christian man did not mean a complete emancipation from all discipline and order in life. It is clear that some at least of the Corinthian Christians were inclined to press the principle of the indifference of external rules and forms to the point of a complete disregard of the principle of that mutual subordination of desires and actions which alone makes social life possible. "All things are lawful" seems to have been the catchword of this tendency. St Paul argues that, while it is quite true that the Christian man is free from the legal principle in life, he must remember that his conduct must be governed by the fundamental principles of society, the principles of mutual love and consideration. "All things are lawful; but all things are not expedient. All things are lawful; but all things edify not. Let no man seek his own, but each his neighbour's good". And so with regard to those spiritual gifts

which St Paul and the Corinthian Christians firmly believed that they possessed, St Paul tries to persuade them that not the more remarkable and conspicuous, or the more abstractly spiritual gifts were the most valuable, but rather the gifts of service and counsel, and that the greatest gift was that of love. Even in writing to the Galatian churches, when St Paul was stirred to the very depths of his nature by the necessity of counteracting the legal spirit which threatened to take possession of them, St Paul warns his converts against the misinterpretation and perversion of the conception of liberty, "For ye, brethren, were called for freedom; only use not your freedom for an occasion to the flesh, but through love be servants one to another." There can, we think, be little doubt that the early Church was troubled with anarchical tendencies, very similar to those of some of the Anabaptist movements of the sixteenth century, and that these sprang from the same source. The reaction against the legal spirit carried men off their feet, and St Paul has to take the greatest pains to counteract the possible effects of his own teaching, just as Luther had to do when he wrote his treatise on 'The Liberty of the Christian Man'.

There is indeed no direct evidence in the New Testament, nor, as far as we have seen, in the early Fathers, of an explicit repudiation of the principle of civil government in the early Church, though such a charge may have been brought against the Church; but it is at least very easy to conjecture that the enthusiastic spirit of the freedom of the sons of God, of the members of the true kingdom of Christ, might easily pass into a contempt for all government, especially when that government was in the hands of unspiritual persons. In a later volume we shall have to consider the significance of Wycliffe's doctrine of civil lordship: it is possible that his view may have been anticipated in primitive times. There are even not wanting some germs out of which such sentiments might grow, both in the Gospels and in St Paul's own writings. Our Lord had very sharply contrasted the spirit of the Gentiles with the spirit of His kingdom, when he said: "Ye know that they which are accounted to rule over the Gentiles lord it over them; and their great ones exercise authority over them. But it is not so among you: but whosoever would become great among you, shall be your minister: and whosoever would be first among you, shall be servant of all." It is not difficult to understand how such a conception might lead men of a rash and impulsive disposition into a contempt for all secular authority. In St Paul's first letter to the Corinthians we have a reference to the relation of Christians to the law-courts, which might quite possibly be understood as indicating a certain tendency to slight the ordinary machinery of the secular power. "Dare any of you, having a matter against his neighbour, go to law before the unrighteous, and not before the saints? Or know ye not that the saints shall judge the world? and if the world is judged by you, are ye unworthy to judge the smallest matters?" No doubt St Paul's words are aimed at the contentious unbrotherly spirit which prevailed in the Church, but there is, probably unintentionally and unconsciously, a slightly depreciatory accent in the reference to the secular courts, perhaps a slight confusion with regard to the nature of civil justice.

It seems most probable, then, that St Paul's vindication of the authority of the civil ruler, with the parallel expressions of St Peter's epistle, were intended to counteract some anarchical tendencies in the early Christian societies, were intended to preserve the Christian societies from falling into an error which would have destroyed the unity of human life, and would have tended to put them into a ruinous opposition to the general principles of human progress. We shall have occasion to see how this question is developed in the writings of the Fathers, and we shall then recognise both how important it was that St Paul had so clearly laid down the true principles of the religious conception of the state, and also how even the clearness of his treatment failed to save later Christian thinkers from a perversion of this conception.

When we now consider the relation of this theory of the nature of government to the contemporary philosophical conception of the state, we find that it is both old and new. It is essentially the same theory as that of the Stoics, that man is by nature a social creature, that

government is an institution necessary to the proper development of human life. St Paul is translating the philosophical conception into the Christian conception of the divine order, and the translation has its real importance, but fundamentally the conception is the same. It is new in expression but the same in substance, and even the expression is, as we have already seen, to be found in such contemporary writers as Seneca and Pliny. We shall have presently to consider the theories that grew up on this translation, but we shall see throughout our work that the translation was necessary if Christian civilisation was to inherit the philosophical tradition of Aristotle and the Stoics. We must remember that clearly enough the Epicurean tradition was not the same as the Stoic, that the attitude of the philosophers of that school towards the organised State was at least one of indifference, and, as we have just seen, there were elements in the Christian conceptions which might have tended towards a similar position. It is therefore a matter of the greatest importance that St Paul should have recognised the gravity of the question, and should have set forth his views with such distinctness and penetration.

We have still to consider the theory of property in the New Testament. A great deal has been said about what has been called the communism of the early Church, and it has been thought that we see the beginnings of this in the condition of the Church of Jerusalem as described in the first chapters of the Acts. We must begin by examining the exact nature of the accounts of this which are given to us. The first reference is at the end of the second chapter: "And all that believed were together, and had all things common; and they sold their possessions and goods, and parted them to all, according as any man had need." The next reference is in the fourth chapter: "And the multitude of them that believed were of one heart and soul: and not one of them said that aught of the things which he possessed was his own; but they had all things common ... For neither was there among them any that lacked: for as many as were possessors of lands or houses sold them, and brought the prices of the things that were sold, and laid them at the apostles' feet: and distribution was made unto each, according as anyone had need."

There is no doubt that if these words stood alone we should conclude that a complete communistic system was established in the Church of Jerusalem, and we might almost conclude that conformity to this was one of the regular tests of membership. But we must look at the general narrative a little more carefully, and our first impression will then be a good deal modified. One of the most dramatic incidents in the story of the primitive Church is the narrative of the falsehood and death of Ananias and Sapphira, and in this narrative we observe phrases which materially affect our judgment of the condition of the Church. "A certain man named Ananias, with Sapphira his wife, sold a possession, and kept back part of the price, his wife also being privy to it, and brought a certain part, and laid it at the apostles' feet. But Peter said, Ananias, why hath Satan filled thy heart to lie to the Holy Ghost, and to keep back part of the price of the land? Whiles it remained, did it not remain thine own? and after it was sold, was it not in thy power? How is it that thou hast conceived this thing in thy heart? thou hast not lied unto men, but unto God."

It is at least clear from this narrative that there was no compulsory system of communism in the Church, that submission to it was not a condition of membership of the Christian society in Jerusalem, and we are compelled to reconsider the judgment which we might be inclined to found upon the passages first quoted. It would seem safest to conclude that the first wave of enthusiasm in the Christian society in Jerusalem led to a sudden development of the charitable impulses of the community to such a point that at least for the time the Christian society might well have appeared to be living in a complete community of goods, but that this condition of things was never developed into a complete system, and that the surrender of individual property was never a condition of church membership.

The narrative of the Acts throws no light upon the continuance of this state of things in Jerusalem. There are many traces in the letters of St Paul of great poverty in the Church of

Jerusalem, a poverty probably due mainly to the crowds of Jews, many of them doubtless of very small resources, who from time to time made their way to Jerusalem, from all parts of the Empire, to attend the great festivals; and we find St Paul engaged in collecting money in the churches which he visited, for the relief of this poverty, but there is nothing to show us whether the Church in Jerusalem itself continued to be under the same conditions as at first or not.

It may perhaps be said that there are traces in the Gospels, and especially in the Epistle of St James, of a tendency to look upon the rich as being, by the very fact of their riches, evil, and the poor as being, by reason of their poverty, good. It is certainly noteworthy at least that St James represents the true disciple as being poor, and oppressed by the rich, and that he proclaims the coming judgment of God upon the rich. And in the Gospels there is more than one trace of a tendency to regard the condition of the rich as being, normally at least, full of danger, and the condition of the poor as being one of blessedness. (In St Matthew's gospel this poverty is explained in a spiritual sense.) In one well-known passage our Lord tells the rich young ruler that for him the way of perfection lies in the renunciation of all his wealth. It is of course true that the interpretation of the passage has been the subject of much dispute: we shall see presently in what very various fashions the Fathers deal with it, but the general impression which we derive from the Gospels is certainly that wealth is at least a difficulty in the spiritual life.

When we consider the condition of the Christian Church outside of Judaea, we find no trace of any such system of the common life as may have existed in some loose fashion in Judaea. St Paul, in his various letters, constantly exhorts his disciples to liberality, especially towards the poor Christians in Jerusalem, but also in more general terms; but there is little trace of a community of goods in the churches to which he writes, unless we may conjecture that the idle and disorderly life of some of the Christians at Thessalonica may be related to a somewhat indiscriminate system of almsgiving in that community. St Paul's emphatic words, "If any will not work, neither let him eat", may imply that the benevolence of the brethren was encouraging a certain number of Christians in idle and thriftless ways. We have discussed the traces of certain anarchical tendencies in the primitive Christian societies, and it is quite possible that this spirit was fostered by a charity which may sometimes have been almost reckless. But in all this there is no trace of any strict community of goods, any notion that the ownership of property was something illegitimate.

So far as the New Testament is concerned, we can hardly say that there is any theory of property of a strict kind: the Gospels and St James may tend to represent the sense of the dangerous responsibilities and temptations which wealth brings; the Acts and the Epistles show us that the Christian societies, from the outset, felt the imperious claims of the brotherhood, and interpreted them as meaning that it was the duty of a Christian man to see that his brother was not in want. We shall return to the subject again when we deal with the theory of property as it is presented in the early Fathers.

CHAPTER IX
NATURAL LAW

When we consider the character of the political theory of the Christian Fathers we find ourselves in face of a considerable difficulty in arranging our materials. The writings which we have to consider extend over a period of some six centuries, from St Clement of Rome and the 'Teaching of the Twelve Apostles' in the first century to St Isidore of Seville in the beginning of the seventh, and they represent very various standpoints. Some of them are written by men who have nothing of a philosophical habit of thought; while others represent the more or less reasoned reflections of men who might be good or bad philosophers, but who were at any rate thinkers. Some of them, that is, simply seem to show us what notions were current among Christian men, others must be taken also to represent the particular turn given to these by the individual writers. We are compelled to recognise considerable diversities of opinion among these writers, and we have endeavoured to note these when they occur, and to discuss the relations of the different views to each other: at the same time, we think that it is true to say that in the main the Fathers represent a homogeneous system of thought, and we have therefore usually arranged our materials under the same general system which we have so far followed, not under the names of the individual writers, while we have usually endeavoured to present their opinions in some roughly chronological order.

We have seen the importance of the development of the theory of natural law in the Roman jurists, we have seen how at the close of the second century the law of nations is distinguished from the law of nature, and how this distinction is fixed with more or less complete definiteness in the sixth century. We must now consider the treatment of this subject in the Christian writers of these centuries. We have observed the general characteristics of the theory of Cicero with respect to the natural law, that there is a law behind all the positive ordinances of human society, a law which is written in the hearts of all men, drawing them to good, forbidding them to do evil, a law which is itself the expression of the reason and nature of God Himself, and that from this all the true laws of men are derived. We have also seen that at least in one great passage St Paul indicates that he also conceives of such a principle as existing in the heart of every man—that every man does in his heart know the law of God, which forbids man to sin, and commands him to do what is right. Whether St Paul's conception should be traced to the natural development of Jewish thought, or to the influence of that Hellenic culture which had already strongly affected Judaism, or to the special circumstances of his own education at Tarsus, is, as we have said, difficult to determine. For our purpose, indeed, we may suppose that it was derived from any or all of these sources. It will be obvious to any one who studies the phenomena, that here is one of the many points where the Christian conception and that of the Western world at large coincided. The theory of natural law became one of the commonplaces of Christian thought.

In Origen's treatise against Celsus there is an interesting sentence which may be taken as characteristic of the attitude of the Christian thinkers. Celsus had urged that "Law is king of all things", and Origen, after expressing a necessary qualification of the phrase as liable to misunderstanding, agrees that that which is law in the proper sense of the word is by nature king of all things, even though there may be some who have like robbers abandoned the law and deny its validity. The Christians, he says, have come to the knowledge of this law which is by nature king of all things, for it is the same as the law of God, and they endeavour to live in accordance with it. This frank admission of the truth of the conception and the identification of the law of nature with the law

of God—an identification already made, at least in terms, by Cicero—is representative of the common attitude of Christian writers towards this conception.

Even Tertullian, who, if any man, represents the extreme opposition to the ideas of the Greek world, uses language which is the same as that of the philosophers. Nature, he says, is our first school: we know God first by nature. Nature is the teacher, the soul the disciple. Whatever nature taught, it was taught by God. Lactantius, with his usual somewhat captious way of dealing with ancient philosophy, when discussing Zeno's principle of living according to nature, complains at first that this is too vague: there are many varieties of nature, he says, and the phrase might mean that men are to live like beasts; but finally he admits that, if the principle means that man, who is born to virtue, is to follow his own nature, it is a good principle. These Fathers, that is, admit that there is a law written by nature in men's hearts which is the true rule of human life and conduct.

The view of the later Fathers is the same. The writer known as "Ambrosiaster", in his commentary on St Paul's Epistle to the Romans, gives us an interesting tripartite definition of law, and a statement of the relation of the law of nature to the law of Moses. The definition is interesting, but more significant is the conception of the relation of the Mosaic Law to the natural law, as being something intended to supplement as well as to confirm it. The same conception is expressed in a letter of St Ambrose: The Mosaic law was given because men had failed to obey the natural law. Again, St Ambrose says, Law is twofold, natural and written. The natural law is in man's heart; the written laws in tables. All men are under the law—that is, under the natural law. And again: The law of God is in the heart of the just man. Which law? Not the written but the natural law, for law is not set for the just, but for the unjust man. The natural law, says St Jerome, speaks in our heart, telling us to do what is good and to avoid what is evil; and, again, he says that the whole world received the natural law, and the Mosaic law was given because the natural law was neglected or destroyed.

It is interesting to notice that the Fathers frequently, as we have before said, connect their treatment of the natural law with St Paul's phrases in Romans. St Ambrose, for instance, says that it is the Apostle who teaches us that the natural law is in our hearts. St Augustine also refers to St Paul's words in a passage in which he divides law into three species; and St Hilary of Poitiers does the same in describing the general scope of the natural law. He defines this as being that a man must not injure his fellow-man, must not take that which belongs to another, must keep himself from fraud and perjury, must not plot against another man's marriage. It is interesting to compare this with the definitions of the natural law by St Ambrose and by St Augustine. It is clear that these are derived from Cicero and other ancient writers.

It is unnecessary to multiply quotations. There seems to be no division of opinion among the Fathers upon the subject. Practically they carry on the same conceptions as those of Cicero and the later philosophers, and while they bring these into connection with the suggestion of St Paul, they cannot be said either to modify these inherited conceptions or to carry them any farther.

The treatment of the law of nature in the Fathers is not complete till we come to St Isidore of Seville at the beginning of the seventh century. Then we find that distinction which we have considered in Ulpian, Tryphoninus, and Florentinus, and in the Institutes of Justinian, restated with great directness, and defined in a method which is interesting and to some extent novel. The importance of the treatment of the natural law by St Isidore is, however, not only due to the fact that he furnishes us with interesting evidence as to the general prevalence of the theory of law in this form, and shows us that it was adopted by an important Christian writer. His importance in the history of the theory of natural law is much greater than this. His definitions were finally embodied, in the twelfth century, in Gratian's Decretum, and so passed into the structure of the Canon Law, and furnished the form of all the mediaeval ecclesiastical treatment of the subject; and though, no doubt, with the reviving study of the roman jurisprudence, the same conceptions would probably have

appeared, yet the fact that they were already embodied in St Isidore's Etymologies secured the unanimity of mediaeval theory upon the subject.

The position of St Isidore in the development, especially of the political theory of the Middle Ages, is indeed out of all proportion to the intrinsic merits or pretensions of his work. His 'Origins', or 'Etymologies', is really the seventh-century equivalent of a modern encyclopaedia. He suggests the derivation of each word with which he deals, and gives a brief account of the thing which it describes. It would be extremely interesting, were it not here out of place, to trace the history and origin of such an encyclopaedic work as that of St Isidore. It is evident enough that in most points and in general conception it is not original. It seems to belong to the same class of work as Martianus Capella's 'De Nuptiis Philologiae'. How much farther back this encyclopaedic form of literature can be traced we are not competent to say. It will be seen in the course of our inquiries that St Isidore furnishes the model of a variety of works of the same kind in the Middle Ages, of which the nearest is Hrabanus Maurus's 'De Universo,' which belongs to the ninth century.

St Isidore's work has therefore little of the character of an original production, and indeed makes no claim to this. For our purpose, indeed, this fact rather increases than diminishes its importance. We feel convinced in reading St Isidore's definitions that he is giving us not merely his own judgments but the generally current conceptions of his time. It may of course be urged that St Isidore, writing as he did in Spain, was rather far removed from the centre of the culture of his time, and that we must be prepared to admit the influence of the new barbarian circumstances upon his mode of thought. With regard to some aspects of his political ideas this may be quite true, and indeed may be a fact of some importance. But with regard to the subject which we are at present considering, his treatment of the theory of Natural Law, there seems no reason to think that any such special influences are at work upon him. We should indeed be glad, if it were possible, to trace more clearly the sources of his theories, for much remains, to us at least, very obscure; but we see no reason at all why we should look for these outside of the limits of the Latin culture.

St Isidore of Seville deals with the definition of law in the following terms: "Jus autem naturale est aut civile aut gentium." That is, he begins by laying down the tripartite character of law as Ulpian and the Institutes do. He then defines natural law, "Jus naturale est commune omnium nationum, et quod ubique instinctu naturae, non constitutione aliqua habetur; ut viri et feminae conjunctio, liberorum successio et educatio, communis omnium possessio, et omnium una libertas, adquisitio eorum quae coelo, terra, marique capiuntur. Item depositee rei vel commendatae pecuniae restitutio, violentiae per vim repulsio. Nam hoc, aut si quid huic simile est, numquam injustum, sed naturale, aequumque habetur."

It will be evident that the definition is related to that of Ulpian and the Institutes, and yet that there are considerable differences between them, and these of some significance. The statement that the *jus naturale* is common to all animals has disappeared, and in its place we read that it is common to all nations, and that men follow it "instinctu naturae non constitutione aliqua". We have already had occasion to deal with this change, but we must again point out that it seems to represent the fact that while Ulpian's definition suggests that the *jus naturale* was something of the nature of the animal instinct, the general tendency of thought was to look upon it as a body of principles rationally apprehended. It is true that St Isidore says that men follow it "instinctu naturae", but this is contrasted, not with reason, but with "constitute aliqua", and it should be observed that under the definition is included an ethical habit, such as the "depositee rei vel commendatse pecuniae restitutio". This has no place in Ulpian's definition. St Isidore defines the jus gentium in the following terms: "Jus gentium est sedium occupatio, sedificatio, munitio, bella, captivitates, servitutes, postliminia, faedera pacis, indutise, legatorum non violandorum religio, conubia inter alienigenas prohibita. Et inde jus gentium, quia eo jure omnes fere gentes utuntur". We have already compared this definition with a fragment of Hermogenianus contained in the Digest, and with one

part of the discussion of this question in the Institutes of Justinian. It is difficult to say whether St Isidore's definition is directly related to these, but there seems to be a general agreement of character between them all. In passing we may point out that there is the same contrast between the natural liberty of all, under the *jus naturale,* and the slavery which belongs to the *jus gentium,* in St Isidore and in the Institutes; but we shall have to return to this point later. The *jus civile* is defined by St Isidore as follows: "Jus civile est, quod quisque populus, vel civitas sibi proprium, humana divinaque causa constituit." This is practically the same as the definition of the civil law as distinguished from the *jus gentium* and the *jus naturale* in the Institutes of Gaius and Justinian.

St Isidore of Seville has obviously reproduced with certain changes of detail the theory of the tripartite character of law which we have already seen in the works of Ulpian and in the Institutes of Justinian. With his work the conception passes into the common stock of mediaeval tradition on political theory. The distinction would, however, have had little or no meaning if it had not been closely connected with that theory of the natural condition, or state of nature, the state antecedent to the conventional institutions of society, which we have already studied in Seneca, and whose influence we have recognised in the lawyers. We must examine this theory as it is exhibited to us in the Fathers, but we shall find it best to approach the subject by considering their theory of human nature and human institutions. We shall find that there is continually implied in this a reference to a condition of life precedent to and other than that which now exists. We shall see that the conception of the state of nature is in the Fathers identified with the conception of the condition of mankind in the unfallen state.

CHAPTER X
NATURAL EQUALITY AND SLAVERY

We have seen that in the New Testament writings we find a conception of human nature which is very clear and distinct as to the essential and inherent equality of mankind; we find that in the teaching of our Lord Himself men are regarded as all equally the children of God, and that in St Paul's writings we have the more technical expression of this conception as signifying the capacity of all men for the spiritual and moral life. Whether a man is slave or free he is still capable of the same moral and spiritual life, capable of knowing God and serving Him. If he is a slave he must be treated fairly and reasonably by his master, who is no dearer to God than is the slave.

This conception is carried on with eloquence and force in the writings of the early Fathers—is indeed implied in all that they say. We may refer to one or two passages which deal with the matter directly: the first is in the little work known as the 'Octavius', written by Minucius Felix. He says that all men, without difference of age, sex, or rank, are begotten with a capacity and power of reason and feeling, and obtain wisdom, not by fortune, but by nature. It is interesting to observe how close these phrases, in spite of certain differences, are to those of Cicero and Seneca; indeed it might be difficult to say whether the author derives his method of expression from the New Testament or from the philosophers. Another passage is contained in Lactantius's work, the 'Divine Institutes'. He is discussing the nature of justice, and after having given the first place in the conception of this to *pietas* he goes on to urge that the second part of justice is *aequitas*—that is, the temper which teaches a man to put himself on an equality with his fellow-men, the quality which Laetantius says Cicero had called *aequabilitas*. God, who brings forth and inspires men, wished them all to be equal. He made them all for virtue, promised them all immortality. Ho one, in God's sight, is a slave or a master; He is the Father of all men, we are all therefore His children. Lactantius finds fault with Roman and Greek institutions as not recognising these principles of equality sufficiently, but it does not appear that he is really attacking the institutions so much as what he considers the wrong temper with which men regard these institutions; for when he considers the objection which some one might make, that the same differences of rank and condition exist also among Christian people, he replies not by denying that the differences exist, nor by condemning their existence, but by urging that Christian people do really recognise each other as brothers and equals, that they estimate all things by their spiritual and not by their material value.

Lactantius's phrases are well-meaning and no doubt sincere, but they scarcely justify his attempt to censure the Greek and Roman spirit, and his somewhat inexcusable forgetfulness of the fact that writers like Cicero and Seneca had taken up much the same position towards the inequalities of human condition as his own. Lactantius does not really condemn the existence of the great inequalities of society, only he wishes them to be corrected by the sense of the fundamental equality of human nature, just as Seneca had done.

In the later Fathers this conception of the intrinsic and primitive equality of human nature is discussed with much fullness, but almost always in direct connection with the treatment of the institution of slavery: they assert that this equality is primitive, and also that in some sense it always continues, while they also develop with great clearness a theory which is to account for the existence of this unprimitive and, in one sense, unnatural institution of slavery.

We do not know that any passage in the writings of the Fathers represents the general character of their theory better than a discussion of the subject by "Ambrosiaster", in his commentary on St Paul's Epistle to the Colossians. He begins by warning masters lest they be puffed up with pride and forget that God made, not slaves and free men, but all men free. Slavery is the consequence of man's

sin; man, making war upon his fellow-man, makes captives, and chance determines whether these are to remain slaves or to be redeemed. Before God the sinner is the slave; Ham is an example of this, and the ancient writers who maintain that the wise were free and the foolish slaves, really recognised this principle. Masters must remember that their lordship extends only over the body; they have no authority over the soul, God only is the master of that: let them remember this, and only exact just service from their slaves, who are still their equals, not to say their brethren.

It will be noticed that there are really four distinct propositions with regard to human nature and slavery contained in this passage. First, that men as God made them were free; second, that this still continues in some sense, the condition of slavery is very largely one determined by fortune, and this condition does not extend beyond the body; thirdly, that slavery is the result of man's sin and sinfulness, the true slavery is that of the soul, for the foolish are the true slaves; fourthly, that masters must treat their slaves with consideration and forbearance. All these points can be amply illustrated from the works of the Fathers.

All the Fathers maintain that in their original nature men were free and equal. Salvian speaks of that human nature and condition which makes masters and slaves equal. St Augustine, in a very notable passage, to which we shall have to return, lays it down that God did not make rational man to lord it over his rational fellows, but only to be master of the irrational creatures, and that no one in that nature in which God first made man is the slave either of man or of sin. In the original order of things men would have been free and equal. Gregory the Great insists upon the same conception. Masters are admonished that they should remember that their slaves are of the same nature as themselves, lest they should cease to recognise that those whom they hold in bondage are equal with them, through their share in one common nature. In a passage in his work on Job, a passage which is frequently referred to in mediaeval literature, and some of whose phrases have become almost classical, Gregory admonishes great men to remember that by nature we are all equal, that nature brought forth all men equal, that it is only by a secret dispensation of God that some men are set over or are inferior to others. St Gregory's phrase, "Omnes namque natura aequales sumus," is strictly parallel to Ulpian's "Quod ad jus naturale attinet, omnes homines aequales sunt." We have just seen how St Isidore of Seville says that under the natural law there is "omnium una libertas."

But, further, this equality is not a thing wholly of the past: the inequalities of condition and life only affect the body, they have no relation to the mind and soul. The slave, St Ambrose says, may be the superior, in character, of his master; no condition of life is incapable of virtue, the flesh can be enslaved, the mind is free. The slave may really be more free than the master. It is sin which renders a man truly a slave, innocence is free. He is free under any outward form of slavery who is not governed by the love of the world, by avarice, by fear. The free man is he who can look out with confidence on his actual life and for whom the future has no terrors. St Ambrose's words remind us very forcibly of those of Seneca, and indeed so far the theories we are considering do not seem essentially to differ from those with which we have already dealt. But they are reinforced by the emphatic assertion that in Christ we are all one. St Ambrose in another treatise puts this very forcibly. Neither family nor rank affect the true position of men. Slaves or freemen, we are all one in Christ; slavery can take nothing from man's character, nor can freedom add anything to it. This is expressed in another and perhaps more technical fashion by the author of one of the sermons attributed to St Augustine, who protests against the harsh treatment of Christian slaves by Christian masters, and upbraids them for not considering that the slave is their brother by grace, has equally with them put on Christ, partakes of the same sacraments, has the same Father, God, and should find in his master a brother. These Christian conceptions do not perhaps add anything in strict theory to the philosophic conception of the equality of man's nature, but they represent to us a mode of apprehending this which has probably had a very great and continuous influence on the development of the practical consequences of this theory of human nature.

Man, then, as God made him was free and equal. The subjection of man to man is something which belongs not to his original nature but to his present condition; and more than that, this equality and freedom is in one sense indestructible and inalienable: even now, though his body may be in subjection, his mind and soul are free, he is still capable of reason and virtue, he may even now be superior to the man to whom he is enslaved, and in his relation to God all differences of condition are meaningless. Men, whether slaves or freemen, are called to one common life in Christ and God, called to know God as the common Father and to hold each other as brethren. We may stay for a moment to notice once again how far we have travelled from the Aristotelian mode of thought, how clearly we are in presence of what we may call the modern conception, the fundamental idea upon which the modern democratic theory of society depends. The Christian Fathers are clearly restating in their own fashion the same conceptions as those which we already met with in Cicero, in Seneca, and in the lawyers.

But slavery is not, in the judgment of the Christian Fathers, unlawful or improper: they recognise its existence, they acquiesce in its presence, and they furnish a complete theory of its origin and a new justification of its continuance. Slavery, they say, had no place in the primitive condition of life; man, as God created him, was not made to be either the slave or the lord of his fellow-man; but, they add, man has long ago passed out of that primitive condition, and lives now under other circumstances. He was once innocent and harmless, now he is vicious and inclined to attack and injure his fellow-man. Under the primitive conditions, he needed no coercive discipline to train him to goodness and to restrain his evil desires; he lived in freedom, and under conditions of equality, for he had no tendency to abuse his freedom to the injury of his neighbours, and therefore he did not need to be under the domination of his fellow-man, lest he should do wrong.

The Fathers conceive of the state of man before the Fall much as Seneca conceives of the Golden Age, and they account for the disappearance of the primitive conditions of that age by the theory of the Fall. By the Fall man passed out of the state of nature into the state in which the conventional institutions of society are necessary. Slavery did not exist in the state of nature when men were free, and in some very large sense equal. But the Fall brought with it the need of new conditions, of a new discipline, by which the new and evil tendencies of human nature should be corrected. Slavery is a consequence of the coming of sin into the world, and is also a disciplinary system by which the sinful tendencies of man may be corrected.

We have already seen how this conception is stated by "Ambrosiaster". In general terms he puts the universal theory of the Fathers, that slavery came into the world with sin. This conception is drawn out with greater completeness by St Augustine, St Ambrose, and St Isidore of Seville. The passage to which we have already referred in the 'De Civitate Dei' as illustrating the conception of the equality and primitive liberty of mankind, also contains one of the best statements of the patristic theory of the origin and rationale of slavery. Man, who was made in the image of God, and endowed with reason, was made to be the lord of all irrational creatures, but not of his fellow-men. Slavery has been imposed by the just sentence of God upon the sinner: it is a consequence not of man's nature but of man's sinfulness; by nature man is the slave neither of sin nor of his fellow-man. Slavery is intended to preserve the true order of life, which is threatened with destruction by sin. St Augustine looks upon slavery partly as a punishment of sin, but also as a remedy for sin, as one of those institutions, unnatural in one sense, as being contrary to the primitive conditions of human nature, but necessary under the actual circumstances of society. St Ambrose urges more than once that sin and vice and ignorance do in themselves make a man a slave. Sin is always servile, innocence alone is free. "Every one who commits sin is a slave of sin". It is really better for a vicious man to be a slave; a man who cannot rule himself is better under the authority of a wise man. When Isaac put Esau into subjection to Jacob, he was really conferring upon him a benefit. The same conception is drawn out with precision and clearness by St Isidore of Seville. Slavery is a punishment for sin, but a

remedial punishment; it is intended to correct the evil tendencies of original sin in human nature. It is necessary that the evil dispositions of some men should be restrained by terror, and yet God is equally careful for men whether they are slaves or free, and it may chance that a good man may be enslaved to an evil master while he is really his superior. St Isidore seems to mean that slavery is one of those disciplinary institutions which are necessary under the actual conditions of human nature, which do, in the general, tend to correct the result of men's depravity, though he is evidently compelled to recognise that the dispensation of Providence is not always adjusted correctly to the individual case.

This theory of the Fathers deserves careful attention. We have seen that they use phrases which illustrate the sincere conviction with which they, like the later philosophers and the lawyers, maintained the natural equality and liberty of mankind. Clearly they all continue to hold firmly to the view that human nature is fundamentally equal, that there is no reality in such a distinction as that which Aristotle had made between the naturally free man and the man who was naturally a slave. Men are all possessed of reason and capable of virtue; they are all the children of God. But it is also quite clear that the Christian writers were no more prepared to condemn the actual institution of slavery as unlawful than were the jurists or the philosophers. In the writings of the jurists we have the apparent contradiction stated, without explanation, that slavery is contrary to nature and yet that it exists. Seneca, at least, among the philosophers, suggests an explanation of the apparent contradiction. Institutions which were not necessary in the age of innocence became necessary as men's vices increased. The Fathers, bringing to their consideration of society a dogmatic theory of the Fall, are able to apply the same considerations as those which Seneca urges, with completeness and coherence. Had Adam not sinned and brought sin into human nature such an institution as slavery would have been unnecessary; but the Fall, in bringing corruption into the world, made necessary institutions which should correct and control the sinfulness of human nature.

Here we have the explanation of what at first sight seems a paradoxical contradiction between the principles of the natural law and the actual conditions of human life. The later Roman jurists had looked upon the natural law as divine and unchangeable, and, almost in the same breath, had spoken of slavery as an institution actually existing and yet contrary to the natural law. Directly at least they suggest no explanation of the apparent contradiction. Seneca had suggested, and the Fathers developed completely, an explanation which was in its own way profound and philosophical. The law of nature in its completeness is only adapted to the state of nature. In the condition of innocence and simplicity men needed no coercion to make them obey the principles of this law. But once this innocence had disappeared man needed discipline and coercion to make him obey even the more general principles of justice and right, and hence much which is contrary to nature in the primitive condition is necessary in the actual condition of human life.

Slavery is then, in the view of the Fathers, a lawful institution, and they constantly urge upon the slave the duty of obedience and submission. St Ambrose, after admonishing masters to remember that they are of the same nature as their slaves, bids the slaves serve their masters with good will; a man must patiently accept the condition in which he is born, and must obey harsh as well as good masters. St Augustine, in one interesting passage which is also of some importance in connection with the theory of government, argues that Christ makes good slaves of bad ones; that, when they turn to Him, He teaches them, not that it is improper that the righteous should serve the wicked, but rather that slaves should follow His example in rendering service. In another place, with still greater emphasis, he repudiates the notion that the precedent of the liberation of the Hebrew slaves in every seventh year might be applied to the case of the Christian slave: the apostle, he says, had admonished slaves to obey their masters, lest Christian slaves should demand such a manumission. The author of one of the sermons attributed to St Augustine puts the matter very forcibly when he bids the slaves love and obey their masters from the heart, because it is God who has made these to be masters and

the others to be their servants. But perhaps the most emphatic assertion of the propriety of slavery is to be found in one of the canons of the Council of Gangrae, held in the year 362. In the third canon the anathema of the Church is laid upon any one who under the pretence of godliness should teach a slave to despise his master, or to withdraw himself from his service.

The Church, then, so far from repudiating the institution of slavery, accepted the fact, and framed its own canonical regulations in accordance with it. The history of the canonical and secular legislation with regard to the slave who entered a monastery, or procured ordination, is long and intricate, and it is not necessary here to deal with it in detail; still some points in this should be observed. At an early date it had become the Church rule that a slave could not be ordained unless he were first set at liberty. St Leo expressly prohibits this, and a little later the matter is treated with considerable detail by Pope Gelasius I. In one of his letters he orders a certain bishop to restore a slave, who had been made a "clericus", to his mistress; but with regard to another slave who had been ordained to the priesthood he orders that he should be sent back to his mistress, not as a slave but as a priest at the church on her estates. In another letter he forbids the reception of any slave into a monastery without the permission of his master. This does not, however, represent the universal character of Christian legislation on the subject. In Justinian's fifth Novel the question of the entrance of slaves into monasteries is handled in a somewhat different spirit. Justinian prefaces his judgment on the subject by the recognition of the fact that the divine grace makes no distinction with regard to human conditions; that in the worship of God all distinctions of male or female, slave or free, disappear; and he goes on to lay it down that every one, whether free or a slave, must undergo a probation of three years before being accepted as a monk. If within that time a master come to reclaim his slave, and can prove that the slave had stolen something, or had committed a crime of some kind, and had therefore fled to the monastery, the slave is to be restored to him, on the promise that he will not injure him. But if he cannot prove the charge, the slave is not to be surrendered to him, even if the master's demand is made within the three years: after that, no demand can be made even on the ground of any crime committed by the slave before his coming to the monastery. Only, if the slave leave the monastery to return to the secular life, then the master can reclaim him. We shall have to recur to this question of the position of the slave or serf with respect to ordination or entering a monastery in later chapters. We here refer to the matter only as illustrating the fact that the Christian Church acquiesced in the institution of slavery, and even formed its own internal regulations in accordance with the fact.

Slavery, then, in the judgment of the Fathers, is a legitimate and useful institution. But the Fathers are very careful to urge upon the masters that they must show their slaves consideration and kindness, and even that they are responsible for the spiritual welfare of their slaves. St Augustine urges upon the masters of slaves that while with respect to temporal matters they may well distinguish between their children and their slaves, with regard to the worship of God they should take equal thought for both: the true *Pater familias* will try to bring up his whole household in the service of God. St Gregory the Great, in a letter addressed to the nobles and proprietors of Sardinia, warns them that they will have to give account to God for all those who are in subjection to them; it is true that these are to serve the temporal interests of their lords, but the lords are responsible for their eternal wellbeing.

We must not be understood to be discussing the question of the complete influence of Christianity on ancient slavery: our work here is concerned with the theory of the subject. So far as we should venture an opinion on this matter, we should say that Christianity was one of the many influences which were gradually tending to bring the slavery of the ancient world to an end. It would appear evident that the influence of Christianity tended to promote the mitigation of the hardships of slavery, not only by its exhortations to the master to remember that the slave was his brother, but also by promoting legislation for the protection of the slave and by actually encouraging manumission.

The laws of the Christian Emperors carry on from the older legislation, and seem to develop further, regulations for the protection of slave women and children from prostitution and exposure, and it is very noticeable that one of the earliest laws enacted by Constantine after his conversion was that by which it was permitted to perform the ceremony of manumission in the Christian Churches. The theory of the Church may have looked upon slavery as legitimate, but it is clear enough that the practical influence of the Church was in favour of manumission. In later centuries we find references to the manumission of slaves which imply that this was considered to be a pious work, likely to profit the souls of the persons who perform it. We do not doubt that the general influence of the Church tended towards the mitigation of the hardships of slavery, and even towards the disappearance of the institution. But the more clearly we may recognise this the more necessary is it to recognise also that the theory of the Church is somewhat different: we think that it must be admitted that the influence of the theory may have had considerable effect both in defending the actually existing slavery of the ancient world, and in assisting in its revival in the fifteenth century when Europeans came into contact with the negro races.

CHAPTER XI
NATURAL EQUALITY AND GOVERNMENT

In dealing with the question of slavery we have anticipated a good deal of what we have to say about the relation of the theory of natural equality to the theory of organised society and government. That natural equality which is, in the judgment of the Fathers, contrary to slavery, is also contrary to the subjection of man to man in government.

The Fathers maintain that man is made for society, that he is by nature sociable and inclined to love his fellow-men. Lactantius, in commenting on a passage from Cicero's De Republica, which we have already discussed, denies that they were ever apart. It is indeed possible that Lactantius is a little confused in his judgment of human nature. In another place he seems to mean that man does indeed desire society, but it is on account of the weakness of his body, which makes him incapable of defending himself in solitude. Still, even so, he maintains that men are by nature driven to the social life. A clearer conception is very forcibly stated by St Augustine in several passages. Human nature is, he says, sociable, and men are held together by the bond of kinship. He approves of the conception that the life of the wise man is a social life. Man, he says, is driven by the very laws of his nature to enter into society and to make peace with men. It is of some importance to observe this judgment, for, as we have already said, it must be remembered that ancient philosophy had spoken with a twofold voice on the matter. The Epicurean had plainly tended to think of political life as at the most a necessity, perhaps an unfortunate necessity, arising from the infirmities of human nature, while the conception of the obligation of political life even for the wise man had been carried on by the Stoics, although, as we have already seen, it requires a little care to recognise how emphatically they held this. Lactantius may perhaps waver between two opinions, perhaps scarcely recognising the significance of the question; but St Augustine, at least, is clear in his judgment, and he is, as far as we see, the representative of the normal type of thought of Christian writers.

Man is by nature made for society. But it is not by nature that man is the lord of man, it is not by nature that man is in subjection to man. We must recur again to that most important treatment of the question by St Augustine, to which we have already referred in dealing with slavery. God made rational beings in His own image, not to be lords over each other, but to be lords of the irrational creatures; the primitive good men were rather shepherds of their flocks than kings of men. The government of man by man is not part of the natural order of the world. In another place St Augustine speaks in the severest terms of the desire of domination, and treats it as arising from an intolerable pride which forgets that men are each other's equals. Gregory the Great represents precisely the same attitude towards the primitive order of human life. In the passage already quoted in relation to slavery, he points out the immense profit that great men will derive from the consideration of the equality of human nature, the great benefit they will gain if they will recollect that in the beginning man was set over the other animals, not over his fellow-man. It is probable that Gregory the Great is here following St Augustine, but the general source of the theory can hardly be mistaken: it is that same Stoic theory of a primitive state in which the conventional institutions of society did not yet exist, of which we have already spoken so often. The primitive state of man was to these Fathers, as it had been to the Stoics like Posidonius and Seneca, a state without any coercive government: in the state of nature men did not need this.

It must be noticed that, at least in St Gregory the Great, this does not mean that in the state of innocence there was no order of society or distinction of authority. In a letter addressed to the bishops of the kingdom of Childebert, in ratifying the authority of Virgilius, the Bishop of Arles, as representing the Roman See, St Gregory urges that some system of authority is necessary in every society—that even the angels, although they are free from sin, are yet ordered in a hierarchy of

greater and less. St Gregory's conception is very similar to that of Seneca and Posidonius, who, while they think that there was no organised coercive government in the primitive age, think that in that time men freely obeyed the wise.

To return, it seems clear that both St Augustine and St Gregory look upon the institution of coercive government as not belonging to the primitive state of man; they do not think that government of this kind is a natural institution; but this does not mean that the Fathers look upon the ordered government of society among men as they actually are, as a thing improper or illegitimate. We have already, in considering their attitude to the institution of slavery, recognised that they conceive of the conditions proper to human life as having been completely altered by the entrance of sin into the world. Slavery was contrary to the natural law of the primitive condition of human innocence, but is proper and even useful under the actual conditions of human nature. It is the same with the institution of government. Coercive government has been made necessary through sin, and is a divinely appointed remedy for sin.

It is interesting to find this conception developed by the Christian writers from a very early date. We have already considered St Paul's treatment of the institution of government and the sanctity which belongs to it. He affirms its sanctity and explains this as arising from the fact that its purpose is to repress the evil and to reward the good. St Clement of Rome, in the great liturgical prayer which forms a concluding part of his letter, does not go beyond St Paul's conception of the sanctity of government: he prays to God for the rulers of mankind, as those to whom God has given authority and glory, that God will give them wisdom.

Towards the end of the second century we have in the writings of St Irenaeus a detailed discussion of the origin of government, of the circumstances which have made it necessary, and of the purpose which it is intended to serve. The passage occurs with that apparent irrelevance which is so characteristic of the writings of the Fathers, in a discussion of the mendacity of the devil. Irenaeus begins by asserting that the devil was, as always, a liar, when in the temptation he said to our Lord that all the kingdoms of the earth were his, to give to whom he would. It is not the devil at all, Irenaeus says, who has appointed the kingdoms of the world, but God, and he establishes this by a reference to the passage in the Proverbs, "By me kings reign and princes administer justice," and the saying of St Paul, already discussed (Rom. xiii. 1, &c.) Authority came from God, not from the devil. So far we have nothing new; but Irenaeus then proceeds to discuss the causes which made government necessary, and urges that this is due to the fact that men departed from God and hated their fellow-men, and fell into confusion and disorder of every kind, and so God set men over each other, imposing the fear of man upon men, and subjecting men to the authority of men, that by this means they might be compelled to some measure of righteousness and just dealing. We have here an explicit statement that the institution of government has been made necessary by sin and is a divinely appointed remedy for sin.

The Christian writers of the same period as Irenaeus do not indeed draw out the relation of government to the existence of evil, as Irenaeus has done, but they agree with him in asserting its divine origin. Justin Martyr lays great stress upon the fact that Christians had been taught by Christ Himself to pay taxes to the ruler, to "render to Caesar the things which are Caesar's", and urges that, while Christians can only worship God, in all other ways they gladly serve their rulers. Theophilus of Antioch, another writer of the second century, while also refusing to worship the king, says that he should be honoured and obeyed, for at least in some sense it may be said of him that he has received his authority from God. No doubt these emphatic assertions of the divine authority of the ruler, while they may have been partly intended to allay any suspicions of disloyalty, were also intended to counteract those tendencies to anarchy in the Christian societies, to whose existence the New Testament bears witness. The Christian writers of the second century, then, clearly carry on the tradition of the New Testament that the principle of authority is a divine principle, while in the case

of Irenaeus at least we see that this means that government is a divinely instituted remedy for the sin and wickedness of men.

The great writers of the fourth, fifth, and sixth centuries carry on precisely the same conceptions. Most of them indeed only deal with the divine character of government, but St Ambrose, St Augustine, St Gregory the Great, and St Isidore develop the conception of St Irenaeus that government is the necessary divine remedy for sin. St Ambrose speaks of the authority of rulers as being imposed upon foolish peoples, to compel men even though unwillingly to obey the wise. St Augustine, as we have already seen, looks upon the government of men by men as being contrary to the primitive condition of human nature, but as being a necessary and divinely appointed consequence of and remedy for sin. We give below another passage from his writings in which his conception of government is very clearly drawn out.

St Gregory the Great echoes the sentiments of St Augustine: we need only refer the reader to the passage which we have already quoted in part, but we may draw attention to some phrases in this which were not specially germane to the subject which we were then dealing with. Men, he says, are indeed by nature equal, but they are different in condition as a consequence of sin: as all men do not live equally well, one man must be ruled by another; there is a bestial tendency in the human race which can only be kept down by fear.

St Isidore of Seville, in the same passage in which he deals with slavery as a consequence of and a remedy for sin, also deals with government in the same fashion. The just God, he says, has so ordered life, in making some men slaves and some men lords, that the tendency to evil may be restrained by the fear of punishment; and to the same end princes and kings are appointed, that by fear of them and by their laws the people may be restrained from evil and encouraged to good.

It is unnecessary to multiply quotations from the Fathers to show that they all accept the theory of St Paul, that Government is a divine institution. We shall have to recur to the matter again when we discuss their conception of the character of the authority of Government, the question of its absolute or limited nature, and the propriety or impropriety of resistance to it. So far we are only concerned to make it clear how it is that we find the Fathers at the same time maintaining that Government is not natural and primitive, and yet that it is a divine institution. We have tried to make it clear that this apparently self-contradictory position is really a perfectly intelligible, and, on its own terms, rational one. For man is not now in the condition in which God made him: once he was innocent and harmless, now his nature is depraved and corrupted, and conditions which would have been wholly contrary to his primitive nature are now necessary and useful.

CHAPTER XII
THE THEORY OF PROPERTY

We must turn to the theory of property in the Christian writers. We have already seen that the New Testament does not seem to contain any definite theory of property: it may contain traces of a theory that the perfect man has little to do with wealth, but the general tendency of the New Testament writers seems to be to assume the existence of the institution, while they enjoin upon Christian men the duty of using their property especially for the benefit of all the members of the Christian societies.

The earliest Fathers carry on these conceptions very much as we find them in the New Testament: on the one hand they do not seem to have any dogmatic theory of the community of Christian men's goods; on the other hand they continue to insist that the Christian man is bound to use his property to relieve the wants of his fellow-man, and especially of his fellow Christian. The 'Teaching of the Twelve Apostles' and the so-called Epistle of Barnabas reproduce from some common source very emphatic exhortations to liberality in giving, which in one phrase echo the words of the Acts of the Apostles: "Thou shalt not turn away from him that hath need, but shalt share all things with thy brother, and shalt not say that they are thine own: for if ye are sharers in that which is immortal, how much more in those things which are mortal." The phrase, "Thou shalt not say that they are thine own", is very near the phrase of the Acts, "No one of them said that ought of the things which he possessed was his own".

The same conception is represented by Justin Martyr in the second century. In his first 'Apology' he contrasts the covetousness and greed of the ordinary man with the liberality of the Christian. He says of the Christians, that they brought what they possessed into a common stock and shared with everyone in need. Justin Martyr again suggests the phrase of the Acts. In the third century St Cyprian quotes the narrative of the Acts, and commenting on it says, that such conduct is that of the true sons of God, the imitators of God. God's gifts are given to all mankind, the day enlightens all, the sun shines upon all, the rain falls and the wind blows upon all, to all men comes sleep, the splendour of the stars and the moon are common to all. Man is truly an imitator of God when he follows the equal beneficence of God by imparting to all the brotherhood the good things which he possesses. Cyprian does not say that the Christian man must share his goods with all the brethren, but clearly he looks on this as the most perfect way. This gradually became the common view of many Christian writers.

But before considering the later Fathers we must observe that other early Christian writers present us with a somewhat different view of the subject. One of the short treatises of Clement of Alexandria discusses the Gospel story of the rich young ruler, and it is both interesting and important to observe that Clement treats our Lord's injunction to the young man to go and sell all that he had and to give to the poor as being a metaphorical saying, and as really referring to the passions of the soul. He maintains that there is no advantage in poverty unless it is incurred for some special object. Destitution is distracting and harassing, and it is much better to have such a competence as will suffice for oneself and enable a man to help those who are in need. Riches, therefore, are things which may, if rightly used, be serviceable to the possessor and to others, and are not to be thrown away. Clement's interpretation of our Lord's words is not, so far as we know, a common one, but it is of considerable importance.

The same general conception is very strongly held by Lactantius. He discusses Plato's theory of community of property, and very emphatically repudiates it as impossible and unjust, and urges that justice is not a matter of external condition but of the soul. It is not property that must be

abolished, but pride and insolence. If the rich would lay these aside it would make no difference though one man were rich and another poor. In another passage he discusses the poetical conception of the Golden or Saturnian Age. He looks upon this as no poetical fiction, but a condition of things which really existed and out of which men passed by reason of sin and the loss of the true religion. Lactantius, that is, formally accepts that theory of the state of nature which we have already considered; but it is very noticeable that he refuses to accept the poetical conception of a complete community of goods in that age. He maintains that we must take this as a poetical metaphor. He cannot think that even in that age there was no such thing as private property, but only that men were so generous and kindly that no one was in want.

What are we to conclude as to the position of the earlier Fathers with respect to the institution of property? We must first observe that their whole thought is dominated by the sense of the claims of the brotherhood. Whatever may be the further significance of the narrative of the Acts and the phrases of 'Barnabas' and the 'Teaching of the Twelve Apostles', this at least is clear, that the Christian societies recognised that every member had a claim upon the others for that which was necessary for his maintenance. Behind this, however, there lies a question more difficult to answer, Did the first Christian teachers and societies, or any of them, think that property was in itself unlawful or improper for the true Christian? It should, perhaps, be observed here that the very important phrases of 'Barnabas' and the 'Teaching' are drawn from a common source, to which the name of 'Two Ways' has been given, and that it has been argued that this work was a Jewish manual of moral discipline. The phrases in the Acts have a very similar ring. It may be suggested, then, that the notion that the perfect life was that of a society in which all shared equally with their brethren all that they had, was one which belonged to some form of the later Judaism, and so passed into the Church.

It is just possible that there may have existed within the Church a tendency to think that among Christian men there should be no private property. But what we know of the historical conditions of the early Christian societies compels us also to recognise that this conception was not carried out into practice, so far as we know, in any community, not even in the community at Jerusalem. It would, however, seem as though there may very early have grown up in the Christian societies a theory that, while it was perfectly lawful for the Christian man to hold property, to give all that one had to the common funds of the society was the more perfect way. This is not, indeed, a view which was universally held. Clement of Alexandria and Lactantius, as we have seen, exhibit no special inclination towards it, but it seems to underlie the phrases of St Cyprian, it was developed by two of the most influential of Western Christian writers, St Jerome and St Augustine, commenting on our Lord's words to the rich young ruler, and it formed part of that theory of the ascetic life as the more perfect way which dominates so much of Western thought in the Middle Ages.

When we turn to the later Fathers we find that their theory of property is closely connected with the same general philosophical system as that which governs the rest of their political theories. In the first place, it seems quite clear that they recognise that private property is in no way evil if it is rightly used. St Augustine maintains this dogmatically against the Manichaeans. Who does not understand, he says, that it is not blameworthy to have such things (*i.e.*, property of various kinds), but only to love them, to put one's hope in them, to prefer them to, or even to compare them with truth, justice, wisdom, faith, a good conscience, with love to God and our neighbours. The same view could be illustrated from the other Christian writers, as being the normal judgment of the Christian Church. Whatever doubt may be entertained as to some primitive Christians, there is no doubt about the formal judgment of the developed society. But when we have recognised this fact, we must also observe that this merely means that the Church accepted the institution of property as being in accordance with the actual conditions of life, just as it accepted the institution of slavery or coercive government: it does not mean that the Church considered private property to belong to the natural or

primitive condition of human life. It is true that the Fathers deal with this question in the most incidental and partial manner, and that it is therefore difficult to express ourselves very dogmatically about the theory which lies behind their references, but we think that the best interpretation of these is that they thought that in the primitive state all things were common,—that it is not the law of God but that of the State which directly gives this thing to one man and that to another.

This view is more clearly expressed by St Ambrose than by any other writer. We may first consider a very interesting and well-known passage in his treatise 'De Officiis'. St Ambrose roundly says that private property is not by nature; nature only produced a common right, use and habit produced private right; nature gave all things to all men. We must not understand this as meaning that property is unlawful, but only that it is not a natural or primitive institution. St Ambrose here, as throughout his treatise, is largely dependent on Cicero's treatise of the same name, and we may be fairly certain that Cicero's words, "Sunt autem privata nulla natura", are the text which he is amplifying. It is not very easy to give any very definite meaning to Cicero's phrase: that of St Ambrose is a good deal easier, for, as we have seen, by his time the theory of the state of nature as contrasted with the state of conventional institutions had become a commonplace of Christian political theory.

Another passage from St Ambrose will perhaps make the matter clearer. God meant, he says, the world to be the common possession of all men, and to produce its fruits for all; it was avarice which produced the rights of property. It is only just, therefore, that a man should support the poor with some share of that which was meant for all mankind. St Ambrose here comes very near indeed to the form of Seneca's statement of the origin of property, namely, that it arose from avarice. and we feel that we can hardly be wrong in looking upon the foundation of St Ambrose's theory of property as being the same as that of Seneca. With St Ambrose's view may be very well compared that of Ambrosiaster. In one passage he treats charity as St Ambrose does, as being an act of justice,—for God, he says, gives all things in common to all men.

St Zeno of Verona, a writer of the latter part of the fourth century, might perhaps be taken to illustrate an almost dogmatic theory of the propriety of some system of communism : he is, indeed, speaking mainly of a community of goods among Christians, founding this upon the passage in the Acts which we have already examined, but it must be observed that the latter words of the passage extend his conception to mankind at large. We think, however, that St Zeno is speaking primarily in a practical sense—that he wishes to put in the strongest possible way the obligation of charity and active benevolence: he certainly puts the matter in a very strong way, for he continues, after the passage we have quoted in the note, to say that the obligation to give to those who need is not to be limited even by the duty of providing for a man's own family.

With these views we must compare those of St Gregory the Great. In one passage he deals with private property in much the same spirit as St Ambrose and Ambrosiaster. He treats the earth and its products as the gifts of God to all men, and therefore regards almsgiving as an act of justice, not of charity. It is evident that he does not regard private property itself as wrong, but, on the other hand, he does not seem to regard it as an absolute right. On the contrary, if a man uses it only for himself, he regards his action as unjust.

We should suggest that in this conception we have the beginnings of a distinction which became very important in the Middle Ages, and is very carefully drawn out by St Thomas Aquinas—the distinction between property as a right of distribution, and property as a right of personal use. St Thomas holds that private property is not an institution of natural but of positive law, and that the right of property only extends to the acquisition and distribution of things: so far as their use is concerned, men are bound to treat them as things pertaining to all. A man has the right to use what he needs, and St Thomas does not take this in any narrow sense, but beyond this a man only holds his property for the common use. We should suggest that the passages of the Fathers which we have just

examined show us the germs out of which this theory grew. Property is not primitive but conventional; it is not therefore illegitimate, but, on the other hand, it is not an unrestricted right: the circumstances of the world and of human nature may make it necessary that men should take things to themselves from the common stock, but they do this subject to the responsibility of using all that they do not themselves need, for the common benefit.

St Augustine does not deal directly with the question of the primitive conditions with regard to property. But he furnishes us with a number of very important observations on the immediate source of this right. His theory of property is for the most part developed somewhat incidentally in his defence of the confiscation of the churches and other possessions of the Donatists in Africa by the Imperial Government. It would seem, from his allusions to their complaints, that they protested that these confiscations were unjust, and perhaps even that they were outside the powers of the Government. His reply to their contentions is founded upon the following arguments. Property, he says, may be considered as an institution of the divine law or of the human law. By the divine law property is either all in the hands of God, for "the earth is the Lord's and the fullness thereof", or else all things belong to the righteous, and the Donatists are not righteous. By human law property belongs to this or that individual, but what human law has given human law can take away. St Augustine also maintains that the right of property is limited by the use to which it is put : the man who does not use his property rightly has no real claim to it.

It is clear from these statements that St Augustine regards property as normally an institution of human and positive law. His distinction between the *jus divinum* and the *jus humanum* is not indeed the same as that between the *jus naturale* and the *jus civile*, but at least it is parallel to it, and it suggests to us very strongly that St Augustine recognises no proper right in things except that which is given by the State. This view is by no means on the same lines as that of the lawyers, who regarded some form of private property as being by natural law: he does not indeed contradict the legal theory of "occupation" and the right which can be acquired in the *res nullius* by him who "occupies" it, but his phrases suggest that this theory is not at all in his mind. Incidentally it is interesting to observe in the passage first quoted that the Donatists are represented as urging an argument very analogous to that on which Locke founds his theory of property, namely, that they had acquired their property by labour. St Augustine brushes this aside unsympathetically by an appeal to the Scripture, which says that the just shall devour the labour of the wicked.

We think that when we consider St Augustine's treatment of property alongside of that especially of St Ambrose, we may feel fairly confident that they represent a tradition which differs materially from that of the jurists, a tradition probably derived from the same sources as the view of Seneca—that is, that they would, with Seneca, have classed the institution of property as one of those which belong to the conventions of organised society, and not to the primitive conditions of the human race.

At the same time, it must be observed that St Augustine's views on the limitation of the rights of property, by the use to which it is put, finds a parallel in a phrase of Gaius, treating of the limitation of the rights of masters over their slaves : "Male enim nostro jure uti non debemus",—a phrase repeated in slightly different terms by the compilers of Justinian's Institutes: " Expedit enim reipublicae, ne quis re sua male utatur". St Augustine's phrases, however, are much wider in scope, and indicate a much more developed theory than those of the lawyers. We think that this is to be connected with the theory of St Ambrose and other Fathers that the things of the world do not cease to be held for the common good, because it is now lawful for particular persons to hold them as their own private property, and that this conception finally takes a definite form in the distinction between the right of property as an authority in distribution and the right of property as one of unlimited use.

We are now in a position to examine the meaning and significance of the references to the theory of property in St Isidore of Seville. We have already discussed his definition of the *jus*

naturale; we must now recall the words of this: "Jus naturale est commune omnium nationum, et quod ubique instinctu naturae, non constitutione aliqua habetur; ut viri et feminae conjunctio, liberorum susceptio et educatio, communis omnium possessio, et omnium una libertas, adquisitio eorum quae caelo terra marique capiuntur. Item depositae rei vel commendatae pecuniae restitutio, violentiae per vim repulsio. Nam hoc aut si quid huic simile est, numquam injustum, sed naturale aequumque habetur". What does St Isidore mean by "communis omnium possessio? " In the Middle Ages he was no doubt taken as meaning the common possession of all things; and if that interpretation is correct, St Isidore sets forth in technical language the theory that by natural law all things were common, and there was no private property. But it is not quite certain whether this is the correct interpretation of the phrase. The words can be taken to mean simply that by the law of nature there is a form of property common to all men. This would not necessarily exclude forms of property belonging to groups of men or to individuals.

It is not very easy to determine which interpretation is the correct one. The nearest parallels to St Isidore's phrase are to be found in the Digest and the Institutes; in the former we have Marcianus's phrase: "Quaedam naturali jure communia sunt omnium, quaedam universitatis, quaedam nullius, pleraque singulorum." Here the phrase itself makes it clear that the genitive *omnium* is possessive; certain things are common to all. In the Institutes we have Marcianus's phrase repeated with a few variations, and throughout the discussion of property we find the genitive case used in the same sense—e.g., "Communia sunt omnium haec"; "Singulorum autem hominum multis modis res hunt." As far, then, as the grammatical construction is concerned, the precedents in legal phraseology seem to point to the genitive case in St Isidore's phrase as being possessive. It must be observed, however, that the legal phrases are not absolutely parallel: *communis* is not connected with *possessio*. But, further, St Isidore goes on to mention certain methods of acquiring property, "Acquisitio eorum quae coelo, terra, marique, capiuntur," and certain moral rules which only exist in a condition of things where private property exists, "Depositae rei vel commendatae pecuniae restitutio", and all, it must be noticed, as belonging to the *jus naturale*. It is difficult to understand this, if St Isidore means to say that by natural law all property is common to all: at the most, it may be suggested that St Isidore is inconsistent with himself, and that it is idle to expect a thorough and completely thoughtout explanation of the subject from him. It must also be observed that St Isidore in his definition of the *jus gentium*, does not indicate that private property belongs to it, as he does, for instance, with regard to slavery, and that there is no reference to property in his definition of the *jus civile.*

It seems to us that for the present we must take it as uncertain whether St Isidore follows the tradition of the Fathers and the Stoics in thinking that private property is not an institution of the natural law, or the general tradition of the lawyers that even by the natural law some things belonged to individuals. The general tendency of the Fathers is, we think, clear, and in the history of political theory this is the important point, for we are thus able to discover the origin of the dogmatic and developed mediaeval theory.

We can now look back over certain general characteristics of patristic political theory, and we think it has become plain that this turns upon the distinction between the primitive or natural state, with its natural law and institutions, and the actual state, with its conventional institutions adapted to the new characteristics and circumstances of human nature and life.

With regard to the theory of human equality and the institution of slavery, the theory of coercive government, and the theory of property, we have seen that the patristic view turns upon this distinction between the natural and primitive, and the conventional and actual. Neither slavery, nor government, nor property are institutions of the natural law, and they did not exist in the natural state. There was a time when men were innocent—when, therefore, these institutions did not exist, when they were not needed. Out of those conditions men passed through sin, their nature was

changed and corrupted, avarice, hatred, and the lust of domination possessed them. New institutions, founded in some measure upon these vices, were needed to correct these same vices. Slavery and government and private property are institutions arising from the vicious tendencies of human nature, as it is, but they are also the instruments by which these vices are corrected. The state and condition of nature is by the Fathers identified with the state and condition of unfallen man.

It is evident, we think, that under some difference of phraseology the Fathers are really carrying on the same theory as that of the Stoics as represented by Seneca. The relation of this to the political theory of the lawyers is more complex, but it is clear that they are related, and that, in some measure at least, it is justifiable to explain the two systems by comparing them with each other. We think that the fact that the entire patristic theory turns upon the distinction between the natural and the conventional state, expressed indeed under the terms of the theological conception of the Fall, but obviously reflecting, not any exclusively Christian conception, but rather some widespread assumption of popular philosophy, encourages us in thinking that the same type of thought lies behind the obscurer references of the lawyers.

It appears to us that it is correct to say that in considering the meaning of justice in human life these thinkers found themselves compelled to recognise that there was an apparent inconsistency between some of the great institutions of society and that natural or essential equality of human nature which they had learned from their experience of the universal empires. Slavery, therefore, which Aristotle could explain by a theory which was at least in- many respects reasonable, to them was a real difficulty, and what they thought of slavery would naturally extend itself to government. On the other hand, they recognised instinctively, if we may use such a phrase, that human life, as it actually is, needs discipline, needs an order enforced by coercion. And thus they came to make a distinction between an ideal, which they think of as also the primitive condition of man, and the actual. Ideally, man, following his truest nature, obeying the laws of reason and justice, which he always, in some measure, recognises, would have needed no such coercive discipline. But, being what he is, a creature whose true instincts and nature are constantly overpowered by his lower nature, it is only by means of a hard discipline that he can be kept from an anarchy and disorder in which all men would be reduced to an equal level of misery and degradation. Their theory is properly a justification of coercive government, but, naturally enough, the institution of slavery being actually in existence, and appearing, as it must naturally have done to them, to be essential to the whole fabric of civilised life, they interpreted it as another form of discipline. Private property also, with its enormous inequalities, they could not accept as a primitive and natural institution. In a primitive or natural state the rights of property could have been nothing more than the right to use that which a man required. But again, in face of the actual condition of human nature, in view of the avaricious and covetous tendencies of human nature as it actually is, they found that a formal regulation of the exercise of the right to use was necessary. Private property is really another disciplinary institution intended to check and counteract the vicious dispositions of men.

The thinkers of this philosophical tendency, then, find a just meaning in the great institutions of human society, human nature being what it actually is, but they conceive of these institutions as being dominated by the end which they serve. They are intended to correct the vicious dispositions of men. They are only justified as far as they actually do this. The equality of human nature still dominates all just order. All institutions must be reconciled with this in some sense. Government is intended to correct the evil tendencies of man, but should respect his true qualities. Slavery is justifiable as a necessary discipline of human life, but the man continues in the slave. The institution of private property is necessary to reduce the contradictory claims of men to some order, but the good things of the world are still intended for the use of all. The theory of Natural Law and the Natural State is then partly a theory of the origin of human life and institutions, but it is also a theory of the principles of justice, by which all the actual institutions of life are to be tested and corrected.

CHAPTER XIII.
THE SACRED AUTHORITY OF THE RULER.

We have now to consider the theory of the nature and immediate source of authority in the Christian writers. We have seen that in their view the institution of Government is not primitive, but is made necessary by the vices of human nature. But Government is a divine institution, a divine remedy for man's sin, and the ruler is the representative of God, and must be obeyed in the name of God. It will be easily understood that the conception was capable of a development which should make the king or ruler the absolute and irresponsible representative of God, who derives his authority directly from God, and is accountable to God alone for his actions. This conception, which in later times became the formal theory of the Divine Right of the monarch, was, as we think, first drawn out and stated by some of the Fathers, notably by St Gregory the Great. It must at the same time be observed that such a conclusion was not necessary, nor was it at first actually developed. The actual tendencies of the patristic theories are very complex; we can very clearly see how the theory of the Divine Bight arose out of the general theory of the sacred character of the civil order, but there are many other tendencies in the political theory of the Fathers, and some of their phrases and theories became in later times of the greatest importance in counteracting the arguments of the absolutist thinkers.

We begin by examining the development in the Christian writers of the theory of the authority of the civil ruler, as the representative of God. We have already mentioned some of the strong phrases used by the early Christian writers to express their sense of the duty of obedience to the civil ruler. We referred to the words of Theophilus of Antioch, in which, while repudiating the worship of the king, he acknowledges that Government is in some sense committed to him by God, and that Christian men will therefore honour and obey him. We should observe that Irenaeus, with whose discussion of the origin and object of Government we dealt fully, makes a statement with regard to civil rulers which is of great importance in relation to certain developments of the later theory. He has pointed out that God has given men rulers as a remedy for man's sin and vice, but he adds that often God gives men evil rulers to punish their wickedness. The ruler is not only the minister of God's remedy for sin, but the instrument of His punishments. We may doubt whether Irenaeus had in his mind the conclusions which might be and ultimately were connected with this view, but it is at least important to observe its appearance thus early in Christian theory. St Optatus of Milevis, in his treatise on the Donatist schism in North Africa, expresses the conception, that the ruler is the representative of God, in a still more explicit fashion. It appears from a passage in this treatise that when the Imperial authority interfered on behalf of the Catholic party, the leader of the Donatists indignantly protested that the Emperor had no concern with Church affairs. St Optatus replies by urging St Paul's commands to Christian men, that they should offer up prayers for kings and those in authority, and asserts that the Empire is not in the Church, but the Church in the Empire, and that there is no one over the Emperor but God only, who made him Emperor.

This theory of the ruler as the representative of God is most clearly expressed in a phrase used for the first time, as far as we have been able to see, by Ambrosiaster, if we may assume the correctness of the identification of the author of the 'Quaestiones Veteris et Novi Testamenti', once attributed to St Augustine, with the author of the commentaries on St Paul's Epistles, once attributed to St Ambrose. In one passage he says that the king is reverenced on earth as the "Vicar of God", and in another passage he draws out his conception in a very curious distinction. The king has "the image of God as the Bishop has that of Christ". We shall find this distinction again in Cathulfus in the ninth century: it is very interesting and curious, but we do not pretend to be able to interpret it. The title of

"Vicar of God" is important, as summing up the conception that the authority of the ruler is derived from God Himself. In the Middle Ages it might mean much more than this, but it would be improper to read later conceptions into a writer of the fourth century. In the last passage he also discusses the question of the conduct of David towards Saul, and there is considerable significance in his discussion. He evidently thinks that the divine character of the office of kingship cannot be lost owing to any misconduct of the ruler. The sanctity of the office gives sanctity to any ruler, even though an idolater. It is clear that the writer is much influenced by the Jewish conception of kingship, but of this we shall have more to say presently.

We must, however, observe that in another of these "Questions" the author seems to take up a somewhat different position. He evidently believes that there may be a wholly evil form of authority which is not from God, but it is extremely difficult to say what he understands this to be, and what is the test of its character. It does not appear to consist in its unjust character or actions, for the writer says expressly that a man sitting on the throne or chair of God may oppress the innocent; and that we must then say that the judgment, but not the throne, is unjust. The phrases are very obscure, but may tend in some measure to qualify the judgment which we might have founded on the preceding passages.

We have then a theory that the ruler is the representative of God, and that whatever his conduct may be, he does not cease in some sense to have this character. St Augustine expresses the same conception with a certain added emphasis. He mentions Nero as an example of the worst type of ruler, but adds that even such rulers receive their power through the providence of God, when he judges that any nation may require such governors. St Isidore of Seville expresses the same view, and even thinks it necessary to explain away a passage of Scripture which, as it appeared to him, might be interpreted as contradicting the theory. The prophet Hosea, as he quotes him, had said of certain kings that they reigned, but not by the appointment of God. St Isidore explains that this means that God had given them to their people in His anger. He quotes the same prophet as saying, " I shall give them a king in my wrath," and concludes that a wicked ruler is appointed by God just as much as a good ruler. The character of the ruler is adapted to the character of the people: if they are good, God will give them a good ruler; if they are evil, He will set an evil ruler over them. How far St Augustine and St Isidore foresaw the conclusions that might be founded upon such statements it is difficult to say. St Augustine does not, so far as we have seen, discuss the question in detail; and St Isidore, as we shall see presently, evidently held, along with this view, others which have a somewhat different tendency.

The conclusions, however, which are not drawn out by St Augustine and St Isidore are drawn out and stated with the greatest emphasis by St Gregory the Great. We may notice first that he treats the relation of the evil ruler to God in the same manner as St Augustine and St Isidore, and argues like them that a good ruler is God's reward to a good people, an evil ruler God's punishment on an evil people. Whether, therefore, the ruler is good or evil, he must be reverenced as one who derives his authority from God. But Gregory the Great goes much further than this. Commenting upon the conduct of David towards Saul, he points out how David is said to have refused to lay his hand on the Lord's anointed, and even to have repented that he cut off the hem of his garment. He takes Saul to stand for an evil ruler, and David for a good subject, and he interprets David's attitude as signifying that good subjects will not even criticise rashly or violently the conduct even of bad rulers : for to resist or offend against a ruler is to offend against God, who has set him over men. And lest we should take this to be an isolated phrase, it is well to observe that he recurs to the matter in his treatise on the Book of Job, and restates the same view with an equal, perhaps even with slightly greater, emphasis.

There can be no doubt that we have here the doctrine of the sanctity and Divine authority of the ruler in a very strong form: even the seventeenth-century apologists of the Divine Right hardly go

further in preaching the necessity of obedience and the wickedness of resistance. It is from the doctrine of St Gregory the Great that the religious theory of the absolute and irresponsible authority of the ruler continually drew its strongest arguments, both in the Middle Ages and later. Other elements, no doubt, both of theory and of actual circumstance, go to produce the later theory, but the authority of St Gregory the Great was a continual protection to those who maintained it.

It may be asked whether the conception of St Gregory the Great was an entirely abstract one, or whether it actually governed his conduct We think that its influence can be traced, in some degree at least, in bis actual relations with the Emperors. Knowing as we do the great force and capacity of Gregory the Great as an administrator, and the energy with which he defended and pushed forward what he considered to be the rights and authority of the Roman See, we cannot but be in some measure astonished at the extremely deferential, sometimes almost servile, tone which we find, at least occasionally, in his letters to the Emperors. We may take as an example a letter addressed to Anatolius, the representative of the Roman Church at Constantinople, with regard to the wish of the Emperor that John the Bishop of *Prima Justiniana* should be deposed on account of his bad health. Gregory protests against such action as being wholly contrary to the canons, and unjust, and says therefore that as far as he is concerned he can take no part in such action. But, he concludes, it is in the power of the Emperor to do what he pleases,—he must act according to his judgment: what the Emperor does, if it is canonical, Gregory will follow; if not canonical, he will, so far as he can do so without sin, endure. The tone of the letter is not undignified, but it is a little strange to find Gregory even appearing to acquiesce in an open breach of canonical rule by the Emperor, especially when we remember that there was quite another tradition in the Western Church than this, as we shall presently see.

Another example will be found in a letter written to the Emperor Maurice with regard to a law issued by him, forbidding the reception in monasteries of soldiers and other persons who were responsible to discharge various public duties. Gregory is much distressed about the law, and begs Maurice to consider what emperor ever issued such a regulation. (It appears from Ep. 64 in the same book that Gregory believed that this had been done by Julian.) He urges that for some men salvation is only possible if they leave the world and give themselves wholly to religion, and he warns Maurice that Christ will in the last day demand from him an account of his conduct in having withdrawn men from the service of Christ. And yet he concludes the letter by saying that, in obedience to the Emperor's commands, he has caused the law to be sent on to various regions. He has obeyed the Emperor, and has delivered his soul by protesting. It is certainly strange to find Gregory, who feels so strongly the impiety of such a law, still acting as an agent for its promulgation, instead of refusing to do this in the name of the Christian law and his own ecclesiastical position. It is true that we must balance the tone of these letters with that of a later one addressed to Boniface, the representative of the Roman see at Constantinople, with reference to a question of the jurisdiction of the Bishop of Corcyra. It appears from this that the Emperor Maurice had given some decision upon the subject, and Gregory speaks of this as wholly void, as being "contra leges et sacras canones". The Bishop of Nicopolis, the Metropolitan of Corcyra, had given a different judgment, to which Gregory says he had given his approbation. But Gregory adds that, as the Emperor Maurice had given a decision, he had abstained from publishing his own decision lest he should appear to act contrary to the imperial command and in contempt of it. He therefore instructs Boniface to do what he can to persuade the Emperor to issue an order confirming the judgment of Gregory. Gregory's tone is very emphatic about the illegality and invalidity of the action of Maurice, but it must be observed that he carefully refrains from publicly denouncing it, and setting his own judgment, or that of the Metropolitan, against it; and hopes to gain his point by persuading the Emperor to agree with his judgment and to issue an order expressing this.

In Gregory the Great, then, we find this theory of the sacred character of government so developed as to make the ruler in all his actions the representative of God, not merely the representative of God as embodying the sacred ends for which the government of society exists. The conception is, so far as we have seen, almost peculiar to some Christian writers. We have not observed anything which is really parallel to the conception in the legal writers, and even in Seneca and Pliny we have only indications of an attitude of mind which might be capable of development in this direction. The theory is a somewhat irregular and illogical development of the Christian conception of the divine character of the civil order.

It will naturally be asked, What were the circumstances under which this theory grew up. We think that we can trace the development of this conception to three causes: first, the need of correcting that anarchical tendency in the primitive Church to which we have already referred; secondly, the relation between the Christian Church and the Emperor after the conversion of Constantine; and, thirdly, the influence of the Old Testament conception of the position of the King of Israel.

We think that the necessity for counteracting the anarchical tendencies in the primitive Christian societies was probably a very real cause of the tendency to exaggerate or misstate the divine authority of the ruler. We think that the great emphasis laid upon the sacred character of the civil order in the New Testament—an emphasis which is maintained by writers like Clement of Rome and Irenaeus—is a very real indication of a danger which menaced the Church, and led naturally to just the same kind of exaggeration as did the parallel phenomena in the sixteenth century. If we add to this the imperious need which lay on the Christian societies to disarm the hostility of the Empire, we shall, it seems to us, find one reasonable explanation of the tendency to overstate the sanctity of authority in the earliest ages of the Church.

With the conversion of the Empire to Christianity no doubt these conditions were greatly altered. But while, as we shall see presently, many of the Christian writers from the fourth to the seventh centuries illustrate conceptions of quite another kind from those which we have just discussed, yet in this period, too, there were continually in operation circumstances which tended to make the attitude of the Church towards the Emperors one of a somewhat servile deference. We may find an extremely good illustration of the influence of these circumstances in that passage from St Optatus which we have already considered. In the case of the Donatist dispute the Empire at last exercised its authority to put down what it considered a schismatical faction. And it is easy to see from the tone of St Optatus that this intervention was unhappily as welcome to many Churchmen as it was distasteful to the Donatists. Donatus urged that the Emperor had nothing to do with Church affairs; St Optatus bids him remember that the Church is within the Empire, and that the Emperor has no superior save God. The truth is, that with the conversion of Constantine the Emperor became the patron and protector of the Church, and it would be easy enough to trace in many cases the effect of this protectorate on the course of Church disputes. Churchmen would resist the Emperor when he happened to be opposed to their view; but when he agreed with them, they were only too apt to fall into the habit of regarding his action against their enemies as that of a truly sacred authority. The emancipation of the political theory of the Church from such conceptions as those of Gregory the Great must be traced in large measure to the actual contests between the Church and the Empire.

It is, however, possible that these influences would not alone have been sufficient to produce so rigorous a theory as that of Gregory the Great, had they not been reinforced and confirmed by traditions which the Christian Church inherited from the religion of Israel. We can hardly doubt that, directly, the theories of St Augustine and St Isidore on the Divine appointment of even wicked rulers, and St Gregory's theory of the duty of submission even to such rulers, are drawn from the Old Testament conception of the position of the king of Israel. According to the tradition of the first Book of Samuel, the monarchy was indeed instituted against the advice of the prophet, who is taken

as speaking in the name of God; but the narrative of the same book and of the other historical books makes it very plain that the king, when once appointed, was looked upon as the anointed of the Lord,—that his person and his authority were sacred. There may, indeed, be traces in the Old Testament of other views than this, but this is the normal view of the monarchy in Israel, a view which possessed no doubt a special force with regard to the monarchy of the house of David. Such conceptions with regard to the sanctity of monarchy were probably in no way peculiar to Israel, but belonged to many oriental nations; but it was largely through the Christian Fathers that they came into the West. The passages to which we have referred will make it sufficiently plain that it is in relation to the Old Testament that these views are developed by the Fathers. We may at least reasonably say that the tradition of Israel provided the centre round which such opinions took definite shape and form.

In St Gregory the Great, then, we find in definite and systematic form a theory of the source of authority in Government which is very sharply contrasted with that which we have seen to be characteristic of the legal writers. They trace the source of all authority in the State to its fountainhead in the people. St Gregory traces the authority of rulers directly to God. The history of mediaeval political theory is very largely the history of the struggle between these two views, in which, however, for many centuries, the combatants change places.

For, at least from the eleventh to the fourteenth century, it is the Imperialist party which defends the theory of the Divine authority of the ruler, it is the ecclesiastical which maintains that his authority is derived from the people. We have to consider how it was that this change took place, and to do this we shall have to examine in detail the history of the political ideas especially of the ninth century.

But before we proceed to do this we have still to examine some other tendencies of thought in the Christian Fathers. We shall see that besides that tradition which we have so far been examining, there are others which, as we think, greatly influenced the political theory of the ninth century.

CHAPTER XIV.
AUTHORITY AND JUSTICE.

So far we have endeavoured to disentangle the history and significance of a political conception, which, as it appears to us, was first, in Western thought, developed by the Christian Fathers,—the conception of the Divine authority of the ruler, the doctrine that the ruler is absolute relatively to his subjects, responsible only to God. It would, however, be a great mistake to suppose that this theory represents the whole contribution of the Christian Fathers to this portion of political theory. There are many other elements in their conception of the nature of authority in the State; one or two of the great Fathers, indeed, seem to tend in quite another direction, and with regard to them all it must be recognised that the elements of their theory on this matter are highly complex, perhaps a little confused. We must consider some general aspects of their thought, arranging them as well as we can.

While the Christian Fathers as a rule think that the institution of coercive Government is not primitive or natural, in that sense, they look upon the institution as being good, inasmuch as it is a remedy for the confusions and disorder which sin has brought into the world. It is true, as we have seen, that they sometimes think of it as being a punishment as well as a remedy for sin; but, normally, they think of the State as an instrument for securing and preserving justice, and they regard it as the chief duty of the king as ruler to benefit his people by maintaining justice. We have already observed that St Paul's assertion of the Divine character of the authority of the State rests upon the assumption that the State rewards the good and punishes the evil,—that is, that it maintains justice.

In the second century we find Irenaeus in very plain terms threatening unjust rulers with the judgment of God, assuring them that God will certainly visit their wickedness upon them; and if we turn to the Alexandrian Fathers, we find Clement defining a king as one who rules according to law, and who is willingly obeyed by his subjects,—that is, if we may so interpret Clement's meaning, a king is one who follows not merely his own caprice or desire, but governs according to those rules of public action which are designed for the attainment and preservation of justice, and whom his subjects willingly obey as representing their own just desires.

When we pass to St Ambrose in the latter part of the fourth century, we find all these conceptions drawn out and developed very clearly and fully. To St Ambrose justice and beneficence form the "ratio" of the State: justice is that which builds up the State, while injustice destroys it. This conception is very significant, especially when we compare it, as we shall have to do presently, with St Augustine's attempt to define the State; and it finds its proper development in the discussion of the relation of the unjust person who discharges an office of Government, to the sacred character of the institution of Government itself. St Ambrose seems to mean that he only is properly the minister of God who uses his authority well: the passage is, indeed, somewhat obscure, but that seems to be his meaning.

But this is not all that is worth observing in St Ambrose's theory of the institution of Government. It is interesting to notice that he lays some stress upon the attitude of the ruler towards liberty. In a letter to Theodosius, on the subject of certain demands which had been made upon the Church, and against which St Ambrose protests, he urges the importance of the permission of freedom of speech and remonstrance; and while, no doubt, he is thinking primarily of the freedom of ecclesiastics in relation to the civil power, he shows some sense of the significance of the conception of liberty in the political order: good rulers, he says, love liberty, while bad rulers love slavery. It would of course be very foolish to lay too much stress on such phrases; but they are at least worth noting, especially as similar phrases are used both by Cassiodorus and by Gregory the Great. Cassiodorus, writing in the name of Athalaric to a certain Ambrose who had just been appointed to

the quaestorship, recalls a saying of Trajan, in which he had expressed his wish that his counsellors should freely advise him, rebuking him if necessary. Gregory the Great, in a letter not perhaps very creditable to him, in which he expressed to the Emperor Phocas his joy that he had taken the place of Maurice, hails his accession as promising to restore liberty to the people in his dominions, adding that this is the great difference between the emperors of the Commonwealth and the kings of the nations, that the former are the lords of free men, the latter of slaves.

In later times St Ambrose was frequently quoted as maintaining that the king or ruler is bound by the laws; and, indeed, there is more than one passage which would seem to have this meaning. In one of his letters he seems to argue that the emperor who makes the laws is also bound to obey them; and in one of his treatises he seems to express an opinion of the same kind. It must, however, be observed that in other places he uses the ordinary legal phrase, that the emperor is *legibus solutus*. It is worth observing that St Augustine also deals with the relation of the ruler to the law in terms analogous to those of St Ambrose, and, in later times, is much quoted with St Ambrose. St Isidore of Seville also urges very strongly upon the prince the propriety of his respecting his own laws. Subjects will learn obedience when they see their rulers observing the laws.

With some parts of St Augustine's theory of the State we have already dealt; but St Augustine's theory has a certain completeness which we do not find in that of the other Fathers, and, at the risk of a little repetition, we think it well to try to consider briefly his theory of law and the State as a whole. We have already seen that in St Augustine's view men were originally equal, and that the institutions of slavery and government, in which one man is the superior of another, are consequences of man's sin. The subjection of man to man is a punishment and a remedy for sin. It must be remembered, however, that this does not mean that men were by nature solitary. On the contrary, as we have already pointed out, St Augustine definitely maintains that by his own nature man is driven to seek the society of his fellow-men; society is natural and primitive. It is the organised society of the State, with its coercive government and its authority of man over his fellowmen, which is a conventional institution, and it may be regarded partly as punitive, partly as remedial.

It is important, therefore, to consider how St Augustine defines the State and what is its relation to justice. In the second book of the 'De Civitate Dei' he gives an account of the discussion of the nature of the State in Cicero's 'De Republica,' and quotes the definition of Scipio: "Populum autem non omnem coetum multitudinis, sed coetum juris consensu et utilitatis communione sociatum esse determinat," but postpones the discussion of the definition. We find this discussion in the nineteenth book. Here, after restating Cicero's definition, he explains that this means that there can be no true State without justice: when there is not justice there can be no *jus*. But, he objects, how can you speak of justice among men who do not serve God? What sort of justice is this to take men from the service of God and to subject them to demons? There is no justice in men who do such things, and there can therefore be no justice in a society formed of such men. This definition, then, will not work, and he proceeds to search for some other definition which may make it possible to admit that Rome had been a true State. This is given in a later chapter of the same book, and is as follows: "Populus est coetus multitudinis rationalis rerum quas diligit concordi communione sociatus." A State may be more or less corrupt, but so long as it consists of a multitude of rational beings associated together in the harmonious enjoyment of that which they love, St Augustine thinks it may be regarded as a State or Commonwealth. This is practically Cicero's definition, but with the elements of law and justice left out. No more fundamental difference could very well be imagined, although St Augustine seems to take the matter lightly; for Cicero's whole conception of the State turns upon this principle, that it is a means for attaining and preserving justice.

This definition does not seem to represent a casual or isolated judgment of St Augustine, corrected perhaps at other times. He does not, indeed, so far as we have seen, formally set out to

define the nature of the State in any other place, but he alludes to the matter more than once, and always in the same sense. In one letter he says: "What is a State (*civitas*) but a multitude of men, brought together into some bond of agreement?" and again, in another letter, "A State is nothing else but a harmonious multitude of men"; and again, in one of his treatises, he urges that every one must recognise the importance of the order of the State, which coerces even sinners into the bond of some earthly peace. These phrases would not, if they stood alone, be sufficient to make clear St Augustine's conception of the State; but when taken with the definition which we have just considered, they seem to indicate that his omissions from Cicero's definition are not accidental, but more or less deliberate and considered.

It must at the same time be recognised that once at least St Augustine uses a phrase which would seem to point in another direction. In the 'De Civitate,' after discussing the comparative advantages of great dominions, and of living in peace and goodwill with one's neighbours, he draws out a comparison between a band of robbers or pirates and a kingdom, and seems to mean that the only point of distinction is that the latter has the quality of justice. Here at least St Augustine expresses himself in the terms of Cicero's conception of the State. And with this passage we may compare a definition which is obviously closely related to that of Cicero,—nothing can be properly called *jus* which is unjust; and an interesting passage, in which St Augustine describes the characteristics of justice in language taken, in the main, from Cicero's treatise, "De Inventione", but which in part also suggests the definitions of Ulpian. These definitions of justice, however, only show that St Augustine follows the general tradition of the relations of law and justice, and the nature of civil justice.

The first mentioned phrase is, as far as we have seen, isolated, and can hardly be cited in correction of the deliberate and considered omission of the quality of justice in his formal definition of the State. It must, at the same time, be recognised that St Augustine is compelled to abstract the quality of justice from the definition of the State, not by any course of reflection upon the nature of the State, but by his theological conception of justice,—a conception which might be regarded as true upon his premisses, but which can only be understood as related to those premisses.

We cannot express a decided judgment upon the very interesting question whether St Augustine's definition of the State exercised any great influence upon the course of political speculation. We have not found that this part of his work is often cited; indeed, we have not come across any instance of this in the earlier Middle Ages at all. But it is hardly possible to escape the impression that, however indirectly, this attitude of St Augustine towards the conception of justice in society is related to that conception of the unrestricted authority of the ruler, which, as we have already seen, takes shape about this period, and was drawn out so sharply by St Gregory the Great. As we have already seen, the tendency to confuse between the Divine authority of the institution of government, and the Divine authority of the individual ruler, can be traced back to very early Christian writers, but in St Augustine this tendency is very much developed. We have already quoted one passage from his writings which illustrates this point, but it will be useful to cite some other passages in which he draws out in detail his view that the worst, just as much as the best, kings draw their authority from God Himself. We have already seen that it is out of this judgment that there grows the dogmatic conception of Gregory the Great, that the ruler must not under any circumstances be resisted. The references to the subject in St Augustine are too scanty to enable us to form a very complete theory of the matter; but, so far as they go, we should be inclined to suggest that there is some real connection between a theory of the State which deliberately omits the characteristic of justice, and the theory that the ruler, whether just or unjust, must in all cases be looked on as holding God's authority. It would appear, then, that the political theory of St Augustine is materially different in several respects from that of St Ambrose and other Fathers, who represent the ancient tradition that justice is the essential quality, as it is also the end, of the State.

We have still to consider two Christian writers of the fifth and seventh centuries who seem to represent the more normal conception of the subject. The first of these writers, Cassiodorus, does not indeed furnish us with any detailed definition of the nature of the State, and he uses phrases which are sometimes ambiguous, but he does in the main seem to present the same judgment as that of St Ambrose, on the importance of justice in the State. He defines justice very much in the terms of Ulpian, as that habit of mind which renders his own to every man; he recognises that it is this which truly magnifies the ruler, and causes the State to prosper; and he exhorts the ministers of State to just conduct, as that which alone renders them worthy of the name of judge. Law is the true instrument of social progress, the true method of human happiness, and this because law represents justice. He quotes the great passage from St Paul on the authority of the ruler, with an interesting comment, pointing out that it is the ruler whose commands are just who is to be obeyed; and, as we have seen, he describes the character of the good prince as that of one who is always ready to hear those who speak in the name of justice, and who delights in a counsellor who will always speak for the State, even when he has to criticise the ruler to his face. The true king is one who can govern and control himself.

On the other hand, Cassiodorus seems to regard the king not only as the source of law, but as one who normally stands above it: the king feels himself bound by his own *pietas* when he is not bound by anything else; and further, the king is only accountable to God—he may transgress against Him, but cannot be said to sin against others, for there is none who can judge him. It is, however, possible to interpret this last passage as merely representing the legal theory as to the ruler being *legibus solutus* and the constitutional conditions which provided no court of justice to which the king was accountable. These phrases of Cassiodorus are interesting, but do not add much to what we have already seen in other Christian writers.

St Isidore of Seville presents us with some of the same ambiguities as Cassiodorus, but his treatment of the subject of the nature of Government is on the whole clear. He gives us very briefly a statement of the beginnings of social life among men. In his definition of *oppidum* he says that men were originally naked and unarmed, defenceless against the inclemency of heat and cold, and the attacks of wild beasts and of other men. At last they learned to make for themselves huts in which they might be sheltered and safe, and these were gradually collected in towns. But much more important than this is his definition of the nature of the State. He defines *civitas* as a multitude of men joined together by the bond of society: this is ambiguous, and he might be following St Augustine; but his definition of *populus* makes his meaning plain. *Populus* he defines as a multitude of men joined together in society by an agreement of law, and harmonious fellowship. It is both interesting and important to see that St Isidore, whether intentionally or not, goes back from the position of St Augustine to that of Cicero, and makes justice an essential part of the nature of the State.

St Isidore carries out a conception of the same kind in his definition of the true king and the sharp contrast he draws between him and the tyrant. The king, he says, derives his name from his function of ruling, and to rule means to correct: if the king does what is right he will keep his name, if he does evil he will lose it. St Isidore quotes an old proverb which says, “Thou shalt be king if thou do right; if not, thou shalt not be king”, and he defines the chief virtues of a king as Justice and Pietas. With this definition is sharply contrasted that of the tyrant, the wicked ruler who cruelly oppresses his people. He carries out the same conception of kingship in greater detail in his ‘Sentences’. In one place he again says that kings are so called from ruling, and lose the name if they transgress. In another passage, which we have already quoted, he explains that the object for which kings and princes were appointed was that the people should be restrained from evil and directed to good. The duty of the ruler is therefore to set forward justice in truth and reality, and he will be guilty of a very great crime if he appoint unjust judges. And finally, in a chapter already cited, which is

often referred to in later times, having been embodied by Gratian in the Decretum, he maintains that it is a just thing that a prince should obey his own laws.

It is true that along with these judgments he also maintains with St Augustine that evil kings are sent by God as a judgment upon evil peoples. We have already quoted his words, and have seen that this notion probably assisted in the development of the theory that the ruler was in such a sense the representative of God that he could in no case be resisted. But St Isidore himself does not draw this conclusion; rather he seems in the main to hold that the legitimacy of Government is determined by its character,—that it is only as far as the ruler promotes justice that he is to be looked upon as a true ruler at all.

We have endeavoured in this chapter to put together the judgments of the Fathers upon the place of justice in society. We have seen that, with the exception of St Augustine, they seem to show the persistence of the conception that the end of the State is the attainment of justice, and that the quality of justice is essential to the legitimacy of any organisation of society. We think it is important to observe this, for in some measure it seems to counteract that tendency of some of the Christian Fathers towards the theory of the absolute Divine authority of the monarch, and the consequent obligation of unlimited obedience. The truth is, probably, that the Christian Fathers had no clearly and completely developed conception of the nature of civil authority. One or two principles with respect to this were firmly fixed in their minds, but the conclusions which might be more or less legitimately derived from these principles were undefined, and not generally thought out, still less brought into logical coherence with each other. They were convinced of the Divine nature of the authority of the State, they were convinced that disobedience to that authority was in normal cases an offence against God. Some of them drew from this the conclusion that all authority, under all circumstances, was from God, and that even an unjust and oppressive command of the ruler must be obeyed. On the other hand, they were for the most part equally clear that the foundation and end of civil authority was the attainment of justice, and some of them more or less distinctly apprehended, as a consequence of this principle, that an unjust authority was no authority at all. The great principles which they held were of the profoundest and most permanent significance; but they had not drawn out from them a complete and coherent theory of the nature of authority in society.

CHAPTER XV.
THE THEORY OF THE RELATION OF CHURCH AND STATE.

We have endeavoured to recognise something of the complexity of the patristic conceptions with regard to the nature of authority in the State. We have at least seen that while there is in the Fathers a tendency towards a theory of absolutism in the ruler, which finds its complete expression in St Gregory the Great, there are also other tendencies which seem to counteract this. These tendencies may be said to centre round the conception of justice, in spite of the fact that St Augustine's hold upon this conception is so loose; for in this matter, as in so much of his theology, St Augustine probably represents, not the normal, but a somewhat eccentric though influential, mode of thought. We think it is correct to say that the Fathers tend to think of the principle of justice as of something which lies outside the power of the civil authority—something which it does not create, and to which it is in some measure answerable. We may perhaps justly consider that there is some relation between this conception of a principle of justice outside the civil order and the gradually developing consciousness that while the civil order is itself one manifestation or expression of the principle of justice, this same principle finds expression in another order, the ecclesiastical, which is, properly speaking, not so much within the State as parallel to it. We find in the Fathers the consciousness that the Church has its own laws and principles, its own administrative authority, which is not at all to be regarded as dependent upon the State, but as something which stands beside it and is independent of it; that the relations between the Church and the State are those of two independent though closely related powers, relations which it becomes necessary, as time goes by, to understand and define more clearly.

Before the conversion of Constantine, indeed, there was little question about the relation between the State and the Church: the Church was not merely separate, but was generally treated by the State as an enemy—an enemy which it would be well, if possible, to destroy. The Church was a voluntary society within the Empire, dependent for every public right that it might enjoy upon the grudging consent of the State. Christians asked for toleration, and maintained that they could not give up their faith and worship at the command of any earthly power; but toleration was all that they asked, and they asked it in the name of humanity, and on the ground that their religion, so far from being hurtful to the State or to good morals, would rather tend to loyalty and good order. The Church was necessarily conscious of its independence, but this independence was a purely spiritual one, and it claimed no rights or properties of a secular kind, except as derived from the sanction and authority of the State.

The conversion of Constantine and the official Christianisation of the Empire brought with them an entirely new set of circumstances; and the Church had to find its true place in these with much difficulty and labour. The change which the conversion of the Empire brought about does not seem to have been at all clearly recognised at first; at least we have been unable to find any source of information as to this in the literature of the time. The actual historical circumstances, however, gradually compelled men to form some sort of theory of the relation of the two societies. The relation of the Church and Church law to the civil authorities was gradually defined; great questions were indeed left outstanding, but we feel that at least some of the Fathers arrived at certain more or less clearly defined conceptions of the relations between Church and State.

We think that, while some of the Fathers use ambiguous phrases, there can be no serious doubt that after the conversion of Constantine, as much as before it, churchmen did normally refuse to recognise any authority of the civil ruler in spiritual matters. Rufinus of Aquileia has preserved in his history a report of a speech which Constantine, as he says, made to the bishops of the Church assembled in the Council of Nice. According to this report, Constantine recognised very clearly the

limitations of the imperial authority in relation to Church order. He acknowledges frankly that he has no jurisdiction over bishops in spiritual matters, while they have jurisdiction over all Christians. A little later than the Council of Nice, we find Hosius of Cordova, as quoted by St Athanasius, in spite of his close connection with the imperial court, repudiating in the most emphatic terms the notion that the emperor had any right to interfere in Church affairs. He warns Constantius not to intrude into ecclesiastical affairs: God had granted to him the kingdom, to the churchmen the care of the Church; he should remember that just as any one who should revolt against him would disobey God, so if he presumed to draw Church affairs under his control he would be guilty of a great fault. Hosius's tone is very emphatic, much more so than we should perhaps have expected from the somewhat servile attitude of churchmen like Eusebius of Caesarea, and it would seem to indicate the presence of a more general appreciation, at that time, of the independence of the Church relatively to the State than has been always recognised. If such language could be attributed to Constantine, and used by a friend of the court like Hosius, we need not perhaps be surprised to find a man of the violent temper of Lucifer of Cagliari using language identical in sentiment but somewhat more unqualified in tone, in the height of the contest of the Athanasian party with the Emperor Constantius. Without these phrases of Rufinus and Hosius we should indeed have hesitated as to the genuineness of the work from which we quote. Lucifer indignantly protests that Constantius is no judge of bishops, but rather should obey them and their laws; and he concludes by saying that the emperor is not even a Christian, and appointed by God to rule his people, but only a heretic and a persecutor. Lucifer's tone is like that of the spurious letters of Gregory II in the eighth century: we might even imagine ourselves in the early stages of the Investiture controversy of the eleventh century.

Against these passages we must no doubt set certain sayings which have a somewhat different character. We have already quoted a passage from the writings of St Optatus of Milevis, in which we find represented a different attitude towards the State, and its interference with Church matters. Donatus had evidently treated the intervention of the emperor in favour of the Catholic party just as Lucifer of Cagliari had treated his interference against it, and had indignantly argued that the emperor had no right to interfere in Church matters. St Optatus urges in reply that the Church is in the empire, not the empire in the Church, and seems to treat the attitude of Donatus as that of one who set himself over the emperor, while, he urges, there is no one over the emperor but God. Optatus seems to go rather far towards admitting the supremacy of the imperial jurisdiction even in Church matters.

It is natural to conjecture that some such notion lies behind that strange phrase of Ambrosiaster, to which we have already referred. He calls the king the Vicar of God, and says that he has the image of God, and the bishop has that of Christ. The phrase is indeed very difficult of interpretation, but it is at least possible that it is intended to signify some superiority of jurisdiction.

If, then, we find in some of the Christian writers a very clear and explicit declaration of the principle that the State has no jurisdiction in Church matters, we must also recognise that others tend to a more doubtful position. We may in part explain the phrases of the latter as only referring to the power of the State to carry out secular penalties for ecclesiastical offences: no doubt the Catholic Church, when it invoked the arm of the temporal power to put down heretics and schismatics, conceived that its position was secure,—that it was for the Church to judge in spiritual matters, for the secular power to carry out the consequence of its judgments in secular conditions. But actually the policy of persecution did tend to make the State the arbitrator between different religious parties. At the same time, we do not think there can be any doubt as to the normal character of the Church theory with regard to its relation to the State. Indeed, the consideration of the views of these writers is, we think, of importance, mainly as preparing us for the examination of the much more complete treatment of the subject in the work of St Ambrose.

In St Ambrose the theory of the relation between the Church and State is more or less clearly defined. He is clear that certain rights of the Church are sacred and inviolable, in the very nature of things, and in accordance with the nature of God's ordinance in the world. He is very clearly conscious that the Church has its own jurisdiction, to which all Christian men, whatever their rank, are subject, and that the jurisdiction of the State does not extend over any strictly ecclesiastical matters.

We have already seen that St Ambrose, like all the Fathers, recognises the divine character of the civil order of society. He insists that the Christian man must render obedience to the civil ruler in virtue of his religion: not even the priest is to act disrespectfully towards the civil ruler, but, on the other hand, if the ruler commits any grave offence, then the priest must reprove him. The ministers of the Church have jurisdiction over all Christian men, and their jurisdiction extends even over the Emperor or other civil ruler. For even the Emperor is the son of the Church, subject to its authority, to its discipline: no title, St Ambrose says, is more honourable than that of son of the Church,—the Emperor is within the Church, not over it. We find it, therefore, very natural that we should hear of St Ambrose exercising the last discipline of the Church, even against so pious and orthodox a ruler as the great Theodosius. The story of the exclusion of Theodosius from the Eucharist is, of course, very familiar, and it is not necessary here to detail the circumstances. For the massacre in Thessalonica Theodosius was responsible, and St Ambrose excluded him from attendance at the celebration of the Eucharist. It is perhaps worth while to cite some words from St Ambrose's letter to Theodosius, and to observe the mingled deference and firmness with which St Ambrose tells Theodosius that he cannot "offer the sacrifice" if he is present.

It may, perhaps, serve to bring out more clearly the significance of this event, when we observe that this action was not isolated, but that for a much smaller matter, as we learn from a letter to his sister, St Ambrose had been prepared to take almost the same action. Certain Christians had burned down a synagogue of the Jews, and some monks had burned down a church belonging to adherents of the Valentinian heresy. Theodosius, very justly, as we should probably think, ordered the Christians to rebuild the synagogue, and the punishment of the monks. But St Ambrose took another view of the matter, and regarded the action of Theodosius as being contrary to religion. He wrote him a letter on the subject, and then preached on the matter in his presence, and, the sermon ended, demanded of Theodosius an assurance that he would withdraw the obnoxious order, before he would consent to celebrate the Eucharist. Practically, St Ambrose was threatening Theodosius with exclusion from attendance at the celebration of the sacrament.

St Ambrose, then, is very clear in his assertion of the principle that the Church exercises jurisdiction over all Christian men, even the most exalted—even over the chief of the State. And at the same time he asserts, with equal emphasis, the principle that in religious matters the civil magistrate has no authority over ecclesiastics. We have cited one of the emphatic passages in which St Ambrose asserts that in matters of faith the layman has no jurisdiction over the priest. He evidently traces this rule to the divine law, and that law, he urges, is greater than the imperial; but he also urges that the principle has been admitted by the imperial legislation. In the letter from which we have just cited St Ambrose urges this point with great persistence. He had been requested to appear before the Imperial Court, and he refuses to comply, on the ground that this was an infringement of a law of Valentinian I. We do not propose to enter into the history of ecclesiastical exemption from secular jurisdiction, a subject of formidable complexity, but it is necessary to observe it as illustrating the development of the position of the Church as being, within its own sphere, independent of the State.

It is not only in relation to the jurisdiction of the Church over the laity in spiritual matters, and its independence of the civil ruler in all such matters, that we can recognise in St Ambrose the sense of the existence of a power and law which is altogether outside of the sphere of the civil ruler. We

can see in his writings the beginning of the importance of those questions with regard to Church property, round which so much of the controversies of later times turned. We have fortunately a tolerably full account in St Ambrose's own writings of the position he took up, when the emperor wished to insist on his giving up one or more of the churches in his diocese for the use of the Arians. In a letter to his sister he gives an account of the discussion between himself and the officials sent to demand this. They insisted that he should acquiesce promptly, for the emperor was within his rights, for all things were in his power. He replied that if the emperor were to demand his private property, he would not refuse it; but those things which were *divina* were not subject to the imperial power. Further on, however, he qualifies this statement by urging that the emperor cannot lawfully seize a private house, much less the house of God. When he is again urged to surrender a church, he replies that it is neither lawful for him to surrender it nor for the emperor to accept it. The emperor, if he wishes to reign long, must be subject to God, and obey the rule to give to Caesar what is Caesar's and to God what is God's. Palaces belong to the emperor, churches to the priest, and he cannot surrender a church.

In the public discourse which St Ambrose delivered upon the same subject he repeats the same observations, but also throws some further light upon the question of what he understood to be the Church property, which was sacred to God. He protests his habitual respect for the emperor, but the demand for a church he cannot comply with. But, he adds, the lands of the Church pay tribute to the emperor; and if the emperor wishes to take these, he will not resist. Evidently he draws a distinction between the churches and other ecclesiastical property. The distinction is one of some importance with regard to later developments of the relation of the State to Church property.

St Ambrose, then, is clear that there are distinct limitations to the imperial authority when the emperor comes into relation with religious matters. The Church has its own position and authority, which is independent of that of the State. We think that it is not unreasonable to judge that there was some relation between these clear convictions of St Ambrose and that tendency which we have already observed in him to limit the absolute authority of the civil ruler, even in secular matters— at least, to conceive of his authority as limited by the principle of justice, and perhaps as limited by the laws of the State.

In the latter part of the fifth century the question of the relation between the authority of the State and that of the Church is discussed very fully, especially in the letters and treatises of Pope Gelasius I; and these not only show us how clearly the question was then apprehended, but also lay the foundations on which the theory of the ninth century was based. It is true that these discussions and definitions go to establish a theory of a strict dualism in society, and they are not therefore in accord with the tendency of those mediaeval thinkers who thought of society as organised under the terms of a complete unity. The development of the theory of unity in society is one of the most important of the movements which we shall have to study,—one of the most interesting aspects of mediaeval political theory: we are at the same time not certain whether its historical significance has not been to some extent exaggerated,—whether scholars have not sometimes mistaken the formal or superficial tendencies of mediaeval political thought for the fundamental. We are not quite sure whether the real importance of the conception of an absolute or formal unity in society, either in mediaeval or in modern political theory, is quite what some may imagine. But this is a subject about which we shall have more to say in later volumes. The discussions and definitions of the fifth century belong to a stage in the development of political theory when the conception of dualism in society was taking shape and making itself felt as of importance in practical administration: we can at the same time recognise in them some of the elements out of which, in later times, the theory of the complete unity of society was to be constructed.

The historical circumstances which produced the literature which we have now to examine were of a highly complex kind. The Council of Chalcedon had tried to end the disputes of the

Alexandrian and Antiochene schools in the Church by a definition of the doctrine of the union of the human and divine natures in our Lord, which was intended equally to condemn the extreme or so-called monophysite tendency of the Alexandrian and the extreme or so-called Nestorian tendency of the Antiochene school. In the main, while its decisions resulted in the separation from the Church of a certain number of extremists at each end, the decisions of Chalcedon did conclude the historical settlement of the terms of the faith of the Church with regard to our Lord's nature. But it was more than two centuries before the disputes on the subject in the Church were set at rest. The monophysite tendency was so strong, especially in Egypt, that in 482 the Emperor Zeno, with the advice apparently of Acacius, Patriarch of Constantinople, issued a statement known to us as the "Henoticon", in which he tried to state the doctrine of our Lord's nature in such a way as to conciliate the Egyptians. In the West, however, and notably by the Bishops of Rome, these proceedings were looked upon with the greatest disfavour, and Felix II finally anathematised Acacius. It is not clear that Felix or his successor, Gelasius I, actually excommunicated either Zeno or any of the other emperors who remained in communion with Acacius, and with Peter, the Patriarch of Alexandria; but practically all communion with those who held to Acacius was broken off, and the Emperors and the Bishop of Borne found themselves in formal opposition to each other.

The circumstances of the time were no doubt favourable to the development of an independent attitude in the Western Church, for this was the period during which the Gothic invasions and occupation had practically destroyed all the power of the Byzantine emperor in Italy. This may perhaps partly explain the confidence of the tone adopted by the bishops of Borne towards the emperors, though it would be a mistake to think that such an attitude towards the civil ruler was unprecedented: we have indeed seen something of the same kind in the case of St Ambrose.

We may perhaps with advantage notice some details in the theory of Felix II. and Gelasius I with regard to the relations of the Church and the emperor before we discuss their formal definitions on this subject. They both assert with great emphasis the subordination even of the emperor to the Church in spiritual matters. Felix exhorts Zeno to remember that it is well for him if he strive to submit his royal will to the priests of Christ: when the things concerning God are in question, the king should learn rather than presume to teach. In the tenth letter of Pope Gelasius the same thing is said, with perhaps a little additional precision and a special assertion of the authority of the apostolic see. The secular power should learn, not judge, of divine things from the bishops, and specially from the Vicar of St Peter: not even the most powerful of Christian rulers of the world may draw such things into his hands. The subject is drawn out in greater detail in the first letter attributed to Gelasius, a letter thought to have been written by him in the name of Pope Felix II to the Eastern bishops. The emperor has no authority, Gelasius urges, to consider the cause of an ecclesiastic or to receive him to communion : this is contrary to all church order. The emperor is the son, not the ruler, of the Church: God gave the authority of ruler in His Church to bishops and priests, not to secular rulers or to the civil law. The emperor has indeed received his authority from God, and should therefore not set himself against the divine order.

As we have said, we do not find in these letters any trace of a definite or explicit excommunication of the emperor; but it is evident from them that they do not look upon the emperor as in any way exempt from the operation of such general disciplinary measures as they had taken. Felix II seems to put before the Emperor Zeno the choice between communion with St Peter or with Peter of Alexandria; and while Gelasius I expresses himself in courteous and friendly terms, and repudiates the notion that he has condemned the emperor, yet we think that his phrases practically mean that communion with the excommunicate separates the emperor from the Roman Church.

The attitude of Felix and Gelasius towards the emperor is courteous, and even deferential, but it is at the same time quite firm. It is clear that while they were reluctant to break with the emperor, to have an open quarrel with him, they had no hesitation in resisting him. It is, in this connection,

therefore, very interesting to find that we have in one of the letters of Gelasius perhaps the first example of a regular enumeration of occasions on which churchmen had, as he thinks, been compelled to resist and reprove the secular ruler. Gelasius begins by referring to the rebuke of David by the prophet Nathan, and then mentions the public separation of Theodosius from the communion of the Church by St Ambrose, the rebuke of Theodosius the younger by St Leo, the action of Pope Hilary against the Emperor Anthemius, and of Pope Simplicius and Pope Felix against the usurper Basiliscus and the legitimate Emperor Zeno. This enumeration of cases in which the authority of the Church had dealt with and rebuked the heads of the civil government serves to furnish us with an interesting view of the circumstances out of which arose the growing consciousness of the existence of an authority in the Church independent of, and in its own sphere superior to, that of the State.

We may again note that Pope Gelasius was concerned not only to assert the authority of the Church in all spiritual matters, but also to establish the principle that the civil power had no jurisdiction over ecclesiastical persons, at least in spiritual matters. We have a letter in which he indignantly protests to the Eastern bishops against their suffering ecclesiastical persons to be tried by secular authorities. We are not prepared to express a definite judgment upon the extent of the immunity which Pope Gelasius claims for ecclesiastics

: it is enough for our purpose to observe how vigorously he repudiates the idea of the State having any authority over them, in matters, at any rate, belonging to the Church.

The theory of the relation of the two authorities, the Church and the State, is definitely set out in the fourth Tractate and the twelfth letter of Pope Gelasius. Together these furnish us with a statement of the actual spheres of the two powers, and also with some explanation of the cause of their separation. Before the coming of Christ, Gelasius says, there were some who were justly and legitimately both kings and priests, such as Melchizedek; and Satan imitated this among the unbelievers,—hence it was that the pagan emperors held the office of Pontifex Maximus. The true and perfect king and priest was Christ Himself, and in that sense in which His people are partakers of His nature they may be said to be a royal and priestly race. But Christ, knowing the weakness of human nature, and careful for the welfare of His people, separated the two offices, giving to each its peculiar functions and duties. Thus the Christian emperor needs the ecclesiastic for the attainment of eternal life, and the ecclesiastic depends upon the government of the emperor in temporal things. There are, then, two authorities by which chiefly the world is ruled, the sacred authority of the prelates and the royal power; but the burden laid upon the priests is the heavier, for they will have to give account in the divine judgment, even for the kings of men: thus it is that the emperor looks to them for the means of his salvation, and submits to them and to their judgment in sacred matters. The authority of the emperor is derived from the divine order, and the rulers of religion obey his laws: he should therefore the more zealously obey them. If the bishop is silent when he ought to speak for the divine religion he will run great danger, and so also will he who contemns this authority instead of obeying it. If the faithful owe obedience to all priests, how much more do they owe it to the bishop of that see which God has set over all priests.

The most important points in these definitions of the character and relation of the two powers are, first, the dogmatic statement and careful explanation of the fact that in Christian society the spiritual and the temporal powers are intrusted to two different orders, each drawing its authority from God, each supreme in its own sphere, and independent, within its own sphere, of the other. We shall have frequent occasion in later chapters to observe the importance of this conception of a twofold authority in society—this attempt to divide the whole field of human activity into two separate parts, and to establish an independent authority for each part. We shall see how the ninth-century writers in particular take these statements as the normal expression of their own position, and we shall have to consider how this is related to the theory of the later Middle Ages. But, secondly, it is necessary to observe that Gelasius is also conscious of the fact that while these two authorities are

each independent of the other, and supreme in their own spheres, they are also dependent upon each other, and cannot avoid relations with each other; so that while each is supreme in its own sphere, each is also subordinate in relation to the other sphere. The king is subject to the bishop in spiritual matters, the bishop to the king in temporal matters. Gelasius is conscious of the fact that no division between the two powers can be complete—that we are compelled to recognise the fact that each has, in certain relations, authority over the other; and, more than this, we may say that Gelasius perhaps feels that the question which is the greater of the two cannot be wholly avoided. He restricts himself, indeed, to arguing that the burden laid upon the ecclesiastics is the heavier; but we can see in his words the beginning of a tendency whose ultimate development we shall have to trace in the scholastic writers. The definitely dualistic theory of authority in society has rarely been more clearly set out than by Gelasius, but his definitions show us the difficulties with which that theory has constantly to contend.

In the Fathers, then, we see clearly the first development of those difficult questions concerning the relations of the temporal and spiritual authorities in society, round which so much of mediaeval political theory was to take shape. There can, we think, be little doubt that in the end nothing contributed so much to emancipate the judgment of theologians from the tendency to recognise an absolute authority in the monarch, as the clearly felt necessity of defending the independence of the Church. It was this, probably more than any other single cause, which compelled the ecclesiastical thinkers to analyse again, and more completely, the source and character of civil authority. There is, indeed, in the Fathers little trace of any very direct connection between the general course of political theory and these questions of the relations of Church and State, though it is noteworthy that St Ambrose, who is the first careful exponent of the independence of the Church, is also that one of the Fathers who seems most conscious of the limitations of the imperial authority even in secular matters. But we think that it is very necessary to take account of the patristic theory of the relations of Church and State; for, however little they may have anticipated the ultimate significance of these questions, we, when we look back from the standpoint of the ninth century or of the later Middle Ages, can see that here are the beginnings of one of the most important elements of the later political theory.

PART IV.
THE POLITICAL THEORY OF THE NINTH CENTURY.

CHAPTER XVI.
NATURAL EQUALITY AND SLAVERY.

We have examined the history of the political theory of the ancient world in its last stages, and the modifications introduced into this theory by Christianity. It is, we think, necessary for the proper understanding of the course of political theory to keep very clearly before us the fact that the political theory of the Fathers is that of the ancient world, that the modifications introduced by Christianity are to be regarded rather as modifications of detail than as completely or fundamentally changing the conceptions which were already current. Unless we are entirely mistaken, the Fathers take the framework of their political theory whole and ready-made from their predecessors and contemporaries, and do but fit into this framework such conceptions as are to be regarded as in some sense peculiar to themselves. As we have endeavoured to show, their peculiar conceptions are, except in regard to two subjects, not very important in character. The two exceptions to this general principle are to be found, first, in the turn they give to the theory of the sacred character of government, and, second, in their development of the relation between the temporal or civil and the religious or ecclesiastical powers in society. Here, indeed, they present to us the beginnings of modes of thought of the greatest historical significance,—modes of thought whose development and modifications we shall have to trace in considerable detail.

The Christian Fathers cannot be regarded as political philosophers, but their theory is constantly and organically related to a system of political thought which, whatever its merits or truth, may be regarded as a philosophical system, the system which centres in the theory of natural law and the contrast between the conventional and the natural state. The Fathers accept these theories, and, as we have endeavoured to show, it is only in relation to these that their own conceptions become intelligible.

When we pass to the political theory of the ninth century, we find ourselves in an atmosphere wholly different. The elements of public life are altered, the conceptions which dominate men's minds are in some most important respects new and strange; we can never forget that the barbarians have overthrown the old civilisation of the West. They may sometimes deck themselves in the trappings of the old world, they are glad to use old names and to claim the titles of ancient offices, but the world has changed. St Gregory the Great or St Augustine may have been very different men from the Roman citizens of the Republic or the Early Empire, but still they were primarily Romans, members of the ancient commonwealth, sharers in the ancient culture, while the greatest ecclesiastics of the ninth century, Alcuin, Hincmar of Rheims, or Hrabanus Maurus, are at bottom men of the new Teutonic tradition, also no doubt the heirs of what had survived of the culture of the ancient world, but still primarily men of the new world. What is true even of the great ecclesiastics is still more obviously true of the greatest laymen. The great Charles himself may be the "Augustus", the great and "peaceable" emperor; but he is really the head of the Franks, the representative, the repository of the tradition or the greatest and most powerful of the new Teutonic races; a great man, great ruler, but still a barbarian.

And the new world is governed by new traditions, new conceptions of life and of law, of the meaning and character of the social organisation. Not indeed that there is as yet much new theory—the time for that has not yet come—but new traditions, new customs, a new sense of the relations between the different members of the State, these meet us at every turn. The world in which we find ourselves in the ninth century is a new world, is indeed the world as we know it now, for it cannot be seriously pretended that between the ninth century and the twentieth there is such interruption of continuity even as there is between the sixth century and the ninth. When we study the Carolingian writers, we feel at once that we are studying the writings of men whose tradition of society and government is that out of which our own has directly and immediately grown. And yet there are in the social and political theory of the ninth century older elements. There is a great gulf between the Teutonic societies of the Middle Ages and the ancient empire, but there are many relations, many traditions which have been carried over from the one to the other. The new society has its own distinctive traditions, its own individual characteristics; but the men who give expression to these, the articulate representatives of the new society in literature, have inherited from the past traditions and theories which profoundly influence the new society: they have inherited a framework of political theory into which, in the end, they will fit their own independent political and social conceptions. The ninth-century writers are Teutonic politicians, but they are obviously also the disciples of the Western Fathers. Indeed they are always trying to bring their own conceptions into harmony with the theories of the Fathers. They seem instinctively to recognise the fact that they have no formal theory of their own, and constantly fall back upon the Fathers, St Ambrose, St Augustine, St Gelasius, St Gregory, or St Isidore, to find a reasoned expression of their own convictions.

At the same time, their own conceptions are often very different from those of the Fathers, and it is largely to this cause that we may attribute that appearance of incoherence, or even self-contradictoriness, which is perhaps the first characteristic which we notice when we study this literature. The truth is, that some centuries were still to pass before, in the hands of the scholastic writers, the Teutonic traditions and the general principles of the political theory of the Fathers and the Roman Jurists were to be reduced to one coherent whole.

The Fathers, as we have said, may not be political philosophers, but in reading them we feel the presence of a great framework of political theory to which even their most incidental phrases are related. The Schoolmen of the twelfth and thirteenth centuries in their turn produced a complete system of political theory by which we may again interpret even the most paradoxical of their phrases. But the writers of the ninth century are neither original political philosophers nor are they as yet fully conscious of the nature of the theory which lay behind the phrases of the Fathers. They are interested in, they are indeed profoundly concerned with, the solution of the innumerable difficulties which presented themselves to the new civilisation of Europe; they are full of interest, and often exhibit a considerable analytical power in dealing with such questions as the nature of the royal power, the relation of the civil power to the ecclesiastical, the nature of the origin and authority of law, and they eagerly lay hold of any straw of traditional authority, or explanation, in the Fathers, or in the remains of the ancient jurisprudence, which may assist them in the practical solution of their difficulties. But they do not go beyond the practical use of the writings of the Fathers: they are not concerned with, or interested in, the question of a general and systematic philosophy of political and social relations.

We shall therefore find that there is much less of reference in the ninth-century writers to the questions of natural law, the natural condition, the relation between natural and conventional institutions, than in the Fathers. All this we shall find again when we come to discuss the scholastic political theory, but in the ninth century there is comparatively little reference to these matters. Their treatment of political theory is concerned mainly with questions regarding the nature and source of authority, secular and ecclesiastical, and the relations of these authorities to each other. This does not

mean that they denied the truth of the conceptions of the earlier writers; on the contrary, as we shall see, so far as they do refer to such general questions as those which we have mentioned, they accept the views, they reproduce the phrases, of the Fathers.

There is only one aspect of the patristic theory of the natural conditions of human nature which has an important place in the ninth-century writings, and that is the theory of the natural equality and liberty of man. Here it is evident that the ninth-century writers not only reproduce the views of the Fathers, but that they do this with intelligence and conviction. They find the authority for their view largely in those passages from St Gregory the Great's writings which we have in former chapters had to consider carefully; but it is clear that the view of St Gregory the Great and the other Fathers is one which is firmly held and understood by them as being the foundation of their conception of human nature in society.

One of the most representative passages in the literature of the ninth century dealing with this subject is to be found in Jonas of Orleans' treatise for the instruction of the layman. He warns his readers lest they should mistake the differences of worldly dignity and wealth for a real difference in nature. Human nature always remains equal in its character, whatever may be the difference of wealth or education. It is only a foolish and impious pride which causes men to forget these things. Jonas justifies himself in this view by quoting the famous phrase of St Gregory the Great, "Omnes namque homines natura sequales sumus," and urges masters to treat their slaves with some humanity, quoting from St Paul, and from a sermon attributed to St Augustine, in which he dwells on the brotherhood of Christian men by grace. The same sentiments are to be found in another treatise of Jonas, "De Institutione Regia", in which he admonishes the king to appoint such officers as will always remember that the people of Christ over whom they are placed are by nature equal to them.

We find another careful statement and exposition of this conception of the equality of human nature in the writings of Agobard, Archbishop of Lyons. In a letter or short treatise on the baptism of those who were slaves of Jews he protests strongly against some regulations of the Emperor Lewis the Pious, which, as Agobard understood, would have prevented the baptism of such slaves without the consent of their masters, and he does this on the ground that all men are of one race, one descent, one condition. But we shall come back to this passage in dealing with the question of slavery.

Hrabanus Maurus, again, quotes St Gregory the Great, Moralia, xxi. 15, in his Commentary on the Book of Genesis, and Hincmar of Rheims quotes the same passage, and also Moralia, xxvi. 26, which expresses much the same sentiments.

It is interesting to observe that the conviction of the inalienable natural equality of human nature has even found a place in the technical legal documents of the time. In the preface to a collection of capitularies issued by the Emperor Lewis the Pious, it is interesting to read a formal recognition by the emperor of his equality in condition with other men, and in a collection made from the canons of various councils we have the same sentiment expressed at greater length and in more detail, and Christian men, whether lay or clerical, are warned to behave towards those who are their inferiors with mercy, for they should remember that they are their brethren, and have one Father, that is, God, and one Mother, that is, the Holy Church.

The theory of human equality is treated most fully in relation to the institution of slavery. In the ninth century we find again that apparently paradoxical combination of a theory of equality with an almost universal acquiescence in the institution of slavery. The explanation is the same in this case as that which we have already considered in the Fathers, namely, that slavery is a disciplinary check upon the licence and disorder of sinful men. There is one writer, indeed, the author of the 'Via Regia', Smaragdus, the abbot of St Michael in the diocese of Verdun, whose attitude to the institution may be different; but it will be best to leave him till we have considered the general position of the ninth century.

Human nature is recognised by all the writers who refer to the matter as being equal. We have already quoted a passage from Jonas of Orleans which illustrates this, and we may now consider that passage from Agobard of Lyons to which we before referred. In this passage Agobard expresses very clearly both the principle of the equality of the origin and condition of the human race and the justification of slavery as being caused by sin. God is the creator of all mankind, having formed the first man and woman, and from them all men are descended: it is in consequence of men's sins and of the secret judgment of God that some men are exalted and others placed under the yoke of slavery. But while God has thus ordered that men should serve each other with their bodies, He does not allow the inner man to be subject to any one but Himself. The inner man is free. It is for this reason that Agobard protests so strongly against the prohibition of the baptism of slaves without the consent of their masters. Men, that is, are by nature equal, and this equality continues in the soul of man, whatever may be his external condition. Agobard reproduces the view of the Fathers with hardly any change. Slavery is not, as we might say, natural, but is an institution adapted to the actual condition of human nature.

Alcuin and Hrabanus Maurus contrast the primitive domination of man over the irrational animals with the later rule of man over man, and trace slavery either to iniquity or adversity, and cite the legal explanation of the condition of the slave, *servus*, as that of one who might have been slain, but has been spared (*servatus*). It is necessary to observe that Hrabanus Maurus in this passage also gives an explanation of slavery, which is obviously related to the Aristotelian theory, that slavery is the natural and justifiable result of the superiority of some men in reason over others. It will perhaps be remembered that in Cicero there are traces of the survival of this theory alongside of the doctrine of natural equality. Hrabanus recognises, indeed, that the actual facts of slavery are not always in accordance with this rational order, and exhorts the pious to submit in view of the rationally ordered and eternal felicity which awaits them. The two views are not wholly inconsistent with each other, the natural and fundamental equality does not exclude differences of capacity and intelligence. But this is not the usual line of thought of the Fathers or the ninth-century writers. It may be well to compare this with the parallel theory of a natural hierarchy of order in government, stated by St Gregory the Great, while in his general view government, or at least coercive government, is a consequence of sin.

Slavery, then, is just and lawful under the actual conditions of human nature. But this does not adequately represent the sanction given by the Church of the ninth century to the institution of slavery. A letter of Hrabanus to a certain Reginbaldus shows us that it was maintained that it was an irreligious as well as unlawful thing for a slave to attempt to escape from his master. Reginbaldus had asked Hrabanus whether it was lawful to say mass for a slave who died while escaping from his master. Hrabanus replies that he does not find any reason against this, and orders prayers for the slave unless he has committed some other crime. At the same time he admits that it is a grave sin to fly from one's master. He quotes the canon of the Council of Gangrae in which those who teach slaves to despise their masters and to fly from them are anathematised, and admits that he must be still more deserving of anathema who actually escapes from his master. But he also urges that the degree of the sin depends upon the reason of his flight, whether it is due to mere pride or to the cruelty of his master. The fugitive slave should be exhorted to return to his master, as Hagar did to Sarah, and Onesimus to Philemon. We have already dealt with this canon of Gangrae in our discussion of the Patristic theory of slavery, and it may be said in explanation of it that, considering the fact that the Church gave its sanction to the institution of slavery as a disciplinary institution, such a condemnation of those who incited slaves to fly was at least logically proper. But the letter of Hrabanus seems to indicate the presence among Christian men in the ninth century of a much harsher view. The question of Reginbaldus clearly shows that it was held by some Christians that a slave who fled from his master was guilty of a mortal sin, and Hrabanus's answer makes it plain that

though he thought that the precise degree or quality of the sin depended upon the motive prompting the slave's escape, yet such an attempt was in itself sinful.

We may again find illustrations of the ecclesiastical view of slavery in the legislation of the Church as well as of the State with regard to the qualifications of those who were to be admitted to ordination. We could quote a series of enactments from the Council of Frankfurt in 794 to the Council of Tribur in 895 by which the ordination of a slave is prohibited except with the consent of his master.

The Council of Frankfurt requires the permission of the master, but does not say whether the slave must be emancipated, but in all the other passages we cite it is laid down that the slave should only be ordained when he has been handed over by his master to the bishops to be free for the rest of his life, and in one passage the master is warned that he will then lose all rights over the slave. It is perhaps worth noticing, also, that in a letter or precept of Lewis the Pious the slave thus emancipated is warned that in the event of his sinning against the sacred orders which he has received, he will be obliged to return to his former slavery.

According to one set of regulations, if a slave procures his ordination by fraud he is to be handed over to his master, or if he was ordained in ignorance of the fact that he was a slave, he may be retained in his office if his master consents, or his master may reclaim him as a slave.

It is perhaps deserving of notice that we find it alleged as a reason for such regulations, that it is improper that the service of God should be conducted by men of ignoble position. We have an excellent commentary on such a view in the very interesting account which Jonas of Orleans and Agobard of Lyons give of the common attitude of the wealthy and noble persons of their time towards the inferior clergy. Their observations illustrate what seems to have been a real difficulty of the time—a difficulty which alone would have compelled the Church to enforce very strict rules about the condition of those who were to be admitted to orders. Jonas of Orleans gives us a very gloomy picture of the social condition of many of the clergy. They were often employed by wealthy laymen as their stewards, and were considered unfit to be their companions at table. Agobard is equally gloomy, and even more vivid, in his picture. All great men, he says, have a domestic priest, not that they may obey him, but simply that he may be useful to them in performing religious services and in discharging any secular function to suit their convenience. When they want a domestic chaplain, he says, they bring to the bishop some slave whom they have brought up in their house or bought, and demand his ordination.

The Church of the ninth century acquiesced in the existence of slavery, and adapted its own legislation to this. It is well, however, also to observe that the influence of the Church seems still, as in the period of the later Empire, to tend towards a mitigation of the condition of slavery. The Church still continued to impose its own penalties upon those who killed the slave. We find a Council of Mainz in 847 A.D. renewing the canons of the Councils of Agde and of Elliberis, which imposed the penalty of excommunication for certain periods upon those who killed their slaves intentionally or by accident. We have already considered that passage from the writings of Jonas of Orleans in which he protests against the harsh treatment of slaves. It is also interesting to find in the "Edictum Pistense" of 864 a revival of a regulation contained in a novel of Valentinian, by which those who sold themselves or their children, because of their great poverty or in time of famine, could be redeemed at a price slightly higher than that for which they had sold themselves or their children.

There is, as we have said, one writer in the ninth century who goes beyond this in his attitude to slavery, and who may even desire its abolition. This writer, Smaragdus, is the author of a little treatise or handbook, the 'Via Regia', on the character and duty of the good king. We shall have occasion to refer to him again in connection with the theory of the royal power, though there is in this portion of his work little that is very different from other treatises.

With regard to slavery the position of the treatise is different. The author quotes a passage from Ecclesiasticus, which enjoins that a slave should be treated as one's own soul, as a brother, and entreats the king to forbid the making of slaves in the kingdom—that is, we suppose, he desires to prevent any of the subjects of the king from being enslaved by their fellow-subjects. Then, after quoting a number of passages from the canonical and apocryphal Scriptures of the Old Testament, on the subject of slavery, he urges that the Christian man should set his slaves at liberty, considering that it is not nature but sin that subjected men to each other, seeing that we were all created equal. He concludes by urging the king to honour God with his riches and slaves, by giving alms of the former and by setting the latter at liberty.

We think that the author of the treatise feels that there is something unchristian in the slavery at least of Christian men, and that he would like to see this ended. He does not, indeed, actually ask the king to abolish the institution, though he does ask him to forbid the enslavement of any of his subjects; but he does look upon it as being the true mode of honouring God, to set the slave at liberty. It is certainly interesting to find this view held in the ninth century, but we must not make any mistake: this view is hardly the normal one; the premisses of Smaragdus are the same as those of the other ninth-century writers, but the conclusions deduced by him from them are different. The theory of slavery in the ninth century is the same as that of the Fathers: slavery is not natural or primitive, but is a just punishment of man's sin, and a remedial discipline by which his vicious inclinations may be restrained.

CHAPTER XVII.
THE DIVINE AUTHORITY OF THE KING.

We have seen that the ninth-century writers maintain the tradition of the natural equality of human nature—an equality which, in a certain sense, is permanent and inalienable; but we have seen that this is not inconsistent with their maintaining that slavery is a necessary and wholesome discipline. It is so also with government; in one sense it might seem that this is incompatible with the theory of the natural equality of man, but these writers look upon it as a necessary discipline by means of which life is preserved and order is maintained. The State is a divine institution; its coercive discipline may indeed be a consequence of the Fall, but it is the divine remedy for the Fall, and as such it must be respected and obeyed by all men. We have seen that in some of the Fathers this conception is developed into a theory that the person and authority of the ruler is so sacred that disobedience to him or resistance to his commands is equivalent to disobedience and resistance to God Himself. By some of the Fathers the divine authority of the State is transferred whole and entire to the particular ruler.

This view is in the ninth century formally held by many, perhaps indeed by all writers. But the actual conditions of the political life of the time often came into conflict with this view, and while the writers of the time may have continued to maintain it in form, they were in fact often compelled to adopt quite another attitude towards the head of the State. We also begin to find in them the influence of a tradition which does not descend from the ancient world. The ninth-century writers are for the most part ecclesiastics, but they are also, at least in Northern Europe, men of the Teutonic tradition. And the Teutonic tradition of the authority of the king is not the same as that of the Latin Fathers.

The conflict of these ideas is the cause of much apparent incoherence and inconsistency: we find the same man speaking at one time as though the divine authority of the king could never be resisted, at another time as if his authority were limited and restricted. The difficulty also of defining the limits of the authority of the ecclesiastical and the civil powers produced a constant friction, which tended to destroy any unqualified theory of the absolute authority of the State.

We find but little speculation or theory as to the beginnings of society and the State, and what little there is, is obviously second-hand and borrowed from earlier writers. In a treatise attributed to Alcuin, ‘De Rhetorica et Virtutibus’, there is an interesting passage on the primitive conditions of human life, drawn, as the author says, from ancient sources, in which man is represented as having originally lived like the beasts, wandering about in the fields, without any rational or moral principle or rule of life. A great and wise man at last appears, and, recognising the qualities and capacities of human nature, gathers men together into one place, and thus brings them to live a peaceable and humane life.

We find a very similar account of the primitive condition of man in Hrabanus Maurus’s ‘De Universo’, taken from St Isidore of Seville. Under the definition of “oppidum” he tells us that in the earliest times men were naked and unarmed and had no protection against the wild beasts, no shelter against the heat or cold, no safety against each other. As time went on they learned to make houses in which they could dwell in safety, and in this way towns began to spring up.

We can scarcely found any conclusions on such scanty and incidental references to the beginnings of society; it is evident that both the author of the ‘De Rhetorica’ and Hrabanus Maurus are simply writing down fragments of ancient descriptions of society, which they accept, but upon which they are not reasoning. In themselves these statements are both too vague and too commonplace to enable us to fix very definitely the philosophic tradition to which we might say they belong. We can hardly go further than this, that they represent a tradition which held that behind the

period of the organised society of men there lay a time when there was no fixed order among mankind. It is a state of nature, but not, so far as these passages go, a good or ideal state, but rather one of disorder and misery. It would agree well enough with the conditions of human life, as they might be pictured after sin and vice had come into the world, and before the great institutions, by which sin is controlled and checked, had been developed.

We have seen that the ninth-century writers maintain the primitive or natural equality of men; but they recognise that the actual conditions of life demand government, as they justify slavery. This is well expressed in a treatise of Hincmar of Rheims. God has set diverse orders in the world, as is shown by the apostolic exhortation to obey kings and rulers for God's sake; for although, as St Gregory says, nature brought forth all men equal, sin has put some below others, and this by God's dispensation, who has ordained that one man should be ruled by another. Indeed the writers of the ninth century reproduce the strongest phrases of the Fathers with reference to the divine nature of the civil power. In the middle of the century we find this enunciated with great force in the 'Capitula Pistensia'. These lament the disturbances and discord in the kingdom, and complain that some men will not endure subjection to the king. They forget that, as St Paul says, all power is from God, and that he who resists the power resists the ordinance of God. God is indeed the true King of kings and Lord of lords, but He has ordained that the ruler is to be a true king and lord in God's place (vice sua) on the earth. The devil fell from heaven because he would not accept his subjection to his Creator; and so he who will not recognise the power ordained by God in the world, makes himself the servant of the devil and the enemy of God.

These phrases can be paralleled over and over again in the Capitularies and in the writers of the time,—Smaragdus, Sedulius Scotus, Jonas of Orleans, Hrabanus Maurus, Hincmar of Rheims, Cathulfus. They represent the accepted view that temporal authority is derived from God, and that all men must obey the authority for the sake of God.

It is this conception which is embodied in the phrases used by Charles the Great and his successors: "Karolus gratia Dei rex"; "Karolus serenissimus augustus, a Deo coronatus magnus pacificus imperator, Romanum gubernans imperium, qui et per misericordiam Dei Rex Francorum atque Longobardorum"; "Hludowicus, divina ordinante providentia imperator augustus"; "Hludowicus divino nutu coronatus." These phrases serve to express the conception that it is God who is the ultimate source of all authority. This is also, we venture to think, the conception which was ultimately conceived to be expressed in the consecration of the king or emperor at his coronation. We shall have a good deal to say about this later, for the mediaeval interpretations of the rite and of the part taken in it by the clergy are of considerable importance. For the present it is enough to observe that the introduction of a religious element into the solemn appointment of a king or emperor, while at first it probably meant little more than that the blessing of God was being invoked upon the monarch, was very soon taken to be symbolical of the fact that it is from God that authority came.

The writers of the ninth century, then, maintain the tradition of the Fathers, that the State is a religious institution, that the authority of the civil government is sacred, and that all Christian men should obey it, as representing the authority of God Himself. But they go much further than this. We have just considered a passage from the 'Capitula Pistensia,' and we must now observe that the king is here spoken of as standing in God's place (*vice sua*) in the world. Smaragdus uses an almost exactly similar phrase when he speaks of the king acting "pro vice Christi". Sedulius Scotus calls the king the "Vicar of God." It is true that Sedulius calls him God's vicar in the government of the Church, a statement which we shall have to consider again in connection with the relations of the ecclesiastical and civil powers,—but probably he includes the State in the Church.

A writer called Cathulfus, of whom little is known, and who is represented in literature only by a letter or short treatise, addressed to Charles the Great, uses a similar phrase. He bids the king

remember God always with fear and love, for he stands in His place over all His members, to guard them and reign over them. The bishop is said to stand in the second place, to represent Christ. Our readers may remember that the writer known as Ambrosiaster expresses a similar thought when he says that the king, whom he calls the Vicar of God, has the "image of God," and the bishop has the "image of Christ." Whether Cathulfus draws the phrase from Ambrosiaster we cannot tell,—it is at least possible that it is from him that the phrases which speak of the king acting in God's place come; but it is also possible that this method of speaking was traditional among Christians, though it has not come down to us in any patristic writer of the West, except Ambrosiaster. It is important to observe the phrase the "Vicar of God". We shall presently have to consider its meaning in these writers in relation to the Church: in a later volume we shall see that it came to mean a great deal in the controversy between Church and State. It is significant for us for the moment as representing in the most terse form the universal judgment of the time that the king is the representative of God,—that it is from God that he draws his authority.

The king thus stands in God's place, is His representative on earth, and the writers of the ninth century use very strong phrases to express their condemnation of rebellion against his authority. The Council of Maintz in 847 inserts in its decrees a very strong condemnation of conspiracy and rebellion against the lawful authorities in Church and State, and threatens those guilty of such acts with excommunication. Some of the manuscripts which contain the documents of this council say that these sentences come from an epistle of Hrabanus Maurus. In one of his letters, written some years earlier, he speaks very strongly on the wickedness of revolt, and enforces this by a number of quotations from the Old and New Testaments, citing especially the conduct of David, who would not raise his hand against the Lord's anointed, and recounting the judgments that overtook several of those who in later times rose in insurrection against their legitimate lords.

Hincmar of Rheims uses equally strong phrases on the necessity of obedience. In his treatise, 'De Fide Carolo Rege Servanda', he also cites the example of David's conduct towards Saul as the true model of right conduct, and then quotes those very strong words of St Gregory the Great on which we commented in a former chapter, in which he warns subjects that if they transgress against their rulers, they transgress against God, who set them over men. In one of his letters he speaks more directly and strongly still. Nothing, he says, is done in the world except by God, or by His just permission. When kings, therefore, reign by God's appointment (*ex illo*) it is the work of God's mercy, that their people may be safe. When they rule, not by his appointment (*non ex illo*), but by His permission, it is God's punishment on a sinful people. The true believers do not resist the power, which is either given or permitted by God, but, humbling themselves under God's hand, give thanks to Him for good princes, and rejoice even while they groan under those who are permitted by God to reign for their chastisement. They do indeed resist wicked works and commands, but they endure patiently, for God's sake, the evils which are brought upon them by wicked princes. This passage is the more noticeable that the general purpose of the letter is to protest against infractions of the privileges of the clergy by the king. These passages will be sufficient to show how strongly the doctrine of the divine authority of the civil government, and the duty of obedience to it, was held in the ninth century. It might seem as though these writers were still wholly under the influence of the extreme position of St Gregory the Great. We can indeed understand how they came to this view. God is the source of all authority; the king as ruler derives his power from God, the evil king as much as the good; the former indeed, as we have seen, in the last passage quoted from Hincmar, holds his power by God's permission rather than by His appointment, but still he holds it by God's permission for the chastisement and correction of evil. Therefore, they say, we must always obey the king, and submit to him, even when unreasonable and unjust, lest we should be found to be resisting God. These writers think that their principles are the same as those of Gregory the Great. We must now consider other aspects of their theory of government, and we shall be led to recognise that while

they repeat these patristic phrases with sincerity, their own final judgment is influenced also by considerations of quite another kind.

CHAPTER XVIII.
THE THEORY OF THE KING AND JUSTICE.

So far as we have gone in our examination of the political theory of the writers of the ninth century, we have recognised the influence of the theories of St Gregory the Great as to the duty of an unlimited obedience to the civil ruler; for in the main it is his sentiments and phrases which they are reproducing. No doubt they reproduce these with honesty and sincerity; no doubt they imagined that they really held just the same opinions as St Gregory. But when we examine their writings further, we discover at once that we have here only one aspect of their view of the nature and source of the authority of government.

The truth is, that while the writers of the ninth century are most anxious to express themselves in the language of the Fathers, most anxious to be faithful to the traditions which they had inherited from them, their own standpoint is really in many ways a very different one from that of St Gregory the Great. The situation of the ninth century was, in fact, a very different one from that of the sixth century. The whole Western Church must probably have been influenced by the violent rupture between the Bishop of Borne and the iconoclastic emperors. Italy had risen in revolt against the attempt to suppress the use of images, and the Bishops of Borne, though they had tried to moderate the violence of the revolt, yet had necessarily been compelled by their own convictions to approve the Italian resistance to the impious wishes of the iconoclastic emperors; and such armed resistance must have tended to neutralise the tradition of St Gregory the Great. The transference of the empire from the Byzantine to the Frank, and the fact that the Western ecclesiastics had in the ninth century to do, not with the civilised chiefs of the ancient Roman civilisation, but with the half-barbarous Teutonic kings and emperors, must have exercised an even greater influence upon the temper of the great churchmen. They might express themselves in the most deferential terms to their rulers, but actually they were civilised men,—at least they had the tradition of civilisation,—while the rulers were for the most part uneducated and half-barbarous. It must have become very difficult for the churchmen to think of an unqualified obedience to men who in some very important matters were their inferiors. And there was yet a third circumstance which profoundly affected the political conceptions of churchmen and laymen alike. They might, as Christians, desire to be faithful to the traditions of the Christian Fathers, like Gregory the Great, but actually and necessarily they were still more powerfully influenced by the traditions of their own race. We shall have to examine the Teutonic tradition of Government presently in more detail: for the moment it is enough to say that the Teutonic tradition knew nothing of an unlimited authority in the ruler, but a great deal of the relation of the king to his great or wise men, and even to the nation as a whole; and for the most part the churchmen outside of Italy, and even to a large extent in Italy, were men of the Teutonic race or tradition.

The situation of the ninth century was wholly different from that of the sixth; and while, as we have seen, the writers of the ninth century, in their anxiety to be faithful to the tradition of the earlier Christian writers, constantly repeat such phrases as these of St Gregory the Great, they are also continually and quite clearly governed by other traditions and give expression to other principles. In this and the following chapters we have to consider these. We begin by examining their conceptions of the relation of government and justice. We have seen that the writers of the ninth century look upon the king as the representative of God, and sometimes speak as though this were true, whether he is good or bad, just or unjust. This does not, however, mean that they are blind to the difference between the just king and the unjust, whom they do not hesitate to call a tyrant. It is true that some of the Fathers had spoken as though this made no difference in the duty of the subject, and we have seen that St Augustine actually omits the characteristic of justice from his definition of the State; but,

as we have also seen, other Fathers represent another tendency, and the influence of one of these is very strong in the ninth century.

We have in a previous chapter mentioned the definitions of *civitas* and *populus* given by St Isidore of Seville. Hrabanus Maurus reproduces them, and it is perhaps worth noticing that in doing this he follows St Isidore in his reproduction of Cicero's definition of the State as against St Augustine. We cannot, indeed, argue from this that he intends to repudiate St Augustine's definition; but the fact may serve to illustrate what we have already said, that St Augustine's definition of the State does not seem to have exercised any considerable influence in the Middle Ages.

We have also in a previous chapter mentioned the definition of the king given by St Isidore of Seville. Kings, he says, are so called from ruling, but he does not rule who does not correct: if the ruler acts rightly, he will keep the name of king; if he transgresses, he will lose it. There is an ancient proverb, "Thou shalt be king, if thou doest rightly; if not, thou shalt not be king." His definition is constantly referred to by the writers of the ninth century. Hrabanus Maurus reproduces it verbatim in his 'De Universo', and it is more or less exactly cited by Sedulius Scotus, by Jonas of Orleans, by Cathulfus, and by Hincmar of Rheims. In itself this definition might mean much or little, but it obtains a very considerable significance when we observe again how sharply the "king is contrasted with the "tyrant". St Isidore, in the same place where he defines the meaning of "king", also defines the meaning of "tyrant." This name, he says, had formerly been used as equivalent to that of king, but in later time was used to denote a wicked and cruel ruler. This definition, again, is reproduced exactly by Hrabanus Maurus, less precisely by Jonas of Orleans; and Hincmar of Rheims seems to have it in his mind when he says that without clemency, patience, and love a man may become a tyrant, but cannot well attain to the kingdom. St Isidore of Seville adds to his definition of the king the observation that the principal royal virtues are *justitia* and *pietas*. Hrabanus Maurus and Hincmar of Rheims reproduce his phrase.

The ninth-century writers are also strongly influenced by a work of uncertain date, which some of them seem to have regarded as being by St Cyprian, though it was also at various times attributed to Origen, St Augustine, or other Fathers. It seems clear that the work is of a much later time than any of these, and it has been contended that it belongs to the seventh century. This treatise, 'De Duodecim Abusivis Saeculi', which is of much value and interest throughout as a criticism of the condition of society in the period, whatever that may precisely be, to which it belongs, has one chapter which is especially important in relation to the conception of justice in the State. The ninth chapter deals with the unjust king, and declares that the king must not be unjust, but must restrain the unjust: it is the proper purpose of his office to rule, but how can he rule and correct others unless he first corrects himself? Justice in the king means to oppress no man unjustly, to judge righteously between men, to defend the weak, to punish the wicked, to protect the Church, to put just rulers over the kingdom, to live in God and the Catholic faith, and to keep his children from evil. The king who does not rule according to these principles will bring many evils and disasters on his country and his descendants. The king should remember that as he has the greatest station among men, so also he will suffer the greatest punishment if he does not do justice. This chapter is quoted by Jonas of Orleans and by Hincmar of Rheims in their treatises dealing with the nature of the royal authority.

The formal treatises on kingship in the ninth century are indeed very largely made up of admonitions to the king to follow after justice and mercy, to seek wisdom and to fear God. Smaragdus bids the king to love justice and judgment, the royal way trodden in older times by former kings. He admonishes him to do justice to the poor and the orphan, if he desire that God should establish his throne. Alcuin in his letters continually urges upon the various rulers to whom these are addressed the same principle, that their chief duty is to do justice and mercy to their people. Sedulius Scotus, in his treatise on the nature of the Christian ruler, lays much stress on the same points. He and Cathulfus have a very interesting enumeration of the eight qualities which are the

most firm supports of a just king. Jonas of Orleans, as we have already mentioned, cites St Isidore's definition of the king and the tyrant, and also the ninth chapter of the treatise 'De Duodecim Abusivis Saculi', and himself urges with much vigour on the king the duty of doing justice. The king's chief duty, he says, is to govern the people of God with equity and justice, and to strive that they may have peace and concord. He is to prevent all injustice and to appoint fit persons to administer the State under him, for he will be responsible if they are unjust. Such ministers must learn that the people of Christ are by nature their equals, and that they must rule them justly, and not lord it over them or ill-treat them, thinking that they belong to them, or are put under them for the glory of the rulers. Such notions belong to tyranny and unjust power, and not to justice.

In another passage of the same treatise Jonas urges that justice preserves a kingdom, while injustice causes its ruin; and he prefixes to another chapter, in which he urges on subjects the religious obligations of obedience to the king, the observation that the duty of the royal office is to care for the wellbeing of the subjects, and that therefore, as they desire that the king should aid them, they should obey and serve him. Hincmar of Rheims, as we have already seen, cites St Isidore's definition of the king and the tyrant, and the treatise 'De Duodecim Abusivis Saeculi' on the unjust king, and he repeats Jonas of Orleans' observations on the duty of kings' ministers.

We find Jonas' statement of the nature of the true king and of his chief duties reproduced in the address presented by the bishops to Lewis the Pious in the year 829. In this they first cite passages from the writings of St Isidore of Seville, St Gregory the Great, and Fulgentius of Ruspe, to illustrate the difference between the tyrant and the king, and the true character of the king, and then urge upon him to remember that his chief duty is to govern with equity and justice, to defend Churches and the servants of God, the widows, orphans, and all other poor and needy people. His duty is to prevent all injustice, if possible, and if it does occur, to put it down. He should therefore be always ready himself to hear the cause of the poor, lest any of his ministers should act unjustly, or suffer the poor to be oppressed. Men of every rank must remember that if they will have to answer for every idle word, much more will they have to give account to God for the office which He has intrusted to them.

Hincmar of Rheims and Sedulius Scotus seem to express these conceptions in stronger terms than any others. Hincmar quotes, without comment indeed, but no great comment was needed by him, a phrase of St Augustine's to which we have referred in an earlier chapter: "Remota itaque justitia, quid sint regna nisi magna latrocinia." And Sedulius Scotus, warning evil rulers of the ruin which impends over them, of the judgment of God which awaits them both in this world and the next, exclaims: "What are impious kings but the greater robbers of the earth, fierce as lions, ravening like wolves; but they are great to-day and perish to-morrow, and of them God has said, 'They reigned, but not by Me; they arose as princes, but I knew it not'." The evil ruler or tyrant is no true king; he is only, as Cicero indeed had called him, a wild beast, the most terrible and loathsome known to the world.

The writers of the ninth century, then, while they reproduce the phrases of St Gregory the Great with regard to the divine authority of the ruler, and speak at times as though he must under all circumstances be obeyed as the representative of God, are also clearly and strongly influenced by other considerations, partly founded, no doubt, upon the authority of other Fathers like St Isidore of Seville, but also in large measure related to their own experience and traditions. They no doubt felt really and profoundly the truth which lay behind St Gregory's phrases, the truth that authority in the State is sacred; they had ample experience of the consequences of discord and civil strife. But, on the other hand, they had no mind to submit to injustice or tyranny; they were probably clearly enough conscious of the fact that many of the kings whom they had known were capricious and fallible rulers.

We must turn to the actual conditions of the government of the time, not to discuss the intricacies of the Frankish or other Teutonic constitutions, but that we may recognise some of the principles which lay behind the constitutional machinery and practice of those times, and that we may more completely understand the forces which were moulding the theory of the State.

CHAPTER XIX.
THE KING AND THE LAW.

We have seen that the writers of the ninth century look upon justice as something essential to the character of the true ruler. Without justice he is a tyrant and no king. The conception of justice was indeed no more clear in the ninth century than in the present day, or in ancient times; but we think that justice, relatively to the ruler, had a meaning in the ninth century whose importance is very great indeed. No king is just who does not observe and respect the law; the law is at least one standard of justice, clear, distinct, constantly appealed to.

We have seen in earlier chapters that in the theory of the Roman jurists the emperor is the source of law. Justinian even speaks of him as the sole "legislator". It is true that, as we have also seen, this power is his only because the Roman people have chosen to confer their authority upon him; the people is the only ultimate source of law. But still the emperor is the actual source of law. And the emperor is "legibus solutus," a phrase whose significance it is not easy to define. It may indeed be doubted whether it can be clearly defined. Perhaps it only expresses a conception whose history can be traced in such a constitutional form as that of the dispensing power of the English Crown,—a power which seems to represent the consciousness present, however vaguely, to any more developed reflection upon law and the State, that there must be a power in the State itself which can, if necessary, interfere to prevent the harsh or inequitable operation of the law in particular cases; a power which, being in its nature administrative rather than legislative, must be intrusted to the head of the State as administrator. It is the influence, perhaps, partly of this consciousness, partly of the revived study of the Roman jurisprudence, which leads the more systematic political thinkers of the thirteenth century like St Thomas Aquinas to observe that the prince cannot properly be said to be under the law, for he must have the power of dispensing with it.

In the ninth century, however, the king is not the sole source of law, but only has his part in the national relation to it, and he is not usually thought of as above the law, or outside of it, but as bound to carry it out. The ninth-century theory of the relation of the king to justice may be reasonably connected with the theory of his relation to law. Lothair, Lewis, and Charles, at their meeting at Mersen in 851, put out a declaration promising their faithful subjects that for the future they would not condemn, or dishonour, or oppress any man against the law and justice. And when Lewis at Coblentz in 860 repeats the promises of Mersen, he adds an emphatic assurance that his faithful subjects shall enjoy the ancient law, and that all shall receive justice and law. Justice, when translated into constitutional tradition, means, in the first place, the observation of the national law: the king is just when he sees that this is carried out, unjust when he acts in contradiction to it.

In the treatise of Hincmar of Rheims on the divorce of Lothair and Tetburga we find a formal discussion of the nature and source of the royal authority, to which we shall have to return later, for it contains much which is important. For the moment we look at it only to see how he deals with the relation of the king to law. It is contended, he says, by some wise men that the prince is a king, and that the king is subject to the laws and judgment of none save God alone. This is true in one sense, he replies—that is, if he is a true king, for the king is so called from ruling; and if he governs himself according to God's will, and directs the good into the right way, and corrects the wicked so as to drive them from the evil way to the good and right one, then he is a king indeed, and subject to the laws and judgments of none save God. Whosoever, then, is a king in the true sense, is not subject to law, for law is set not for the just but for the unjust, for wicked men and for sinners; and he who rules himself and others according to the fruits of the spirit is not subject to law, for "against such there is no law." But the adulterer, murderer, unjust man, the ravisher, and the man guilty of other vices, whoever he may be, will be judged by the priest. Hincmar's treatment of the question seems to

indicate that he was in some measure conscious of the difficulty of defining in precise terms the relation of the king to law; but it is fairly explicit as indicating that whatever might be the relation of the true ruler to the law which he is justly administering, the evil ruler who sets at nought the moral law is liable to correction at least by the Church. We shall have to return to this particular aspect of the question later.

If in this passage Hincmar seems to express himself in the most cautious fashion, we find him speaking in more unqualified terms in other places on the principle that it is the duty of the ruler to observe and obey the law. In another part of the same treatise he quotes a phrase of St Ambrose which we have already discussed, "Leges enim imperator fert, quas primus ipse custodiat", and warns the king that if he breaks the laws he may find himself condemned by the apostle's words, "Thou that preachest a man should not steal, dost thou steal?" We have considered the meaning which may be attached to this phrase as it is used by St Ambrose; Hincmar of Rheims' comment on it makes it fairly clear that he understands it in a somewhat strict sense. Hincmar also quotes the passage from St Augustine's treatise 'De Vera Religione' which we have already discussed: the citation occurs as part of a discussion of the action of Charles the Bald in summoning Hincmar, Bishop of Laon, to appear before a secular court, and passing some sort of judgment on him in his absence. Hincmar argues that this action is contrary not only to the canons, but also to laws of the emperors from Constantine downwards, and to the promises made by Charles himself to observe the canons. Therefore he concludes, in a phrase of St Gregory the Great, "It must be so, that whatever is contrary to the laws has no force", and then quotes St Augustine as saying that when men make laws they judge what is good, but when they have once been made, the magistrate cannot judge the laws, but can only act in accordance with them. It is clear that Hincmar uses St Augustine's phrase to confirm his opinion that the king cannot violate the laws which had long been in force as to the relation of the ecclesiastical and secular courts. In the 'De Regis Persona' Hincmar quotes the first part of the same saying of St Augustine, and then concludes that just laws which have been promulgated must be enforced by the prince.

But the strongest and most noteworthy statement of the same view is to be found in Hincmar's treatise called 'De Ordine Palatii'. In the eighth chapter of this work we have an exceedingly important statement of the writer's conception of the relation of the king to the law, and of the source of the authority of the latter. He begins by a reference to the rule that no priest must be ignorant of the canons, and then proceeds to say that in like manner the sacred laws—that is, the Roman laws in the 'Lex Romana Visigothorum'—decree that no one may be ignorant of the law or despise its decrees. This includes persons of every worldly rank. Kings, therefore, and the ministers of the commonwealth, have laws by which they must rule the inhabitants of every province; they have the capitularies of the Christian kings, their ancestors, which were lawfully promulgated with the universal consent of their faithful subjects. And he then again quotes St Augustine's sentence that men judge the laws when they make them, but when they are once made, the judge cannot judge them, but must act in accordance with them. We cannot here mistake Hincmar's meaning; the king's duty is to govern according to the laws; he is no more entitled than any private person to ignore the law or to violate it. His duty is to carry out the law, not to act contrary to it.

In Hincmar's words we find not only a strong statement of the normal subordination of the prince to the law, but a suggestion of one important cause of this subordination. We think that the words which describe the "capitula" which the king is to carry out, as having been made *generali consensu fidelium*, are extremely significant, and indicate one of the strongest grounds for Hincmar's judgment that he must keep the law. The law is not merely his law, nor is it merely by his will that it has been made. So far as laws have been made, they proceed from the whole State, they have been made with the general consent of the faithful subjects of the king. It requires but little reflection to observe how far this conception is from that of the Roman jurists. The relation of the Roman

emperor to laws when promulgated may be a little obscure, perhaps a little doubtful. Ulpian's "legibus solutus", and Theodosius' and Valentinian's "Digna vox majestate regnantis legibus alligatum se principem profiteri," may represent two different tendencies of thought, but at least the emperor was normally in his own person the direct source of law. To the ninth-century writers the king had his part in making law, so far as law is made, hut he has only one part out of many. Other voices have been heard besides his, the consent of others has to be given before anything can become the national law. This conception is one of the very greatest importance in the development of mediaeval political thought, and we must proceed to examine the legislation of the ninth century to make ourselves quite clear upon the matter.

We must observe in passing that the legal system of the ninth century has a very different character from that which we should attribute to modern law. The great mass of the law of the early Middle Ages was not, so far as the consciousness of men went, made at all. It was a part of the national or tribal life ; it had grown with the tribe, changing, no doubt, but the people or tribe were hardly conscious of the changes. Such traditional law is contained in most of the early mediaeval codes, and its authority was like that of nature. But in the ninth century there was already developed, perhaps prematurely, the conception that law needs deliberate adaptation, or at least addition, and therefore, while much of the legislation of the time is nothing but the formal reiteration of what is supposed to be immemorial custom, other parts of it represent conscious and deliberate attempts to improve or add to the traditional customs of the nation.

There are three bodies of secular law to which the ruler of the Teutonic States was related: first, the traditional tribal law, which varied considerably within such extended dominions as those of the Frankish Empire; secondly, the legislation of the ancient Roman Empire, which obtained in many districts, mainly in the form of different editions of the Theodosian code, a system of laws over which the Frankish king or emperor had little control, which are usually referred to by the writers of this time as the "leges sacrae" ; and, thirdly, the actual new laws, or additions to old laws, which the king or emperor might issue, but only with the consent and counsel of some or all of his subjects.

The relation of the king or emperor of the ninth century to the secular law is thus very different from that of the Roman emperors of antiquity. We are only repeating the judgment of the great majority of historical scholars, and would refer to the work of Stubbs and Waitz among the older writers, and to Kichter and Kohl and Viollet among the more recent. It is true that Fustel de Coulanges has argued with much learning and ingenuity against this view, or at least in favour of a considerable modification of it, but we do not think that he has succeeded in establishing his case. The matter is, however, of such great importance in the history of the development of political theory that we think it well to illustrate it briefly from the legal documents of the ninth century.

We may begin by observing the method of promulgation of a series of "capitula", to be added to the "leges", issued by Charles the Great in the year 803. One manuscript contains an account of the method of promulgating these in Paris. They were sent to Stephen the Count, who was to cause them to be read in the "mallus publicus" in the presence of all the "scabinei". When this had been done, and they all agreed that they would for the future observe the laws, the "scabinei", bishops, abbots, and counts, affixed their signatures. This statement, it is true, only refers to one place, but a comparison with sect. 19 of the "Capitulare Missorum" of the same year makes it fairly plain that something like this was the normal mode of promulgating these new laws. We learn that the "missi" were to inquire of the "populus" about the "capitula" which were to be added to the laws, and to see that, when all had consented, their signature or other authentication was appended to the "capitula."

We can now compare with this the formula with which Charles the Great issues the "Capitulare Aquisgranense". Charles does this with the consent of his bishops, abbots, counts, and all his faithful subjects. We find yet another very noteworthy illustration of this conception of the mode of public administration and legislation in the 'Ordinatio Imperii' of Lewis the Pious in 817, the

document which provides for the partition of his dominions between his sons. These regulations are made in a sacred assembly and "generalitas" of the whole people, held after the wonted manner. After a fast of three days his eldest son (Lothair) was elected by Lewis and the whole people to be his colleague in the empire. Then with the common counsel it was decided to give the younger sons, Pippin and Lewis, the title of kings, and to allot to them certain lands by definite "capitula". These were considered and then confirmed by Lewis and all his faithful subjects, so that what was done by all might by all be held inviolable. (This last phrase is perhaps especially worthy of notice.) We may compare with these the terms of the "Proemium" to the "Capitularia tarn Ecclesiastica quam Mundana" of 818, 819; sect. 29 of the "Capitulare Ecclesiasticum"; the phrases of the "Cap. Legi Salicae Addita" of 819; and the "Cap. de Functionibus Publicis" of 820.

But it is hardly necessary to multiply citations to establish a judgment which is almost universally accepted as to the constitutional theory of the Teutonic States,—namely, that the king does not make laws by his own authority, but requires the consent and advice of his wise men, and, in some more or less vague sense, of the whole nation.2 It is this tradition or theory which at last finds something like a formal and explicit definition in the famous phrase of the "Edictum Pistense" of 864, "Quoniam lex consensu populi et constitutione regis fit,"— a phrase which, no doubt, like so many of the obiter dicta of the Middle Ages, must not be interpreted under the terms of what we consider our clear-cut modern conceptions, but which is full of significance for the development of the theory of law, when it is taken in its proper connection with the general tendencies of the ninth century and of the Teutonic traditions.

This phrase represents the common tradition of the Teutonic States, and we can see no reason to think that the transformation of the Frankish kingdom into the empire made any change whatever in these constitutional conceptions. We see no reason to think that even Charles the Great dreamed of claiming the position of the ancient Roman emperors as the sole legislator. It is true, indeed, that Charles the Great and Pippin issue laws in Italy under another form than that which is customary elsewhere, and that in these there is usually no mention of the council and consent of the great men, but we think that this must be understood as arising out of their position in Lombardy as conquerors.

We think, then, that the political theory of the ninth century regarded the ruler as being bound by the laws of the nation, not as superior to them. The king had his part in making and promulgating law, but others had a part also, and in some vague sense even the whole nation. We think that this is clear, but it is no doubt also true to say that the historical circumstances of the Frankish States in the ninth century probably tended to give this tradition rather more reality than it may have had before, or in other Teutonic States. The history of the century is the history of a perpetual series of revolts and civil wars, and as a result of these the royal authority was certainly dwindling, so that as the century advances we perhaps find a more and more frank assertion of the limited and even conditional nature of the royal authority.

CHAPTER XX.
THE THEORY OF THE SOURCE AND CONDITIONS OF AUTHORITY IN THE STATE.

We have so far considered the source of the authority of law, and its relation to the king or other ruler. We must now examine the immediate source of the authority of the ruler.

It would be a grave mistake, we think, to conceive of the ninth-century writers as having any such definite theory of the delegation of the popular authority to one man as that which obtained among the Roman Jurists. The theory of the ninth century is much vaguer than this: the divine appointment, the custom of hereditary succession, the election by the great men and the people,—all these elements go to constitute the conception of a legitimate claim to the throne. In a document concerning the election of Charles the Bald to the kingdom of the Eastern Franks in 869 we have a good statement of all the grounds of succession—the right of the legitimate heir, the appointment of God, and the election of the nation.

The custom of hereditary succession—that is, of succession within one family—was among the Franks, as generally among the Teutonic tribes, accepted as normal; but it is also true that among the Franks as elsewhere, in order that a succession should be valid, it should be confirmed by some national election or recognition. We are not here concerned with the constitutional question of the organisation of the council of the great men or wise men of the kingdom, —that their election was in some sense considered as the election of the nation will hardly be doubted, we think, by any one. The question in which we are now interested is the fact of the elective character of the monarchy of the ninth century rather than its method.

In order to make the matter clear we think it is desirable to consider certain elections as illustrating this principle. There is, indeed, one instance of the appointment of rulers in the Frankish Empire of the ninth century which might seem at first sight to furnish an example of a strictly personal appointment without the sanction of the nation. This is to be found in the statement of the division of his dominions by Charles the Great in 806. In this he makes no mention of the counsel or consent of any one, but seems to determine all the questions concerning the appointment of his sons as colleagues to himself during his lifetime, and the division of his dominions among them after his death, by his own will and authority. It should, however, be observed that Einhard in his Annuals for the year 806 relates how this settlement was made by Charles at a meeting of the *primores* and *optimates* of the Franks, and that it was confirmed by the oath of the Frankish *optimates* and sent to Pope Leo to be subscribed by his hand. It is perhaps also worth noting that even if Charles might be thought to claim the right of nominating his successor, he clearly enough conceives of a return, after his death, to the custom of election. In the fifth clause of the "Divisio Regnorum" he provides that if one of his sons should die leaving a son, he should, if the people elect him, reign in his father's place. If, however, it should be contended that the relation of the action of Charles the Great to the principle of election is a little ambiguous, there can be no doubt about the matter when we turn to the successors of Charles the Great.

We have already considered the settlement of the empire in 817 by Lewis the Pious, and we need only here draw attention to the very explicit terms in which is expressed the consent of the whole people to the election of Lothair, the eldest son, as colleague to his father in the empire, and to the elevation of the younger sons to the dignity and title of kings and to authority in the several portions of the empire, and to the provision for the election by the people of their successors.

We pass on to the later part of the century, and we find not only that the principle of election is very clearly retained, but that we can trace the gradual development of the custom of stating the conditions on which the elections are made. In the documents concerning the succession of Charles

the Bald to the kingdom of Italy in 876 we have a very clear statement of the election by the bishops, abbots, counts, and others, and we have also the record of the mutual promises made by subjects and king to each other. The bishops and counts swear obedience, counsel, help, and fidelity, while Charles swears to give law, justice, honour, and mercy to all.

When Charles the Bald died Lewis the Stammerer finally came to the throne, with the consent of the bishops, the abbots, the primores of the kingdom, and others, and was consecrated and crowned by Hincmar, Archbishop of Bheims. We have the promises which he made at the time, and in these we find both a very frank recognition of the fact that he is appointed king by the mercy of God and the election of the people, and very emphatic assurances that he will observe the ecclesiastical rules and the national laws.

We may compare the tone in which Hincmar addresses Lewis III. While protesting his humility, Hincmar says that he may very well say to him (the king) that it was not he who elected Hincmar to his office in the Church, but Hincmar and his colleagues, with the other faithful subjects of God and his forefathers, who elected him to be ruler in the kingdom, on the condition of his keeping the laws.

If we find such strong pledges of good government given by the kings and emperors of the regular line, we need hardly be surprised to find that these become almost stronger in the case of the election of those who were not so near the direct succession. In the documents concerning the election of Boso to the kingdom of Arles in 879, we find something very like a formal statement of conditions of election. The synod or assembly sends to Boso inquiring whether he will grant law and justice to all his subjects, great and small, and will listen to all intercession, and freely hearken to all good counsel, seeking rather to make himself useful than merely to be chief. Boso replies that he is but little equal to such a charge as that offered, and would have refused it had they not been unanimous, and promises that he will maintain law and justice, and will strive to follow the example of the former good princes, and to maintain equity both to the clergy and to his other faithful men. We feel that this is something like a compact between the ruler about to be elected and his subjects.

This is almost more clearly still expressed in the capitularies of the election of Guido as King of Italy by the bishops met at Pavia in 889. The formal document of the election recalls the disastrous confusions that had followed the death of the Emperor Charles, and then proceeds to state how they have met at Pavia to consider the common welfare of the kingdom, and have elected Guido, inasmuch as the divine aid has enabled him to triumph over his enemies, and inasmuch as he promises to love and honour the holy Roman Church and to obey the ecclesiastical laws, and to maintain their own laws to all his subjects, to put down rapine and establish and maintain peace throughout his kingdom. They report that for all these and many other indications of his goodwill they have elected him to the kingdom.

It is, however, not only at the time of the election or appointment of a king that we can see something very like a bargain or agreement between people and ruler. More than once we find the emperors or kings trying to bring back confidence and order by solemn assurances that they will maintain law and justice if their subjects on their side will render them true help and obedience. In 851 Lothair, Lewis, and Charles met at Mersen, and issued a document in which they assure their faithful subjects of all ranks and conditions that they may be fully secure that for the future they will not condemn or dishonour or oppress any one in violation of law and justice or right authority and reason, and that they will, with the common council of their faithful subjects, set forward the restoration of holy Church, and the whole state of the kingdom, in the assurance that their subjects on their part will be faithful and obedient, and true helpers to them, with such counsel and aid as is due from every subject to his prince. This assurance or agreement we find repeated at Coblentz in 860 in almost identical terms, and again by Charles the Bald in the “Capitula Pistensia” of 869. We have also the form in which these promises were issued after the meeting at Coblentz by Lewis, and it is

perhaps worthwhile looking at this, as it exhibits almost more clearly the character of an agreement or mutual promise.

In the "Capitula Pistensia" of 862 we have another statement of the same principle of mutual obligation. These begin with a very solemn acknowledgment of the faults which have brought the present distress upon the country: the king laments that by his own evil deeds he has driven away the Holy Spirit, which was given to him by the imposition of hands of the bishops at his consecration. Then there follows a passage, which we have already quoted, on the divine nature and authority of government on earth, and this again is followed by an exhortation to all to strive together for justice; and the capitulary concludes by saying that by common consent it has been decreed to sign this, remembering that as all men of all ranks expect that the king shall maintain their proper and lawful rights, so all men of all ranks must observe the proper and lawful honour and obedience due to the king.

We have seen that the principle of the joint action of the king and the nation in making law finds a formal expression in the "Edictum Pistense"; we may find a good illustration of the significance of the promises of justice and obedience on the part of kings and subjects in another document of this time, the "Capitula ad Francos et Aquitanos Missa de Carisiaco" of 856. A large part of his kingdom was in revolt against Charles the Bald, and these Capitula were drawn up with the view of pacifying the revolters, and present us with a very clear statement of the conception that just as his subjects were bound by certain obligations to the king, so he on his part was bound by very distinct obligations to them: they even speak of these mutual obligations as constituting a pactum. What is more than this, the capitula are drawn in the form of an address from the loyal subjects of Charles to the revolters, and while they urge them to come back to their allegiance, and intimate plainly that they will in the future compel obedience to the just judgments of the king, on the other hand they intimate just as clearly that if the king, "juxta humanam fragilitatem," should do anything contrary to the *pactum*, they will, reverently and honourably, admonish him of his duty; and they assure the rebels that if, when he is thus admonished, he should wish to do injustice, the king will be unable to carry out his will. The document exhibits not only the conception of a mutual agreement made, at his election or otherwise, between the king and the people, but also the conception that the subjects have the same right to compel the king to observe his agreement as he has to compel them to observe theirs.

The circumstances of the ninth century tended thus to favour the development of the conception that the ruler holds his place in virtue of the election of the nation, and of his fulfilment of the promises on which that election was based; and there were not wanting in the century circumstances which tended towards the further conclusion, that if the king failed to discharge the obligations which he had undertaken, he might not improperly be deposed. The deposition of the unhappy Lewis the Pious serves to illustrate this tendency, and probably also helped materially to develop it. We cannot here discuss either the general circumstances or the constitutional conditions of the deposition or abdication of Lewis the Pious. But it is for our purpose extremely important to observe the terms in which the deposition of Lewis is alluded to. It was at Compiegne in the year 833 that Lewis was compelled to abdicate, and the bishops, there assembled, published a statement in which they set forth the great faults that Lewis had committed,—how he had neglected his charge, and done many things displeasing to God and men; and they relate how they had exhorted him to repentance, inasmuch as he had been deprived of his earthly power in accordance with the counsel of God and the ecclesiastical authority. In the next chapter we must consider the significance of this reference to the action of the ecclesiastical authority in the deposition of Lewis. In the meanwhile we are only concerned to observe that the bishops look upon the deposition as lawful.

It is in this same sense that Hincmar of Rheims appears to refer to the subject in his treatise on the divorce of Lothair and Tetburga, in a passage to which we have already referred. He is arguing

against those who maintained that the king was subject to no laws or judgments, and pointing out that kings like David were rebuked by the prophets, Theodosius by St Ambrose, goes on to say that in his own time the pious Emperor Lewis had been cast down from his kingship, and was restored to it "post satisfactionem" by the bishops with the consent of the people. Hincmar seems to mean that the deposition had been unwise, but he does not suggest that in itself there was anything improper in the action; indeed the general context would suggest that he regarded such action as being under certain circumstances proper and right.

It is true that in that letter or treatise of Hrabanus Maurus which we have already cited, Hrabanus, referring to the deposition of Lewis, speaks very emphatically about the honour due from sons to their parents, and the honour and obedience which all men are to give to the royal authority, and illustrates the right attitude of the subject by the classical example of David and Saul, and from more recent historical examples shows the judgment which overtakes those who rise against their legitimate princes. We have already cited the letter as illustrating the persistence of the characteristic mode of thought of Gregory the Great in the ninth century, and there is nothing to surprise us in the fact that those who disapproved of the revolt against Lewis the Pious should have appealed to these principles.

Perhaps the strongest illustration of the tendency to conceive of the deposition of the king as being under certain circumstances justifiable is to be found in a document or proclamation issued in 859 by Charles the Bald against those who wished to depose him. In this document, after appealing to his claim of hereditary succession from the Emperor Lewis, he argues that he was elected with the will, consent, and acclamation of the bishops and other faithful men of the kingdom, and was consecrated, anointed, and crowned by Wenilo, Bishop of Orleans, and that from the office in which he was then placed he cannot be cast out, at least without the judgment of the bishops by whom he was then consecrated. "They are," he says, "the thrones of God," among whom God sits, and by whom he decrees judgments, and to their paternal correction and chastisement he is willing to submit, and does submit.

We shall have to consider this passage again in discussing the relation of the ecclesiastical and secular powers, but in the meanwhile it is worthy of note, as indicating in a very forcible way that the deposition of a king, who was held to have failed to discharge his obligations, was a thing not wholly improper in the minds of the men of the ninth century. We may very well recall those phrases concerning the distinction between the king and the tyrant which we considered in a previous chapter, and we shall feel that the conception of the character of the king, as depending upon his respecting and maintaining justice, was not a mere piece of abstract sentiment, but was tending to have a more or less practical and effective influence on public life.

CHAPTER XXI
THE RELATION OF THE AUTHORITIES OF CHURCH AND STATE.

We must now resume the consideration of the theory of the relations of the secular and ecclesiastical authorities. No student of the history of the Middle Ages will doubt that the theoretical and actual relations of the two great powers in society continually exercised a very strong influence upon the theory of the State and the theory of the origin and nature of political authority.

To the political theorists of the ninth century, however great their reverence for the king and the secular authority, there is obviously always present the consideration that alongside of the law of the State there stands a law which the nation has not made, a law which is more majestic and authoritative than that of any secular society—the law of the Christian Church; and that alongside of the secular organisation and institutions there stand the organisation and institutions of the Church. If the ruler is bound to respect the law of the nation, much more is he bound to respect and obey the law of the Church; and while the great organisation of the Catholic Church may admit him to some share in its councils, may look to him for assistance in enforcing its decrees, yet the Church is not only independent of him in religion but looks upon him as its subject in spiritual matters.

We have seen that the patristic theory of the relation of the two powers, the ecclesiastical and the civil, finds its completest statement and definition in the letters and tractates of Gelasius I. These may also be said to furnish us with the best starting-point for examining the theory of the ninth century. The bishops of the empire, in a long and important statement on the condition of Church and State and the nature of ecclesiastical and civil authority, addressed in the year 829 to the Emperor Lewis the Pious, quote and comment on the words of Gelasius' twelfth letter, in which he had said that there are two authorities by which alone all the world is governed—the sacred authority of the bishop and the power of the sovereign. The same passage is quoted by Jonas of Orleans in the first chapter of his work 'De Institutione Regia', while Hincmar of Rheims cites the words of this letter and also those of Gelasius' fourth tractate.

It is important to observe not only the fact that these passages are quoted, but the character of the comments which are made on them. The bishops in 829 preface their quotation by the statement that the body of the Church of God is divided chiefly between two exalted persons, the priestly and the royal. Jonas of Orleans puts the same view more clearly when he tells us that all faithful men should know that the universal Church is the body of Christ, and that Christ is the head of the body, and in this body there are two persons of chief authority, the priest and the king. While Gelasius thinks of these two authorities as existing in the world, the bishops and Jonas conceive of them as being both within the Church.

It is also worth noting that while the bishops simply quote the words of Gelasius, "In quibus tanto gravius pondus est sacerdotum", Jonas, in his introduction, calls the priestly person *praestantior*, and in applying this conception he urges that the priest must always anxiously care for the salvation of the king and carefully admonish him lest he should turn aside from the will of God or neglect the charge which God has committed to him. While Gelasius, that is, insists only upon the obedience which the king should render to the priests in religious matters, and the priest to the king in secular matters, Jonas also thinks that the priest is in some measure responsible to see that the king does his duty even in secular affairs.

Hincmar embodies large parts of the tenth letter and of the fourth tractate of Gelasius. Christ is the only person who was both king and priest, and although there is a sense in which Christians may be called a royal and priestly race, yet Christ, mindful of the infirmity of human nature, has allotted to each authority its own duties, so that Christian kings require the bishops for eternal life, and the

bishops require the king for temporal things, and therefore the clergy should keep themselves clear of secular business, and the secular person should not interfere in spiritual matters. So far Hincmar does little more than follow Gelasius, but his development of the principle "Tanto gravius est pondus sacerdotum," &c., is different and noteworthy. The burden of the priest is greater, because he will have to give account, in the judgment, even for kings, and the dignity of the bishop is greater than that of the king, because kings are consecrated to their office by the bishop, while the bishop cannot be consecrated by kings.

In three important points, then, we see that some, ninth-century writers have developed the position of Gelasius,—the first, that both the secular and the spiritual powers are within the Church; the second, that in some measure the priest is responsible to see that the secular ruler does his duty; and the third, that the dignity of the ecclesiastical person is greater, for it is by him that the king is consecrated: and each of these principles has importance in the ninth-century conception of the relation between the spiritual and the temporal powers. In the main it is clear that the ninth century simply carries on from the sixth the principle of the two authorities in society—two authorities which are theoretically independent of each other in their own spheres; but the experience of the ninth century tended to bring out the difficulties of this position, and to develop the tendency towards the assertion of the priority of one or other of the two. The conditions of the time are indeed so complex that we could easily quote phrases from the legal documents and the general authors of the period to support almost any theory of the relations of the two powers. It would be easy to produce evidence to show that the temporal power was really superior even in ecclesiastical matters; to show that the consent of the king or emperor was necessary for ecclesiastical action, and that it was the secular power which controlled all ecclesiastical appointments. On the other hand, it would be quite as easy to produce evidence to show that the Church was actually superior to the State; that the king was absolutely under the canonical law, liable to excommunication like any private person; that it was the Church which really conferred the royal authority, and that the Church could take it away again.

A century or two later we shall find views of this kind set out in open contradiction to each other; we shall find Europe filled with the clamour of the great struggle for supremacy between the Church and the Empire. But it is the characteristic of the ninth century that these apparently divergent tendencies of thought can often be traced in the same person; that we find the same person using language which in later times would mark him clearly as a papalist, and the next moment using phrases which became the catchwords of the imperialist.

It is possible, no doubt, to maintain that in the early years of the ninth century the authority of the State relatively to the Church was at its highest point, and that the opposed conception develops throughout the century till it culminates in the pseudo-Isidorian literature. But we think that the safest judgment which we can form on the whole character of the ninth century is this, that men were convinced that each power had its own appropriate sphere, but that they were also keenly alive to the fact that in practical life the two spheres intersected, and that no general principle could enable them to determine, with regard to many questions, what exactly was the sphere of the State and what the sphere of the Church.

We may find a very good illustration of the complexity of the situation and the ambiguities of theory in the position of that writer to whom we have already so often referred, Sedulius Scotus, whose work seems to belong to the middle of the century. He does not seem to have had the same practical experience of affairs as Hincmar of Rheims, and there are therefore some points on which Hincmar is his superior; but he shows a considerable power of putting together his views, so that, in spite of a certain incoherence of detail, they really form an organic whole. At any rate, it may be useful to consider for a moment what are his views as to the position of the emperor or king relatively to the Church.

He begins his treatise by urging the prince to remember that he should give thanks to God and honour to His Church. The whole commonwealth flourishes when the king fears and honours God and provides carefully for the wellbeing of the Church. The charge of the king, then, is not to be thought of as merely secular. The work of the king is to set forward such conditions as will further the cause of religion as well as the temporal wellbeing of the State. If his heart is not set upon God's service, God may take the kingdom from him. He has therefore great responsibilities in Church matters as well as in secular. He must prefer the wellbeing of the Church to his own personal advantage, and must help and protect all those who work in God's service.3 We have here simply the common medieval conception of the duty of the ruler of the State to do what he can to further the work of the Church. Sedulius evidently did not imagine that the State could stand aside and refuse to take a part in the service of religion. But this is not all. The good ruler, he says, will set forward the wellbeing of the Church in all ways, and he must remember that God has set him as His vicar in the government of the Church, and has given him power over both orders of rulers and subjects, and therefore he is especially admonished to see to the holding of synods every year. We have in an earlier chapter referred to this title of the Vicar of God as applied to the secular ruler. Certainly as used by Sedulius it seems clearly to imply a large measure of authority even over the Church.

So far we have one aspect of the theory of Sedulius. But if we now turn back to the eleventh chapter of his treatise we shall see the other side of the matter. Here also the king is admonished to provide diligently for the meeting of synods, inasmuch as these are of great benefit to the Church. But then, abruptly and somewhat sharply, he is warned that he must not interfere recklessly in ecclesiastical affairs; he must show himself humble and very cautious, and beware lest he should take upon himself to judge of any ecclesiastical affair before he has learnt the decrees of the synods. The pious ruler will carefully hear what is just and lawful according to the canonical decision of the holy bishops, and will then give his consent and authority to what is just and true. He will in no way form any *praejudicium* on such matters, lest haply, falling into error, he should find himself guilty of some fault hateful in the sight of God. Sedulius enforces this with a story of how Valentinian, when he was invited by the bishops to take part in some doctrinal discussion, said that he was in no way worthy to take part in such matters, but that this belonged to the priests. Sedulius follows this up in the next chapter by urging the ruler to make himself an example of humility and obedience. If he is reproved by wise men he should repent; and Sedulius cites the examples of David and Nathan, of Theodosius and Ambrose.

If, then, in the title of Vicar of God in the government of His Church Sedulius expresses something of the authority of the king even over churchmen, in his treatment of his relation to the synods and their decisions he gives us the other side of the matter. It must be noticed, however, that even here the king has his own place, at least in the execution of Church law. After he has heard the judgment of the bishops, it still remains for him to give his consent and authority to what has been decreed.

We have before cited the letter of Cathulfus on the nature of the royal authority. He states, even more emphatically than Sedulius, that the king is the representative of God, and he certainly seems to imply that the position of the bishop is secondary. He bids the king remember God always with fear and love, for he is in God's place, to watch over and govern all God's members, and will have to give account for these in the day of judgment. The bishop is, in the second place, "in vice Christi tantum". The king must therefore carefully see that he establishes the law of God over the people of God, whose place he holds, "cujus vicem tenes." He must, with his bishops, superintend the life of the monks and nuns, but he must do this through spiritual pastors, not through laymen, for that would be wickedness. We should judge that the position of Cathulfus was practically the same as that of Sedulius, though undoubtedly he is more emphatic in his assertion of a certain priority of

the royal power. The letter is, however, too brief, and the discussion too incomplete, to enable us to form a very definite decision upon the subject.

The conception of the separate provinces of the secular and the spiritual powers is so well defined in the fifth century, and so carefully restated in the ninth, that we cannot doubt that all parties, lay or clerical, would have, in theory, held that the powers were co-ordinate, and, in their own spheres, independent of each other. But, as a matter of fact, circumstances were too strong for theory, and not only did the definition and delimitation of the boundaries of the province of each power prove a task of insuperable difficulty, but each power in turn found itself compelled to trench in some measure upon the province of the other. We begin by considering some of the many points in which, in spite of the theory of the independence and authority of the Church, the State did actually trench upon its prerogatives.

We have seen how Sedulius and Cathulfus speak of the king or emperor as the vicar of God in the government of His Church; that is, they conceive that it is part of the duty of the civil ruler to maintain good order and piety in the Church. We find the same principle very strongly declared by Smaragdus. He urges upon the king that if he sees anything wrong in the Church of Christ it is his duty to reprove and correct it. If he sees any person in the Church of God running into luxury or drunkenness, he is to forbid, to terrify him. He is to put down all pride and anger with threats and sharp reproofs. He is to do what he can as a king, as a Christian, and as the representative of Christ ("pro vice Christi qua fungeris"). We can find illustrations of this conception of the duty of the civil ruler to maintain good order and discipline in the Church in the proceedings of Charles the Great, of Lewis the Pious, and of Charles the Bald. In the "Capitula de Causis cum Episcopis et Abbatibus Tractandis" of 811 we have a list of topics on which the bishops and abbots are to be interrogated, and certainly the tone of the questions indicates clearly enough that Charles the Great thought it his duty to look very sharply into the conduct of the clergy even in purely religious matters. In the "Admonitio ad omnes regni ordines," issued by Lewis the Pious in 823-5, Lewis lays down very explicitly the principle that it is his duty to admonish men of all. orders as to the discharge of their duties, and frames regulations for a very comprehensive inquiry which is to be made by taking the evidence of the bishops about the conduct of the counts in administering justice, and that of the counts as to the conduct of the bishops in their life and teaching. In the "Capitulare Septimanicum apud Tolosam datum" of 844 we find Charles the Bald strictly forbidding the bishops to take action against those priests who had appealed to him for protection against the oppression of the bishops, and warning them that they must obey his injunctions, and see that every one obeys the Canons. In 853 we find the same Charles sending round his "missi" to hold inquiries and correct abuses in all cities and monasteries along with the bishop of each diocese.

There are even indications in the literature and history of the times that the responsibility of the emperor for the conduct of the Church extended to the condition of the papacy itself. We do not wish to enter into any discussion of the exact character of the purgation of Pope Leo III in the year 800, but at least it is clear that Charles the Great had been gravely concerned with regard to the charges brought against the Pope. Leo III was very careful, in purging himself by oath of the crimes laid to his charge, to make it quite clear that he did this of his own free will, and not as one amenable to the judgment of any man, and to guard against his action being taken as a precedent for his successors; but his own statement makes it clear that Charles had come to Borne, in part at least, to inquire into the matter. And in spite of the care Leo III had taken to guard against his action becoming a precedent, we cannot help feeling that Pope Leo IV was following in Leo III's steps, and was even going somewhat further, when, in his letter to the Emperor Lewis II of about 853, he expressed his willingness that the emperor and his " missi " should inquire into the charges which had been made against him, and his readiness to amend everything according to their judgment.

We think that all this will serve to show sufficiently clearly that the civil ruler in the ninth century was thought of, and was recognised in fact, as having some real responsibility for the good order and conduct of the Church. He was not only the protector of the Church against external enemies, but was, at least in some measure, responsible to guard it against corruption and decay. How exactly this responsibility was to be carried out into practice was a very uncertain matter, and one upon which, when put to the test of practical action, men in the ninth century would probably have differed greatly; but there seems no doubt that this conception of the responsibility of the king was held very commonly, if not universally.

It is partly at least from this standpoint that we may most usefully consider the relation of the civil ruler of the time to the synodical and legislative organisation of the Church. We do not think that any one doubted the independent legislative and administrative authority of the synods of the Church, but yet we find that the synods are constantly spoken of as being called together by the emperor or king as well as by the ecclesiastical chiefs, and that the decrees, administrative or legislative, of the synods, are issued with the cooperation of the royal power.

We may take as our first example of this condition of things the Capitulare of Karlmann of 742. Here we find Karlmann, with the counsel of the bishops, presbyters, and chief men of the kingdom, decreeing that a council and synod should be held to advise him how religion and the law of God might be restored, and then, with the bishops and great men, ordering that synods should be held every year, at which the king should be present, and by which the canons and laws of the Church should be restored. We find parallels in Charles the Great's Capitulary of 769, in the "Capitulare Haris tállense" of 779, and in the "Admonitio Generalis" of 789. We are specially told that Charles the Great was present at the Synod of Frankfort in 794, and he is said to have presided. The synod, we are told, was called together by the apostolic authority and by that of Charles the Great. Perhaps the most marked recognition of the imperial share in such ecclesiastical business is to be found in the Epilogue to the decrees of the Council of Arles of 813. In this we find the decrees presented to the emperor, and he is asked to add anything which may have been omitted, to correct anything that may be wrong, and to aid in carrying into effect whatever may have been rightly decreed.

It may perhaps be urged that these examples are all taken from the time of Charles the Great himself, and that his relation to the Church was wholly exceptional; but we can find some parallels at least later in the century. In 818-19 Lewis the Pious issued a number of capitula on ecclesiastical and secular matters, and it is worthy of note that the form in which this is done is very much the same as that in the earlier cases. Lewis calls together his bishops, abbots, and great men, and with their advice issues the Capitula which are to be observed by ecclesiastics and laymen alike. The proceedings of the Synod of Ponthion in 876 seem to show that the principle that synods should be summoned by the king or emperor, and that he might preside at them, was still accepted. The Emperor Charles the Bald is said to have presided at this synod, and it is spoken of as having been called together by the Pope and the Emperor.

The history of the century seems to illustrate very exactly the theory as we have seen it in Sedulius and Smaragdus or Cathulfus. The king is responsible for the good order of the Church, and at least has his share in the calling together of the synods of the Church and the promulgation of their decrees.

There is yet one further point of Church order in which the influence of the secular power is very great—that is, in the appointment of ecclesiastics. We do not wish to enter upon a discussion of the many and intricate questions connected with this subject, but we must deal with it so far as is necessary to bring out the fact that here again the theory of a separation of the two powers was found impossible of literal application to the actual circumstances of the time. The emperor or king did as a

matter of fact exercise a most powerful influence over all appointments of the greater ecclesiastics, and the propriety of this is not denied by any writer of the ninth century.

The bishops, in their address to Lewis the Pious of 829, quite frankly recognise this, and exhort him to see that the greatest care is exercised in appointing pastors and rulers in the Church of God. Hincmar of Bheims is quite as frank in recognising the authority of the secular ruler in the appointment of bishops. In his treatise, "De Institutione Carolomanni," he very clearly reckons the consent of the prince, and the election of the clergy and people, as the proper elements in an appointment to ecclesiastical rule ; and in a letter to Lewis III, occasioned by some dispute about the appointment of a Bishop of Beauvais, he again admits very frankly that the consent of the prince is a necessary part of the appointment to such an office. This is the more noticeable, as the general purpose of the letter is to condemn and correct what Hincmar clearly thought was an exaggerated conception of the royal authority with regard to ecclesiastical appointments. We must indeed notice how emphatically Hincmar condemns the notion that the appointment of a bishop was a matter in the arbitrary power of the prince, attributing this to the suggestion of the devil himself, and that he wholly denies that the prince can order the election of whomsoever he pleases. A bishop, Hincmar seems to mean, should be elected by the other bishops of the province, with the consent of the people and clergy of the diocese, and when the prince has given his consent he is to be taken to the metropolitan for consecration. We do not enter into any discussion of Hincmar's position with regard to the part of the metropolitan and the other bishops of the province in the election of a bishop: it is enough for us to observe that Hincmar clearly admits the place of the secular ruler, but as clearly also is anxious that this should be defined and limited.

A position very similar to that of Hincmar is represented by the little treatise "De Electionibus Episcoporum", written by Florus Diaconus, a writer of the ninth century. Here also it is candidly admitted that in certain kingdoms the custom prevailed that a bishop should be consecrated after the prince had been consulted, and Florus admits that this custom tends to peace and tranquillity, but he emphatically denies that it is necessary to a proper consecration. Florus maintains that the true requirements for a proper appointment are the election of the clergy and the whole people of the diocese, and consecration by the lawful number of bishops; and he urges that for nearly four hundred years from the time of the apostles no consent was asked from the secular power, and that even after the emperor was Christian this liberty for the most part continued.

The position of Hincmar and Florus is not quite identical. Hincmar looks upon the consent of the prince as normally necessary for the appointment of a bishop; Florus considers this as a legitimate custom of some kingdoms, but not as being a universal custom, and still less does he admit it to be of universal obligation. But they agree in admitting that, as a matter of fact, the secular ruler has a considerable power with regard to ecclesiastical appointments, while they are both concerned to correct any exaggerated conception of this.

It is perhaps necessary to say a word about the theory of the relation of the emperor to the papal elections. We may begin by observing that Floras Diaconus assumes that the consent of the civil power is never asked for in this case. Whether such a statement can be taken as accurately representing the relations of the emperor to the papal elections in the ninth century is doubtful. The "Pactum Hludowici Pii cum Paschali Pontifice" of 817 does, indeed, agree with this in its careful provision that no one is to interfere with the election of a Pope, but that it is to be left in the hands of the Romans, and that they are freely to elect him whom the divine inspiration and the intercession of St Peter suggest. Only after the consecration is an ambassador to be sent to Lewis or his successor to arrange for the continuance of friendship and peace between the Emperor and the Pope. The terms of Lothair's "Constitutio Romana" of 824 are so far in agreement with this. It reiterates the provision of the Pactum, that no one is to take part in the election of a Pope except the Romans themselves. There is in existence, however, a form of oath, supposed to be of this time, required of all those who were

to take part in the papal election: this not only makes the electors swear allegiance and fidelity to the emperor, but also includes a provision that he who is elected is not to be consecrated until he has taken such an oath in the presence of the "missus" of the emperor as that taken by Pope Eugenius. From a passage in Einhard's Annals for 827, it would appear that on the death of Valentinus, his successor, Gregory IV, was elected, but not consecrated until the ambassador of the emperor had come and examined into the character of the election. It must, however, be noticed that these documents, and especially the "Pactum," while they are probably genuine in substance, are probably not all authentic in detail.

Our examination of these matters will, we think, have served to bring out sufficiently clearly the fact that, whatever might be the theory of the division of functions between the secular and the spiritual powers, the secular power did in practice certainly tend to exercise a very considerable authority even in the strictly spiritual sphere. We may say that the foundation of the whole situation, as far as theory is concerned, lies in this, that it is the duty of the civil ruler to care for the wellbeing of the Church, and to interfere when he sees that the Church is, for any reason, being badly administered or falling into corruption. We can see how this conception naturally gives rise to the theory that it is the king's duty to see to the regular meeting of synods, and thus gives him necessarily a share in the legislative, as well as the administrative, control of the Church. It is easy also to see how this conception of the responsibility lying upon the king to see that justice and righteousness prevailed in the Church as well as elsewhere, might lead to a considerable ambiguity in his relation to the discipline of the Church. The relations of the empire to the Papacy in the cases of Leo III and Leo IV are but the final examples of a tendency to look to the civil power to set things right in the Church, when there was no one else who could act. And, finally, the tendency to subject ecclesiastical appointments to some control on the part of the civil ruler, while it has many other political and social relations, may also be regarded in part at least as illustrating the same conception, that the secular power has its own responsibility for the good order of the Church, and has therefore necessarily something to say with regard to the persons to whom the government of the Church is to be intrusted.

We have said enough, we think, to make it clear that in the ninth century the theory of a strict duality of authority in society does not prevent the civil power from acting very frequently in the sphere of the ecclesiastical, and that this intervention is not only tolerated in practice, but is to a considerable extent justified in theory.

We must now consider the other side of the subject, the extent to which the ecclesiastical authority intervened in civil affairs, and the character and conditions of this interference. We may begin by observing that if the king or emperor is by some writers styled the Vicar of God, the same title is also claimed for the bishops. Hrabanus Maurus calls the priests or bishops the vicars of the prince of shepherds in the Church of God, and wans them to be determined against the proud and contumacious, to be careful that no earthly power terrifies them in their rule of souls, and no worldly blandishments soften their rigour.

What is more important than this title of Vicar of God, it is certain that the people of the ninth century were perfectly clear that the ecclesiastic is bound to correct and reprove persons of every rank and degree,—to use against them, if necessary, the severest penalties of the Church. A very strong phrase is used by a synod held in 859, which expresses this very directly and forcibly: the bishops are exhorted to be united in their ministry and holy authority, and with mutual counsel and help to rule over and correct kings and the great ones of the earth, and the whole people committed to them in the Lord. The same view is very strongly expressed by many writers. Alcuin exhorts the priest to declare the Word of God, and the prince to obey. Jonas of Orleans quotes that passage from the history of Rufinus, discussed in an earlier chapter, in which Constantine is represented as saying to the bishops that God has made them the judges of all, and that they cannot be judged by any. The

same passage is quoted by the bishops in that address to Lewis the Pious which we have already frequently cited. There is, therefore, nothing that we should regard as new, when we find the pseudo-Isidorian Decretals using very strong language about the subjection of princes to bishops. In his 39th Decretal letter Clement is represented as saying that all princes of the earth are to obey the bishops, to submit to them and help them, and that those who oppose them, unless they repent, are to be put out of the Church.

The political theory of the ninth century, then, very clearly recognises that there is an authority in the Church which extends over all persons, even the most exalted in society. It will be useful to consider more closely the relation of the civil order and the civil rulers to the law and discipline of the Church. We have already examined the treatment in Hincmar's work, 'De Ordine Palatii', of the relation of the king to the law of the State; we have seen that Hincmar expresses the general view of the ninth century when he maintains that these laws are binding upon the king. Hincmar goes on to say that much more must the king obey the divine laws. There is a system of divine law in the Church to which all men owe their obedience. We do not wish to enter into so complicated a subject as that of the gradual formation of the body of Church law: to do so would take us very far away from our proper topic. It will here suffice if we point out that by the ninth century there were in existence and circulation in Western Europe collections of Church regulations on doctrine and discipline, and these regulations were looked upon as having in some sense a divine authority. There are some words in Hincmar's treatise 'Pro Ecclesiae Libertatum Defensione' which may very well be taken as representative of the attitude of the ninth century towards these laws. This is the treatise written by Hincmar in the early stages of the quarrel between Charles the Bald and Hincmar's nephew, Hincmar. Bishop of Laon. Hincmar at first sided wholly with his nephew, and wrote this treatise to protest against the royal action, which at first he looked upon as an outrageous interference with ecclesiastical prerogative. A vassal of the Bishop of Laon had complained to Charles of his treatment by the bishop, and Charles had summoned the bishop to appear and to answer before his courts. When he did not appear, Charles put his property under the ban. Hincmar of Bheims protests against such action as being wholly improper and even scandalous, and quite contrary to the canons and the laws. He quotes St Leo as saying that the canons were enacted by the Spirit of God, and confirmed by the reverence of the whole world, and were established by men who now reign with God in heaven and still work miracles on the earth.

We think that these words are highly characteristic of the general attitude of men in the ninth century towards Church law. No one, we think, doubted that in some sense all men of all ranks were bound to obey it. Earlier in the century Ago-bard of Lyons had used phrases similar to those of Hincmar. Agobard is writing of the proceedings of the bishops at Attigny and Compiegne, and represents himself as making a speech in which he discussed the nature and authority of the canons of the Church. In former times, he said, the holy bishops had come together and decreed that the canons must be preserved inviolate, inasmuch as they had been confirmed by the Spirit of God, the consent of the whole world, the obedience of princes, the agreement of Scripture, and that from that time it had been an accepted doctrine that any action against the canons was an action against God Himself, and against His universal Church, and that they could not be violated without danger to religion. A little earlier in date still we find a letter by Siegwald, Bishop of Aquileia, mutilated unfortunately and only partly comprehensible, in which we have a very emphatic exhortation to Charles the Great on the duty of obeying the canons. In spite of the fragmentary state in which it has come to us, we can make out fairly clearly the emphatic terms in which Charles is admonished to observe and enforce obedience to the canons.

There is, then, a body of law in the Church which all men must obey and to which all other laws must conform themselves. Hincmar considers the question of a possible collision between the national system of law and the divine law, and is perfectly clear that in such a case the human laws

must be altered and made conformable to the divine; and in another treatise written by Hincmar we have an exposition of the superiority of the divine law, and men are reminded that they may now justify themselves in their actions by appealing to human laws and customs, but in the day of judgment they will have to answer, not to the Roman, or Salic, or Gundobadian laws, but to the divine and apostolic laws. Hincmar urges that in a Christian kingdom even the public laws should be in accordance with the principles of Christianity.

There is again, therefore, nothing new in the strong phrases in which the Pseudo-Isidorian Decretals express the principle that no emperor or other potentate may do anything contrary to the divine commands: if the judges, at the king's desire, should command anything unjust or contrary to the evangelical, or prophetic, or apostolic doctrines, such commands have no authority.

The secular ruler, then, must, like other persons, obey the divine law, and if he refuses to do this he is subject to the discipline of the Church. It is indeed clear that there were some in the ninth century who doubted or denied that the authority of the Church extended so far as to the excommunication of the king or emperor. Prom that section of Hincmar's treatise on the divorce of Lothair and Tetburga, to which we have so often referred, it is clear that there were some who denied that the king was liable to the judgment of the bishops of his own dominions, or to that of any other bishops. Some wise men, says Hincmar, maintained that the king is subject to no laws or judgments but those of God alone, who made him king; and that, as he should not be excommunicated by his own bishops, whatever he may do, so he cannot be judged by other bishops. Hincmar, indeed, makes short work of this contention, describing it concisely as blasphemous and full of the spirit of the devil, and then shows by a series of examples, drawn from the Old Testament and Church history, that kings were reproved by the prophets and separated from the Church by bishops, and at the end of this section of the treatise he lays it down that the synods of the Church know no respect of persons.

Hincmar's judgment is clear, and we do not doubt that almost all ecclesiastics in the ninth century would have agreed with him. That the Popes may have been unwilling to go the length of directly and explictly excommunicating the emperors of the fifth and sixth centuries, we have seen in former chapters. But in their relations to the Prankish rulers the Popes were not so restrained. As early as 770 we find Stephen III. threatening to excommunicate Charles and Carlo-man if they neglected his injunctions against a marriage with the daughter of the Lombard king Desiderius; and in regard to this very question on which Hincmar writes we find that Pope Nicholas threatened at last to excommunicate Lothair unless he would take back Tetburga.

It must at the same time be noticed that we may find a partial explanation of the existence of such views as those which Hincmar condemns, in the tone of some letters of Pope Leo IV in reference to a threat of Hincmar to excommunicate the Emperor Lothair. He complains of the pride of Hincmar, which had led him to threaten with excommunication the emperor whom Pope Paschal had consecrated with the oil of benediction, thus violating every divine and earthly law. Leo IV's phrases are no doubt related to such a question as whether it was competent for any one except the Pope himself to excommunicate kings and emperors, and must not be construed as meaning that Leo would not have claimed that authority for himself: they belong to the question of the relation of the authority of bishops and metropolitans to that of the Pope. But it is easy to see that such phrases might tend to encourage the judgment that within his own dominion the ruler was not amenable to the jurisdiction of Church courts. There were clearly certain ambiguities and uncertainties in regard to the relation of the discipline of the Church to the monarch in the ninth century; but no doubt, also, the Church was very clear that it had spiritual authority over even the highest in station.

No doubt these claims, that the church should exercise jurisdiction even over the most exalted persons in the State, are to be interpreted as referring to spiritual matters. But it was not easy to draw a clear line between things which were to be regarded as spiritual and those which belonged to the

secular sphere. We have already noticed that Jonas of Orleans, in commenting on the twelfth letter of Gelasius, urges that as the priests will have to render account to God for kings as well as for private persons, it is their duty carefully to admonish them lest they depart from the will of God, or from the proper discharge of the office which was committed to them. The ecclesiastical order was in some measure responsible for the just administration of the State, just as we have seen that the king was responsible for the good order of the Church. It is interesting to see that this principle finds expression in some of the formal documents of these times. In the "Præceptio" of Chlothar II, of about the end of the sixth century or the beginning of the seventh, we find it provided, that if any judge should condemn a man unjustly in the absence of the king, the bishop is to reprove him. Again, in the documents concerning the election of Guido in 889 we find a provision that the common people are to have their own laws, and are not to be burdened further than the laws allow : the count is to see to this, but if he neglect his duty, or allow injustice to be done, he is to be excommunicated by the bishop of the place till he has rendered satisfaction. Again, therefore, we find nothing strictly new in the emphatic assertion of the Pseudo-Isidorian Decretals, that any one who is oppressed should freely be allowed to appeal to the priest.

The intervention of the bishops for the protection of the oppressed has, indeed, a long and complex history. As early as the time of Justinian we find the Imperial Government laying upon the bishops a great deal of responsibility for the supervision of the expenditure of money left for public charities and other public purposes; and we even find them given a considerable power of intervention, to protect the citizens against attempts on the part of the magistrates to impose improper exactions. It may be doubted whether such powers were originally given to them on account of their spiritual authority, or because of the position occupied by the bishops as prominent citizens in their dioceses: the truth probably is that both their secular and their ecclesiastical position contributed to bring about such arrangements. However this may be, it is clear that in the ninth century the Church, through the bishops, exercised a very considerable authority in the control of even the secular affairs of society, altogether apart from that authority which the bishops possessed as being among the great men of the kingdom or empire.

The Pope and the bishops of the church exercised a considerable authority in the appointment and in the deposition of kings and emperors. We do not wish to discuss the question which in later times was often raised, as to the nature of the authority by which Charles the Great was elected to the empire. In later times men on the one side maintained that this was done by the Pope,—that he in the plenitude of his power conferred the empire on Charles; while on the other side it was held that the action of the Pope was simply that of one who recognised his accession, and by consecration invoked on it the divine blessing. We do not know that there is any reason to suppose that at the time the theory of the matter occupied men's minds to any serious extent at all.

The Franks had come to Italy on the urgent invitation of the Popes as their protectors against the Lombard power, and later on against the Greek power. Pope Stephen II had recognised Pippin as king of the Franks, and had afterwards crowned him, and finally Pope Leo III had crowned Charles the Great as emperor. We doubt whether at the time it occurred to any one to consider what precise authority lay behind these acts. There is no doubt, however, that in the ninth century we find clear traces of the rapid development of a theory that the Pope had some very distinct share in the appointment of emperors or kings, and that the consecration by him was regarded as something more than the mere solemn recognition of a proper election or succession, and the invocation of the divine blessing. And so also with the position of the bishops in the appointment and consecration of kings, there are very clear traces of the conception that they had a great deal to say in elections, and that their consecration was looked upon as a very important matter.

It is here again difficult to say how much of the authority of the Pope or the bishops is to be attributed to the political importance of their position among the most important magnates of the

empire, and how much to their religious authority. We must be prepared to recognise that each has its real influence, while these two elements of their authority are often fused to such an extent that it is exceedingly difficult to separate them. When, for instance, we find that the provisions for the partition of his dominions by Charles the Great, after they had been considered and sworn to by the magnates of the empire, were sent to Pope Leo that he might subscribe them, we can hardly say whether this is to be taken as a recognition of some right in the head of the spiritual power as such to take his part in these arrangements, or whether it is to be interpreted as due to the sense of the great political influence which the Pope had exercised and was still exercising in Western Europe, and especially in Italy.

Whatever may be the exact meaning which we are to attach to such a recognition of the authority of the Pope, there is no doubt of the importance of his position later in the century. In the 'Chronicon Salernitanum' there is preserved a letter of the Emperor Lewis II. written to the Emperor Basil of Constantinople in 867. It appears that Basil had expressed his indignation that Lewis should call himself "Imperator Augustus". Lewis defends his use of the title on the ground largely that he had been anointed and consecrated by the Pope, and says that those Frankish princes were called first kings and then emperors who were anointed with the holy oil by the Pope. It has been suggested that this letter is spurious—that it is impossible to think that any Frankish emperor would have spoken in such terms. It seems to us that such a line of argument is exceedingly unsafe, for, apart from this letter, there is considerable evidence that at least in the latter part of the eighth century it was frequently recognised that the Pope had a very important part in the appointment and consecration of kings and emperors. In a former chapter we have referred to the terms of the document concerning the election of Charles the Bald to the kingdom of Italy at Pavia in 876; we must now notice in this document the reference to the elevation of Charles, a few months earlier, to the empire as being the work of the Pope. The bishops and other magnates of Italy elect Charles as king in view of the fact that God had raised him to the imperial throne by means of the vicar of the blessed prince of the apostles Peter and Paul, Pope John. It might, perhaps, be suggested that this is only an Italian view of the appointment of Charles the Bald, but the same conception is expressed in the proceedings of the synod of Ponthion, which was held in June and July 876. We learn that at this synod the proceedings of the Italian magnates at Pavia were read and confirmed: the part of the Pope in the election of Charles to the empire seems as clearly recognised at Ponthion as it had been at Pavia. We find similar references to the influence of the Pope in the election of kings in the separate kingdoms which made up the empire, while here we also find a similar authority attributed to the bishops. In the proceedings of the synod held at Quierzy in 858 we find some very significant phrases on the subject. The synod sent a letter, which is thought to have been composed by Hincmar of Kheims, to Lewis of Germany, protesting against his invasion of the territories of Charles, and addressing a special remonstrance to those archbishops and bishops who had themselves, with the consent of the people, anointed Charles to be king, while the Holy See had afterwards honoured and confirmed him, by letters, as king. The synod evidently attaches great importance to the unction, and speaks of him who faithlessly and contumaciously lifts his hand against the Lord's anointed, as of one who despises Christ, and who will, therefore, perish by the spiritual sword. Again, we find the archbishops and the bishops of the kingdom of Arles electing Lewis, the son of Boso, to follow his father in that kingdom, and they do this partly on the ground that the Holy See had approved of such an election.

We find the strongest and most remarkable assertion of the importance of the consecration and unction by the bishops in another document, which refers to the election of Charles the Bald as King of the Neustrian Franks. This is a proclamation issued in the name of Charles the Bald himself in 859: he recounts how, after his election by the bishops and other faithful men of the kingdom, he had been consecrated and anointed with the holy chrism, and had received the crown and sceptre, and he urges that after this consecration he cannot be cast down from the kingdom by any, at least without

the judgment of the bishops by whose ministry he had been consecrated king: they are, he says, the thrones of God, among whom God is seated, and by whom he decrees his judgments, and to their paternal reproofs and chastisements he had been and still was prepared to submit. We may perhaps suitably recall the phrases in which the bishops describe the deposition of Lewis the Pious, and the words of Hincmar in referring to the same event, and to the restoration of Lewis by the bishops with the consent of the people.

The importance of this conception of the authority of the Pope and the bishops in relation to the appointment and the deposition of emperors and kings is very obvious. As we have said, it is very difficult, perhaps impossible, to disentangle the relative importance of their spiritual and their secular position in the matter. The fact that they are great persons in Western Europe, or in a particular kingdom, has obviously much to do with it, but there are already clear traces of a theory that, as spiritual rulers, they have some, though it may be a somewhat indefinable, authority over the secular power.

We have endeavoured to bring out as clearly as possible two facts with regard to the theory of the relation of the authorities of Church and State in the ninth century. First, that in the ninth, just as in the fifth century, men believed firmly that the two authorities were separate and independent, each sacred and supreme in its own sphere—that the ecclesiastic owed allegiance to the king in secular matters, and that the king owed allegiance to the Church in spiritual matters. But also, secondly, that the practical experience of the ninth century made it clear that it was very difficult to distinguish the two spheres by any hard-and-fast line. Still, we think that the writers of the ninth century held to the theory of a dual authority in society; we think that they would have repudiated any other conception.

It is true that there is one work which belongs to this period, which in the later middle ages was interpreted as expressing quite another theory—the theory, that is, of the supremacy of the spiritual power over the temporal. This document is the famous "Donation" of Constantine. We have hitherto left this document out of account for two reasons—first, because it is almost certain that the later interpretation of the document was incorrect; and, secondly, because, whatever its meaning and purpose may have been, it exercised no appreciable influence in the ninth century on the theory of the relations of Church and State.

From our point of view the important phrases of the "Donation" are those which deal with the grant of authority to the Pope, and the transference of the seat of imperial authority from Rome to Byzantium. The exact meaning of these phrases has been discussed by a number of scholars, and it is generally agreed that the interpretation given to them in the later middle ages can hardly be that which was in the mind of the compiler. In later times they were understood to signify that Constantine granted to the Popes a complete temporal authority over the West, and it is not disputed that the words might have this meaning; but it is now generally agreed that they must be interpreted as referring to a grant of temporal authority in Italy. Most historical critics think that the purpose of the document was to assist the Roman See in securing the reversion of the Byzantine territories in Italy, and especially of the Exarchate. It seems possible that the "Donation" was built up in part on traditions which may have been long current in Italy, and that the circumstances of the eighth century, when the Bishops of Rome came to be the actual representatives of the Roman *res publica* in Italy, and its principal defence against the Lombards, may have tended to give these traditions a new significance, and to suggest to the author their reduction to a definite and coherent form. We are not here concerned with the growth of the temporal states of the Bishop of Borne, but it seems to us that so far from looking upon this as the result of an unreasonable greed for secular power, it should be recognised that nothing was more natural than that the Popes, finding themselves to be the actual chiefs of what survived of the ancient Roman State in Italy, should have desired to maintain and even extend their authority. Any one who studies the papal correspondence and the 'Liber Pontificalis' in the eighth century will, we think, feel that the leadership of the Roman *res publica* in the West was

forced upon them rather than deliberately sought. It was only slowly and reluctantly that they drew away from the Byzantine authority, for after all, as civilised members of the Roman State, they preferred the Byzantine to the barbarian; and when circumstances had practically destroyed the Byzantine power in Italy, it was natural that they should seek to hold together, or to recover from the barbarian, even though, like the Prank, he was a friendly barbarian, some fragments of the ancient commonwealth of civilisation. It is of course true that once they had broken with the Byzantine power, they had no inclination for reunion with it, but this again, considering the history of the eighth century, was not unnatural.

It is then generally thought that the purpose of the "Donation" was to assist the Bishops of Rome in establishing a claim to the reversion of the Byzantine authority in Italy. Other conjectures, such as that of Grauert, that it was intended to support the Frankish empire against the criticism of the Byzantines, though they have been urged with much learning and ingenuity, seem too far-fetched. It must at the same time be recognised that the problem of the date and place of origin of the document is surrounded with perplexities. The "Donation" cannot be later than the ninth century, as it is contained in a manuscript of that time, and is embodied in the Pseudo-Isidorian decretals. How long before that it may have existed is a question of great complexity. In a letter of Pope Hadrian I of 778 there are phrases which, it is urged, imply a knowledge of the "Donation," but the text cannot be said to render this certain. Hadrian evidently refers to some tradition of great grants of authority by the Emperor Constantine, but whether he is referring to this document is another question. In a letter of the same Pope to Constantine and Irene, of 785, he describes a vision of Constantine, which suggests the tradition which is embodied in the "Donation," but this does not at all necessarily prove that he was acquainted with the "Donation" itself. The first writers of whom it can be said with any degree of confidence that they are acquainted with this document are Ado of Vienne and Hincmar of Rheims, in the ninth century. It is certainly perplexing that there should be no certain evidence that the document was known in Italy until the latter part of the tenth century. At the same time the more recent investigations into its phraseology, and especially those of Scheffer-Boichorst, seem to make it fairly clear that the work was compiled in Italy, and in the latter part of the eighth century.

In later volumes we shall have to consider what importance this document may have had in the scholastic period. For the present it is enough to say that it produced no appreciable effect upon the political theory of the ninth century. The theorists of the following centuries may have tried to reduce to a complete unity the elements of authority in society; the ninth century writers knew nothing of this.

If we now look back over the political theory of the ninth century, we can lay down certain general propositions about its character. It is, we think, in the first place, clear that there did not exist in this time and among these writers any general philosophical system of political theory. Certain great and important conceptions the men of this period apprehended and developed with force; but in the main it is true to say that they are concerned much more with the practical circumstances of the life of their time than with the attempt to construct a system of political thought, We have pointed out the fact that their statements are often incoherent, sometimes almost self-contradictory; this is the direct consequence of the fact that they are not conscious of any systematic theory as lying behind their practical judgments. We think that when we have recognised this, and if we very carefully keep it in mind, we may still with justice say that their treatment of the character and the foundation of the organised life of society turns upon three great conceptions.

In the first place, they clearly held, and in some measure understood, that conception of the equality of human nature, whose history we have studied from the time of Cicero. They not only reproduced the phrases of the Fathers, but they clearly also understood their point of view. This implies, indeed, something more than the fact that they held to the theory of equality; it also means that they understood and approved the conception of the difference between the primitive condition

of man and the actual condition of human society. They held that it was not nature but man's faults which had brought into existence the conventional institutions of society. It is quite true that, except with regard to the institution of slavery, the subject does not greatly occupy their minds; but it is important, especially with reference to the developed mediaeval theory of society, to recognise that this conception was always alive.

Secondly, they held very firmly to the conviction of the sacred character of the organised structure of society in government. They follow the New Testament and the Fathers in the doctrine that the civil order of society is necessary, and that it is sacred. Indeed it is the very firmness with which they hold this that causes them to adopt the extreme language in which St Gregory the Great had expressed the conception, and sometimes to speak as though any resistance to the actions of those who represented the sacred authority were a thing unlawful and irreligious. The disorders of the time were so great, the necessity of delivering western Europe from the confusions which followed the downfall of the ancient empire in the West was so obvious, that we cannot wonder if at times they exaggerate the principle of obedience to authority.

But, in the third place, the theory of the ninth century recognised with equal clearness the necessity of checking the unjust and tyrannical use of authority. If the Fathers like St Ambrose and St Isidore lay much stress on the limitation of authority by its end—namely, the establishment and maintenance of justice—the ninth-century writers assert this conception with even greater clearness, and, under the influence of the traditions of the Teutonic races, find a practical application of the theory of justice in the conception of the supremacy of law, and of the limited and conditioned character of the authority of the ruler. The emperor or king is bound by the national law, and derives his authority, ultimately no doubt from God, but immediately from the nation, and holds this authority on the condition of his setting forward righteousness and justice in the State.

PREFACE TO VOLUME II.

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

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

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

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

A. J. CARLYLE.
Oxford, April 1908.

INTRODUCTION.

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

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

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

It is, of course, true that often the most extravagant or paradoxical phrase covers the profoundest and most fruitful thought, that the eccentric and the insurgent often represent the future, while the normal man only represents the present, and we shall endeavour to recognise and to set out the value of even the most paradoxical and eccentric phrases and movements, of which the Middle Ages were indeed fertile. But if only to find the due place and to interpret the full significance of the

ideals of these thinkers, it is well to begin with the most sober and matter-of-fact aspects of our subject.

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

PART I.
THE POLITICAL THEORY OF THE ROMAN LAWYERS OF THE MIDDLE AGES TO ACCURSIUS.

CHAPTER I.
THE THEORY OF LAW. *AEQUITAS* AND JUSTICE.

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

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

The political theory of the mediaeval civilians is directly founded upon that of the law books of Justinian, and no doubt they often do little more than restate the positions laid down by the great jurisconsults of the second and third centuries or the editors of the sixth; but the world had greatly changed, and the mediaeval civilians, even when they were most anxious to restate ancient law, were yet influenced by these changes and sometimes aware of them. They did much more than merely repeat the phrases of the ancient law, they endeavoured to explain what was difficult, to co-ordinate

what seemed to be divergent or contradictory, and to show how these ancient principles or rules could be brought into relation with the existing conditions of society.

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

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

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

We next consider the theory of the relation of justice to *aequitas*. In the passage of the Prague fragment which we have just quoted, justice is defined as *aequitas* translated into will, justice is a quality of will or purpose. This is the normal theory of these civilians. It is no doubt derived directly from Ulpian's definition of justice as "constans et perpetua voluntas jus suum cuique tribuendi". We may cite as illustrative of this a gloss of Irnerius on the Digest, a phrase of the Summa Codicis attributed to him, and a phrase of Placentinus' work on the Institutes. Justice is regarded as a quality of will, the will to secure and maintain cequitas. The definition of *aequitas* is no doubt partial and one-sided; *aequitas* may be taken, perhaps more normally, as the principle which distinguishes between a general law and its application to particular circumstances. We do not here deal at all with the general theory of the subject, but only with what seems to be the tendency of these civilians to relate the conception of *aequitas* to the abstract principle of justice in these formal definitions.

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

In order to appreciate these definitions and principles more completely, we turn to the full and formal treatment of the subject in two of the great civilians of Bologna, in Placentinus and Azo. We have already quoted some sentences from Placentinus' "Summa" on the Institutes, which deal with the nature of *aequitas* and justice; these are only parts of an extended discussion of the subject. He first defines the nature of *aequitas*, and then says that justice resides in the minds of just men, we ought to call a judgment *aequum*, while the man or the judge should be called just. He then quotes a definition of justice from Plato and another from Cicero, but it is the definition of Justinian, that is, of Ulpian in the Digest and Institutes, on which he dwells, and from which he derives the principle that it is the will which makes an action good or evil; he adds that justice is not only a good will, but a good will or temper which is constant and enduring. The statement of Azo is extremely interesting, for he draws out at length the conception of justice as being primarily a quality of God, and secondarily of man.

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

The conception of justice in these writers is profound and significant. We shall presently deal with the interpretation of their conception into the practical theory and criticism of law, and we shall then see how significant these conceptions really are. We may find a fitting conclusion for their treatment of justice in a passage from the 'Quaestiones' of Imerius, a passage which describes the vision of the ineffable dignity of Justice surrounded by her daughters, Ratio, Pietas, Gratia, Vindicatio, Observantia, and Veritas, and holding Aequitas in her embrace, while she deals with the "causes" of God and men, and, rendering to every man Ms due, preserves unharmed the society of men.

CHAPTER II
THE THEORY OF *JUS*.

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

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

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

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

Here we come, however, to an ambiguity in the meaning of *aequitas*, of which we must take account. So far we have considered the term defined as some essentially fair and reasonable adjustment of things, a principle which finds expression in the just will to give every man his due. We have now to observe that the term *aequitas* is also used, by some at least of these civilians, in a

much more technical sense. All the civilians agree with such a statement as that of Bulgarus, but they differ greatly as to the sense in which *aequitas* is to be understood.

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

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

One school of civilians seems to have held to the view, possibly the older view, that the judge must decide cases in accordance with the abstract principle of *aequitas*, even against the written law; but another school maintained that the *aequitas* which the judge was to obey was of quite another kind. In the collection of disputed questions compiled by Hugolinus, we have a passage which makes the nature of the discussion clear. The question raised on Cod., III. 1. 8 was the following—Whether unwritten equity was to be preferred to strict law? Some said that the passage meant by "justice" that which was established by law (*lege*), and not that which a judge might consider to be justice; and they quoted Nov., 18. 8 to show that the strict law must be preferred to such personal judgments. Others said that justice, whether written or unwritten, was to be preferred to strict law (*jus*), and they referred to Dig., I. 3. 32 and 33 in support of this position. Savigny has drawn attention to an observation of Odofredus which seems to imply that Martin, another of the four doctors, had often appealed to an unwritten equity, even against the written law. Azo, in his treatise on the Institutes, shows that he understood by the *aequitas* which was to override the written law a written *aequitas*—not some principle which a man may chance to find in his heart. In another place Azo puts the same view with great clearness: it is certain, he says, that *aequitas* is to be preferred to strict law—that is, an *aequitas* devised by law, not by any one's private judgment.

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

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

But before we deal with this, another question arises, that is, whether justice in man is a perfect reproduction of justice in God, of the final justice. Some at least of the writers on the Civil Law are very clear that this is not the case. There is a very interesting passage in that anonymous treatise, 'De Justitia', to which we have already referred, bearing upon this. The author makes a very clear

distinction between the divine and the human justice, although he holds that the latter is also by the divine testimony declared to be divine. He urges that there is a great difference between such a divine law as that of the Gospels which bids a man turn the left cheek to the smiter, and the human law which permits men to oppose violence to violence. The author looks upon human justice as incomplete and inadequate, but he argues that it is a preparation for the divine or perfect justice, and he regards the relation between the law of the Old Testament and that of the New as illustrating the conception of an imperfect law, and an incomplete conception of justice, preparing the way for the perfect.

There does not seem to have been much discussion of this point among the civilians, but the distinction seems to have been familiar to them. Roger clearly refers to it in discussing the nature of justice and *jus*, when he speaks of that aspect of justice which allows a man to return a blow, as being unjust when considered by itself, but just when compared with injustice; and Azo does the same when he speaks of the second form of equity which forbids you to injure your neighbour unless you have been injured, and says that this is inequitable when compared with the highest equity, which consists in turning the other cheek to the smiter.

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

A similar conception is expressed by the author of the Prague fragment in the passage already quoted, when he says that in justice *jus* has its beginning, and that justice is the will to give every man his due: this is complete and perfect in God, in us it is called justice "per participationem"; justice differs from *jus*, for justice is constant, *jus* is variable, though this variability lies in the nature of the things with which it is concerned, rather than in itself.

We have thus indicated some of the most important elements in the theory of the relation of *jus* to *justitia*, but the conception of *jus* can only be adequately considered in relation to the more or less formal definitions and discussions of it which we find in the treatises of the great jurists. We may take these in their chronological order, and begin with an interesting discussion by Irnerius of that phrase of Paulus on which we have already commented in our first volume: "Jus pluribus modis dicitur : uno modo, cum id quod semper aequum ac bonum est jus dicitur, ut est jus naturale. Altero modo, quod omnibus aut pluribus in quaque civitate utilis est, ut est jus civile" (Dig., I. 1.11). Irnerius compares with this the phrase of Ulpian: "Jus est ars boni et sequi" (Dig., I. 1. 1), and asks how these two conceptions can be reconciled with each other. He replies by pointing out that the phrase of Ulpian assumes that *jus* represents the authority of him who ordains it, but also the principles of *aequitas*; but the word *jus* is also sometimes used to describe a form of authority which does not necessarily represent *aequitas*, as, for instance, an unjust judgment of the Praetor. Irnerius explains that this is called *jus* because the Praetor ought to give a just judgment. The distinction between the "natural" and the "civil" *jus* is related to this double sense of *jus*, and also to the fact that the "civil" *jus* often has reference only to some particular place or time, while the "natural" holds always and everywhere. This is only a brief summary of the discussion: how far Imerius' interpretation really corresponds with the meaning of Paulus and Ulpian may be doubted, but the

passage serves to show very clearly how strongly the mediaeval civilians insisted upon the conception of law as representing the principle of justice, and as deriving its character from this fact. This is still further illustrated by another passage in the same treatise.

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

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

Our examination of these discussions will have made it plain that the mediaeval civilians maintain the doctrine that law (i.e., *jus*) is the embodiment of the principle of justice, that they are clear that all systems of law represent the attempt of man to apply the principle of justice to the circumstances of human life. Justice is the source of law: from it law proceeds, by it law is to be tested, in accordance with it law is to be made or to be changed. In the first volume of this work we have endeavoured to point out that these are the principles laid down by the great jurists of the second and third centuries; while they are restated, and to some extent developed, by the compiler of the Justinian Institutes in the sixth century. We have now endeavoured to show that the mediaeval civilians not only recognise these principles, but develop and expand them. To these writers law is not the expression simply of the will of the sovereign—if we may use a phrase which belongs to a later time,—but rather all systems of law represent the attempt to apply the fundamental principles of justice to the actual conditions of human life.

CHAPTER III.
THE THEORY OF NATURAL LAW

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

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

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

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

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

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

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

The formal definitions of the *jus naturale* leave us in doubt whether the civilians had arrived at any clear view as to the sense in which the phrase should be used; we may reasonably conclude that the ambiguity in the definitions of the 'Corpus Juris' hampered them so much as to make it difficult for them to come to any definite conclusion. The Canon Law presents in this respect a noticeable contrast with the Civil Law. The civilians cannot make up their minds to choose between the various senses in which the phrase might be used, while the canonists, as we shall see, decided clearly and definitely in favour of a particular usage. But on the whole it seems true to say that while the civilians hesitated to commit themselves in definition to any one sense of the phrase, they do very constantly mean by the *jus naturale* that body of moral principles which is always and everywhere recognised by men's reason as binding—that is, they do constantly use it in the sense in which it is sometimes used in the 'Corpus Juris Civilis', and regularly in the Canon Law. With all their hesitation about definitions the civilians assert very emphatically that the *jus naturale* is immutable, and not to be overridden by any other system of law. It is a graver fault to be in error as to the Natural than as to the Civil Law; no one can be allowed to plead ignorance of it. Natural Law is not on the same level as other laws, but is in some sense supreme, not normally to be overridden by other laws, not to be abrogated except in certain rare cases. The principle is well brought out by a passage in Hugolinus' collection of questions disputed among the jurists, in which he puts together the views of different lawyers on the question how far the emperor's rescripts, obtained contrary to the existing law, were to be accepted in the courts. We shall have to return to the discussion of this subject when we deal with the theory of the authority of the ruler. In the meanwhile it is enough to observe that, while some jurist is represented as maintaining that imperial rescripts, unless they have been obtained by falsehood, override the Civil Law, he is also represented to have said that if these rescripts are contrary to the Natural or the Divine Law, they are to be repudiated. The same principle is here said to have been held by Albericus. Placentinus lays down a similar view in his work on the Institutes, in discussing the legislative power of the emperor. Azo also held that a rescript of the emperor which is contrary to Natural Law is void. It is clear from such passages as these that the mediaeval civilians have carried on from the Institutes the conception that Natural Law represents the immutable principles by which the world is governed, principles apprehended by men but not controlled by them. The civilians have learned from the 'Corpus Juris' the same conception as that held by the canonists.

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

general terms in a treatise which may very probably be earlier than Bulgarus, in an appendix to ‘Petri Exceptiones Legum Romanorum’.

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

CHAPTER IV.
THE THEORY OF SLAVERY.

The mediaeval civilians, like some of the great jurists of the Digest and Institutes, are involved in what seems at first sight an inconsistency and a self-contradiction. At one moment they speak of the *jus naturale* as immutable and perpetual; at another they describe and assent to institutions which they say are contrary to the *jus naturale*, such as the institutions of slavery and property. Some jurists of the Digest lay down very clearly the principle that slavery is contrary to nature or natural law, while at the same time they accept the institution. It is the same with the mediaeval civilians, and indeed in general their views are directly taken from the ancient jurists. The author of the 'Brachylogus' puts together the phrases of Florentinus and Ulpian, which assert that slavery is contrary to nature, and that by natural law all men were born free. Irnerius is quoted by Odofredus as classing slavery among those things in respect of which the Civil Law adds to or takes away from the *jus commune*; and there is an interesting discussion of the subject in another gloss on the Digest by the same jurist. Liberty, he says, belongs to the Natural Law; it exists both in fact and by law. In fact, it is interfered with by force, in law by another law,—for the law of nations is contrary to the law of nature, just as the Lex Falcidia was contrary to the earlier law. The slave has no doubt *naturalis facultas*, but he has not the *facultas* of doing whatever he wishes, for his *facultas* is dependent upon the will of his lord". Bulgarus, in a passage to which we shall have to recur, asserts that slaves are by Natural Law free, and all men are equal. Placentinus quotes and comments upon the saying of Florentinus. Hugolinus describes freedom as the primitive condition of man.

These quotations will suffice to make it clear that the jurists of the twelfth and thirteenth centuries take over from the ancient lawyers the theory that in some sense slavery is contrary to nature or Natural Law, and yet that it is an institution of the *jus gentium* or of the *jus civile*. We find that is the contrast between the natural and the conventional order of society, illustrated by the institution of slavery, just as it is in the ancient lawyers and in the Christian Fathers. We must presently consider how far the same thing is true in the case of these civilians with regard to the institution of private property. But before doing this, it will be convenient to consider a little further the principles of the civilians with regard to the position of the slave. As far as we can judge, these do not in any important point depart from the principles of the ancient law, but perhaps they carry a little farther that tendency to modify the condition of slavery which we find in the 'Corpus Juris'—at any rate, they restate some of the phrases which exhibit this tendency.

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

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

IX. 14, but with some modifications, and, as he says, differing from Placentinus on one point. The master, he says, who kills his slave without cause and wilfully, is liable to the same charge as though he had killed a freeman; but if, he says, the master punish him reasonably, then he is not liable to any punishment, and he adds that Placentinus had stated a contrary opinion. This is not the case in Placentinus' treatise on the Institutes just quoted, but it may be so in the treatise on the Code, or in some gloss, it would be interesting if indeed Placentinus had expressed this view, but it seems improbable. It is important to notice that Placentinus says that a master killing his slave without cause will be punished as though he had killed a freeman, and that Azo says the same. This seems to be stronger than either Inst., I. 8, or Cod., IX. 14.

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

With regard to the question of the ordination of a slave, Azo reproduces the provisions of Novel 123, 17. Slaves ordained with their master's consent are free; if ordained without the knowledge of the master he can within one year prove that the man is his slave, and reclaim him. With regard to the reception of slaves into monasteries, Azo summarises the provisions of Nov. 5, 2. If any unknown man enter a monastery, he is not to receive the habit for three years, and if within that time his master appears and proves that he is his slave, or *adscriptius*, or *colonus*, and that he has fled to the monastery to escape his work, or because he had committed some theft or other crime, he is to be restored to his master, on an oath that he will not punish him. But if after three years he has received the habit, no claim is to be entertained.

It remains to notice some statements by these jurists on the position of the *ascriptitius*, and the distinction they draw between his position and that of the slave. Irnerius, commenting on Florentinus' definition of slavery in Digest, I. 5. 4, says that the *ascriptitius* is not subject to the dominion of another man, but is the slave of the estate (*glebe*). Placentinus is more explicit, and says that in his judgment the *ascriptitius* is *liber*, although he is *servus glebe*. And Azo is even more dogmatic, and maintains that the *ascriptitius* is really free (*liber*), although he is bound by certain kinds of *servitium*, and he repeats the provision of the Novels that he can he ordained without his master's consent, but must in that case continue to fulfil his agricultural task.

CHAPTER V.
THE THEORY OF PROPERTY.

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

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

We begin with some references to the subject in those works which are either earlier than the school of Bologna, or at least independent of it. Conrat and Fitting have published a gloss on the Institutes which they consider to be entirely independent of Bologna; a passage in this speaks of things which are acquired by the civil law or by the natural law. Fitting has published a little work which he considers to belong to the eleventh century, and to be of North Frankish origin, consisting of definitions of legal terms. This explains *possessio* in the terms of Digest, XLI. 2. 1, and then adds that it is either natural or civil. Another treatise, the 'De Natura Actionum', speaks of the *accio in rem* to which a man has the right, who has *dominium* by civil or natural law; and it is interesting to notice that the author has misquoted the passage in the Digest which he is citing—unless indeed his text was different, for Paulus, in this passage in the Digest, speaks of those who have dominium by the law of nations or by civil law. Fitting has suggested that Placentinus is correcting this treatise, when in his work 'De Varietate Actionum' he states that dominium does not belong to the *jus naturale*; we shall recur to this presently. The 'Brachylogus' enumerates six methods by which men acquire *dominia* under Natural Law; clearly the author of the treatise had no doubt that the institution of private property belonged to it.

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

Irnerius, in a gloss on the Digest, lays down the principle that there is no private property by nature; while in another gloss he says that private property is one of those institutions which illustrate the meaning of the saying that by the civil law something may be added to or taken from the *jus commune*, and that in the case of property this had been done by *iniquitas*. These statements seem very clear and unequivocal. Private property is a conventional, not a natural, institution; and Irnerius seems to mean that it is the result of some vicious disposition, as Seneca and the Fathers had held. We should indeed be inclined to suspect the influence of the patristic tradition. In the 'Summa Codicis', which Professor Fitting ascribes to Irnerius, we find, however, a different view. In one

passage the author speaks of the beginnings of *naturalis juris dominium*, and gives an account of the origin of property by "occupation", "accession", "translation", as in Institutes, II. 1, or Digest, XLI. 1; and a little farther on he says that there is a natural as well as a civil possession. In a collection of the "Distinctiones" of the oldest glossators, it is said that possession may be understood in two ways— either as civil, which is a matter of law; or as natural, which is a matter *corporis vel facti*. Natural possession is described in terms suggested by the definition of Paulus (Digest, XL. 1. 2,1) as "quasi pedum positio seu assessio"—that is, in terms of physical occupation.

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

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

The treatment of this subject by Azo is somewhat difficult, and it is specially complicated by the fact that while, as we have seen, he distinguishes between the *jus gentium* and the *jus naturale*, he also, as we have pointed out, holds that the phrase *jus naturale* may be used in several senses : it may be defined as something quite distinct from the *jus gentium*, but it may also in one sense be identified with it, and, in another sense still, it may be identified with the Mosaic Law and the Gospel. In one passage of this 'Summa Institutionum' he says dogmatically that it is not by the *jus naturale*, but by the *jus gentium* or *civile*, that we obtain property: this is the more noticeable owing to the fact that the passage of the Institutes on which he is commenting says expressly that men become the owners of some things by the *jus naturale quod sicut diximus appellatur jus gentium*. Azo evidently means that in the strictest sense we do not obtain property by the natural law, but only in that sense in which the natural law may be identified with the law of nations. It is in this sense no doubt that a little farther on in the same passage Azo follows the Institutes in speaking of property by *traditio* as belonging to the *jus naturale*. His theory is again set out in a passage of his 'Summa Codicis', when he defines the nature of possession, and says that it is *naturalis*, but not under that *jus naturale* which belongs to all animals, for the irrational animals cannot have the desire for possession. On the other hand, in his 'Summa Institutionum' he quotes the sentence of Hermogenianus in Dig., I. 1. 5, which speaks of *dominia distincta* as having been introduced by the *jus gentium*, but adds that he does not mean to say that *dominia* were first brought into existence by the *jus gentium*, for according to the Old Testament some things are mine, some things thine, and theft was prohibited. In another place he says that theft is forbidden by the *jus naturale*, and again that it is prohibited by the *jus naturale decalogi*, and yet once more, defining the nature of theft, he says that it is contrary to the *jus naturale*, for the Divine authority warns us not to do to others what we should not wish them to do to us, and the Decalogue forbids us to steal. The statement that theft is forbidden by the *jus naturale* is no doubt taken from Paulus in Dig., XLVII. 2. 1, repeated in Inst., IV. 1. 1, but Azo here identifies the *jus naturale* with the Decalogue, and we must understand him under the terms of this identification. Another passage is interesting, as illustrating the conception

that one form at least of property has been created for the public convenience, but is contrary to *naturalis aequitas* : what exactly Azo meant by this phrase it is difficult to say.

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

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

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

CHAPTER VI.
THE THEORY OF THE *JUS CIVILE* AND CUSTOM.

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

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

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

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

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

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

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

It is clear, then, that these civilians all recognised that custom once had the force of law, but the passages which we have quoted will have indicated that there was among them a difference of opinion on the question, whether custom still and always had this force. We shall best consider this question by proceeding to examine the theories of the civilians with respect to the source of political authority.

CHAPTER VII.
THE SOURCE OF POLITICAL AUTHORITY.

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

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

We may find a convenient starting-point for our discussion by noticing a definition of the *universitas* and its functions which we find in the little treatise, 'De Aequitate', which Prof. Fitting has edited, and has ascribed to Irnerius. It is the function of the *universitas*, that is, of the *populus*, says the author of this treatise, to care for the individual men who compose it, as for those who are its members, and hence it comes that it makes law, and interprets and expounds the law when made, since it is by the law that men are taught what they should do and what they should not do. We may compare with this a gloss of Irnerius on Papinian's definition of *lex*, in which Irnerius treats the *populus* as being identical with the *res publica*, and says that the *populus* commands in virtue of the authority of the *universitas*, and undertakes obligations in the name of its individual members. We may again compare with this an interesting phrase in that treatise on the fiftieth book of the Digest which Savigny identified as the work of Bulgarus. The author is commenting on a saying of Paulus, in which it is laid down that individuals are not allowed to perform those actions which belong to the public duty of the magistrate, lest this should prove the cause of disorder, and he explains this by saying that judicial authority has been established lest individuals should make laws for themselves; this power is reserved to the *universitas*, that is, the *populus*, or to him who represents (*obtinet vicem*) the *universitas*, as the magistrate does. It is interesting to observe that we have here not only a statement of the supreme authority of the *populus*, but also of the doctrine that all magisterial authority is representative. These passages present a clear exposition of the principle that the legislative authority of society is founded upon the natural relation between a society and its members, and that if this authority is intrusted to any particular person it is in virtue of some representative character in him.

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

We need not multiply citations to prove that the mediaeval civilians, with whom we are dealing, have all accepted from the *corpus juris* the principle that the authority of the Roman emperor is derived from the grant of the Roman people. They not only repeat the phrases of the Digest or Code, but it is clear that they accept these as the foundation of their theory of political authority.

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

We must now go a step further, and consider the theory of these jurists as to certain questions that arise out of these principles. The ancient lawyers, while stating that the people had conferred all their authority upon the emperor, do not expressly say whether, in doing this, they had renounced altogether their own authority, or whether they could possibly still exercise this either by direct legislation or by the force of custom. It is true that Justinian at least in one passage of the Code speaks of the emperor as being actually the sole legislator, and that Constantine in the Code says that custom cannot prevail against law, but how far these phrases represent the general judgment of the ancient jurists is uncertain. This is just the point on which our mediaeval civilians differed or were doubtful: there were those who maintained that the people had in such a sense transferred their authority to the emperor, that they could not resume it, and that even the custom of the people had lost its authority in making and unmaking law, while others were inclined to hold that the people retained something of their old power, or at least the right of resuming it. On the one side we find, along with others whose names we cannot recover, Irnerius, in a gloss, Placentinus, and Roger, and on the other side Bulgarus, Joannes Bassianus, Azo, and Hugolinus, and their view again seems to have been supported by others whose names are unknown.

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

We might have supposed from the confident tone of these statements that this was the only view generally current among the civilians in the twelfth and thirteenth centuries. When, however, we examine the literature more carefully we discover that some of them hold another tradition. The collection of "Dissensiones" of the great lawyers contained in the 'Codex Chisianus' includes a very elaborate discussion of the relations of Custom and Law, and of the effect upon the authority of

Custom of the terms under which the people created the emperor. Some writers are mentioned as maintaining that no custom can override the written law, and this for the special reason that the prince is now the sole legislator, while some are mentioned as maintaining that only a universal. custom which is approved by the prince can override written law. But on the other hand there are cited the views of some who maintained that either generally, or in certain cases, custom still prevailed against law. Some are cited as maintaining that customs which are contrary to law are to be observed when they are of such a nature that they could be confirmed by an agreement or contract, for custom is nothing but a tacit contract, but not otherwise. Others again are said to hold that a written law which has been ratified by custom cannot be abrogated by custom, but if the written law has not been ratified, then custom can in some cases render the law void. Others again held that a good custom can abrogate law, but not a bad one. More important, however, is the opinion of those who maintained that, while the custom of the people, which has grown up through their ignorance of the law, cannot override the law, that custom which the people have deliberately adopted in contradiction to the law does amend it; and again, the view that while a merely local custom cannot override the law, the universal custom of the people of the whole empire does this. It is clear that the civilians who are referred to, unfortunately only occasionally by name, were greatly divided; that while there were some who held that the Roman people had completely transferred their authority to the emperor, there were others who maintained that the Roman people had always reserved to themselves the authority which they had exercised through their custom.

In the works of Azo, and specially of Hugolinus, we find these positions drawn out more completely, and the conclusions which might he founded on them more explicitly stated. Azo discusses the question of the force of custom in commenting on that rescript of Constantine which we have just cited. What, he asks, is the authority of custom? It makes, it abrogates, and it interprets law, and he cites Dig., I. 3. 32, 33 and Inst., I. 2. 9. There are however, he adds, certain persons who maintain that the true principle nowadays is represented by the phrase in Constantine's rescript, and that all power has now been transferred by the people to the prince; or again such persons maintain that the principle of Dig., I. 3. 32, only applied to the case of customary laws, which could be overridden by custom, or to the authority of a general custom which had the sanction of the prince. We must, he adds, be careful to consider whether a law which is opposed to a custom, followed or preceded it; in the former case, the law will override the custom, in the latter the custom will override the law. The discussion is very much on the same lines as that of the 'Codex Chisianus', but it is fairly clear that Azo himself looks upon the custom of the Roman people as still possessing the force of law. His meaning in this passage finds its best comment in another passage of his work on the Code, in which he discusses the nature of law, and the persons by whom law can be made. He mentions first the emperor, who is to make law with the advice of the *proceres sacri palatii*, and of the Senate; then the Praetorian Prefect, and those persons to whom the emperor gives this authority; finally, he adds, perhaps even today the Roman people can make law, for though its authority has been transferred or conceded to the emperor, this does not mean that the people has wholly abdicated it: once before, the people transferred their authority, but afterwards they resumed it.

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

Azo's position would be interesting, even if he stood alone, but his conception of political authority has a much greater interest when we observe that Hugolinus, a pupil, along with Azo, of Joannes Bassianus, holds the same principles, but expresses them with more confidence and emphasis. In his 'Distinctiones' he discusses the relation of law and custom in terms which are in

large measure similar to those of the passage we have quoted from the 'Codex Chisianus'; but he also expresses with great clearness his own judgment on certain questions arising out of this. Placentinus, he says, had maintained that custom could not abrogate written law, and had interpreted the passage from Julianus in Dig., I. 3. 32, as referring only to those ancient days when the people had full power to make laws, and held that after they had transferred their authority to the emperor, they had ceased to possess this. Hugolinus himself bluntly and emphatically contradicts this, and maintains that the Roman people never transferred their authority to the emperor in such a sense that they ceased to possess it, while the position of the emperor, he maintains, is that of a *procurator ad hoc*. He adds the very important information that Bulgaras and Joannes Bassianus had taught that a universal custom abrogates law, and that even the local custom of a particular city does so within that city, if the custom has been adopted knowingly or deliberately.

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

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

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

The 'Libellus de Verbis Legalibus' defines a "Pragmatic Sanction" as a new constitution devised by the Senate, and bearing upon some new and difficult question submitted by the emperor. This definition only refers to one particular form of imperial legislation; but it is suggestive to find that, in the view of the mediaeval civilians, the Pragmatic Sanction required the advice or authority of the Senate. When we turn to Irnerius we find him laying down a general principle of great scope and importance. In a passage, of which we have already quoted a part, he discusses the question by

whom and by what process laws are to be made, and says that laws are made by the Roman people, or by that person to whom the Roman people have given their authority; while the manner in which laws are to be made is defined by the constitution of Theodosius and Valentinian—that is, they are to be first considered by the chief men of the court, and especially by the Senate, and after that they are to be promulgated. This, Irnerius adds, is the true method of legislation, for law is an ordinance of the people, promulgated with the advice of the wise men of the community.

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

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

Clearly there was a division of opinion among the civilians, but it is extremely interesting and important to observe that some of the most important among them should have so dogmatically held the view that the legislative authority of the emperor could only be exercised with the counsel and consent of the Senate. It would seem probable that the civilians may have been influenced by the general constitutional principle of the new Teutonic States, but it is also interesting to observe the continued or revived influence in the West of these clauses of the fourteenth title of the first book of the Code. There does not appear, as far as we can find, to be any very careful discussion of the significance and importance of these rescripts of Theodosius and Valentinian. It would seem as though they were intended in some measure to revive the legislative functions of the Senate. It seems to be clear that Justinian did not regard them as in any way binding upon him, and it would seem that the attempt to revive the functions of the Senate had little immediate effect; but it is possible that these rescripts may have exercised a greater influence in the West than we are at present aware of. It is worthwhile to observe that the "Dissensiones Dominorum", contained in the 'Codex Chisianus', indicate that certain civilians maintained that the Senate still possessed the power of making and abrogating law.

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

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

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

There remains one aspect of the theory of the imperial authority in these civilians which we must consider—that is, the theory of the relation of the emperor to private property. Savigny has put together the traditions as to the differences among the Bologna doctors when consulted by Frederick Barbarossa, about the imperial rights over private property, some of them maintaining that the emperor was really the lord of all property, while others denied this. It is clear that there was much difference of opinion among the civilians of the twelfth and thirteenth centuries with regard to the subject. The earliest discussion of the matter which we have found in this period is contained in Irnerius' 'Summa Codicis'; according to the text which Professor Fitting considers to be the original, he holds a clear and decided opinion upon the subject, and maintains that any person who accepts from the prince property which belongs to another man may be compelled to make restitution: no rescripts, he adds, procured by fraud, or contrary to the law, or injurious to others are to be received; they are in error who maintain that the prince can seize a man's goods and give them to another, without due cause—such a proceeding is condemned by the law of the courts and of heaven.

It is a curious thing to find that a Bologna MS. of this same work has a wholly different text in this passage, and seems to represent a defence of the view that the emperor can take a man's property and give it to another. Professor Fitting has suggested that this text represents a modification of his original view by Irnerius himself, in consequence of his being in the imperial service. However this may be, these texts will serve as illustrations of the diversity of opinion among the civilians upon this subject. We find the matter further illustrated in the collection of the "Dissensiones" of the early jurists. In the collection made by Hugolinus, some jurist is reported to have said that the emperor could transfer one man's property to another. In the similar collection made by Roger, he states that some maintained that the prince could alienate a man's property whether he knew that it was the man's and not his own, or was ignorant of this, and that this was founded on Cod., VII. 37. 3, but adds that Jacobus, one of the four doctors, the immediate successors of Irnerius in Bologna, maintained that this law was only applicable to cases where the emperor was ignorant that the property was another man's. Another collection cites Martinus, also one of the four doctors, as agreeing with Jacobus. Azo discusses the question in his 'Brocardica', and agrees with Martinus and Jacobus, but also holds that the emperor can make grants of that property which is in part his, and even of that in which he has no share, if this is for the benefit of the State and the public utility demands it.

If we attempt to sum up our impression of the theory of political authority which was held by these civilians, we are led to the conclusion that the conception of the revived study of the Roman

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

CHAPTER VIII.
THE THEORY OF THE RELATIONS OF THE ECCLESIASTICAL AND SECULAR POWERS.

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

The lawyers, as we have endeavoured to show, are clear as to the nature of the authority of the civil law—that is, that it represents those principles of justice which ultimately have their fountain and source in God Himself; while the immediate and direct source of authority in political society is the people, or the person or persons upon whom the people have conferred their authority. The system of the secular order is, then, in their minds sacred, fulfilling as well as may be, under the terms of the actual conditions of the world, the purpose of the final justice of God Himself. We may find a formal expression of this conception in certain phrases of these writers. John Bassianus, the master of Azo and Hugolinus, in commenting on the 'Novels', says that God established the emperor upon earth in order that by him, as by a "procurator", he might make laws suited to circumstances as they arise, and that the emperor might thus benefit his subjects. Again, Hugolinus, after beginning his work on the Digest with the invocation of the Holy-Trinity, says that the fear of God is the foundation of law, which is in its turn the foundation of human society and the State—for the State is a multitude of men joined together to live by law.

The civilians, then, clearly held the principle of the sacred nature of the secular law; but they also very clearly recognise the existence alongside of the civil law of another law which is not to be confounded with the civil law. We may find an expression of this conception in a phrase of the 'Summa Codicis' of Roger, in which it is said that there are two systems of *jus*—one human and one Divine; and of these the Divine is the more exalted. And again, alongside of the organisation of civil authority there is another organisation, which derives its authority from God as well as from men,—an organisation which, as it has its own laws, has also its own courts and jurisdiction. This conception is expressed in a phrase of that work on the Code which Professor Pitting attributes to Irnerius. The author speaks of the court or authority of the Bishop as being given to him by divine as well as by human law. We may add to this a phrase of Pillius, in which he speaks of the Pope as having, in divine matters, that same complete (*plena*) jurisdiction which the emperor has in his. The civilians may make little direct reference to the theory of the relations of the Church to the State, but there can be little doubt that they look upon it as related to it, but also distinct, and as possessing a character and authority which are divine.

We must begin by examining the conception of the canon law which is held by the civilians, or rather their view of its relation to secular authority and law. The civilians recognise very clearly the supremacy of the law of God over the civil law. The prince, according to Placentinus, is not to ordain laws contrary to the Lord or to nature; according to a passage in the collection of Dissensiones of Hugolinus, rescripts which are contrary to the natural or divine law are to be rejected by the courts. Azo says very emphatically that an imperial rescript or *privilegium* against the law of God, of the apostles and evangelists or prophets, is to be wholly rejected; the emperor cannot abrogate the laws of his superior, though he may apply them with some discrimination of persons, and of the public needs. This is an important qualification; and in another passage he applies it specifically to the question of usury, which may be permitted by the civil law on account of the actual necessities of the world, though it is properly unlawful because it is against the law of God. It is, however, clear that

the civilians fully recognised that the law of God in the Scriptures represented an authority superior to that of the civil law, and that whatever was contrary to this was properly invalid.

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

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

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

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

Irnerius, and, with an important addition, by Roger and Accursius, who mention some civil cases which the bishop cannot decide, and also explain a process under which the case is to be re-tried by the secular court if the bishop's sentence is held to be unjust. John Bassianus states the general principles in much the same way, and mentions some other circumstances which may prevent bishops from acting; but he does not refer to the process by which the case is to be taken to the secular court in the case of an unjust sentence in the spiritual court. Azo puts the matter briefly, very much as John Bassianus does; he also makes no reference to the possibility of recourse to a civil court against an unjust judgment of the bishop. A somewhat later civilian, Bagarottus, puts the principle briefly, that no civil case by an ecclesiastic or by a layman against an ecclesiastic is to be heard in the civil court. It is noticeable that Roger is the only one of the civilians who, as far as we have seen, maintains that if the lay suitor thinks the Bishop's sentence is unjust he can go to the secular court.

We turn to the question of criminal proceedings against the clergy. The author of the 'Brachylogus' says that in criminal cases the cleric may be brought either before the bishop or before the secular court: if the case is taken to the bishop, and he finds the accused *dignus capitali supplicio*, he is to degrade him, and hand him over to the *praesses* to be punished; if the case is taken in the first instance to the secular judge, he cannot punish the cleric until he has been degraded by his bishop; if the bishop is doubtful about the justice of the treatment of the case, he can postpone the degradation (*sub legitima cautela*) until the matter has been referred to the prince. This is very close to the 'Epitome' of Julian and the 'Novels'. Irnerius says that criminal cases against a cleric are to go to the civil judge, who must decide the case in three months: if he find the accused guilty, he must not condemn him until he has been deprived of the priesthood (*sacerdotio*) by the bishop. Roger lays down practically the same rule as Irnerius. John Bassianus holds that in criminal matters the case is to go to the secular court, unless the accuser prefer to take it first to the bishop's court: if the secular court finds the accused guilty, the sentence is not to be pronounced until the record of the proceedings has been sent to the bishop, who is to degrade if he is satisfied with the evidence, then the secular court is to impose the proper punishment. The view of Azo is that criminal cases against the clergy belong to the civil judge, who can acquit without consulting the bishop; but if he conclude that the accused is to be condemned, he must first be deprived of his orders by the bishop.

These civilians all agree in the main principles, that it is for the secular court to try and punish the cleric, but that the court cannot carry this out until the bishop has degraded the cleric. Some of them—*i.e.*, the author of the 'Brachylogus' and John Bassianus—also clearly held that the bishop is to consider whether the evidence is satisfactory before he degrades: it is not clear whether Irnerius, Roger, and Azo take this view or not. The author of the 'Brachylogus' stands alone in following Nov., 123. 21, in the view that if the bishop is not satisfied the matter is to be referred to the prince. The clergy are, then, primarily subject to the jurisdiction of the Church: it is not till they have been deprived by the Church itself of their ecclesiastical character that they come under the ordinary jurisdiction of the secular authority.

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

For the laity, as members of the Church, are in some respects subject to Church law, and are in some measure under the jurisdiction of Church courts. A layman may be guilty of an ecclesiastical offence, and is then liable to be brought before the Church courts. The layman, however, is not liable to the jurisdiction of those courts in the same way as the ecclesiastic. John Bassianus and Azo

maintain that when a layman is charged with an ecclesiastical crime he is to be tried, not by the bishop alone, but by the bishop and the *praesses*. They found this judgment upon certain phrases of Justinian in the Novels; whether their application of these was correct we do not pretend to say. The layman is then subject to the Church law and to the jurisdiction of the Church, though, as these civilians hold, the secular authority is entitled to take its part in the decision of cases brought against the laity in the Church courts.

And again, in quite another connection, we find illustrations of the fact that the two societies are not really separate. For the civilians very clearly recognise that in certain cases the ecclesiastical authorities could intervene even in purely secular matters. The first example of this which we have to consider is the permission given by the Roman law to take a civil case between two laymen before the bishop, instead of the secular judge, if both parties to the suit agreed. This is implied in the 'Exceptiones' and the 'Brachylogus', and is laid down by Irnerius in his treatise on the Code and by the Provençal Summa of the Code. Irnerius makes it clear that such a procedure is entirely voluntary, but he adds that if the parties have agreed to it, and have appeared before the bishop, they will then be compelled to go on: against the judgment of the bishop in such cases there is no appeal, and it must be carried out by the civil authorities. More important, however, is the doctrine of the civilians that, at least in some cases, if a suitor has doubts about the justice of the secular court he may demand that the bishop should sit in court with the secular judge. This doctrine is set out in the handbooks of law, and also by Joannes Bassianus and Azo, among the great civilians of Bologna. In the 'Exceptions' the principle is laid down that while no one can refuse the jurisdiction of the *judex ordinarius*, if either the plaintiff or the defendant suspects the judge, he may demand that the bishop, or some other honest man (*probus*), should sit with the judge, and if they then agree in their judgment, the man who has called in the bishop, or other judge, may not appeal. The same principle is briefly stated in the 'Brachylogus'. These regulations are evidently derived from the 'Novels' of Justinian and from the 'Epitome': but it must be observed that the rule that a man who thus calls in the bishop may not appeal is not clearly asserted in the 'Novels'. It lays down the principle that if a man cannot get justice from the judge, he is to call in the bishop; and if the bishop cannot persuade the judge to do justice, he is to give the suitor letters to the emperor.

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

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

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

PART II.
THE POLITICAL THEORY OF THE CANON LAW TO THE MIDDLE OF THE THIRTEENTH CENTURY.

CHAPTER I.
INTRODUCTION.

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

We do not need to discuss the history of the gradual process of accumulation and selection through which the Canon Law passed before it reached the form which it now wears in the ‘Corpus Juris Canonici’, but a few words are needed to explain the nature of the sources from which it was drawn, and the stages through which it passed. The canon law is in the main derived from four different sources— the Holy Scriptures, the decrees of the great general councils and of certain local councils, certain letters of the Bishops of Borne on public and judicial matters, and the writings of the Fathers. The relative importance and authority of these sources we shall have to discuss in detail when we come to deal with the theory of the canon law itself.

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

Decretals known as the Sext, and by Pope Clement V that known as the Clementines, but with these latter collections we do not deal in this volume.

CHAPTER II.
THE THEORY OF LAW IN GENERAL.

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

We begin by taking account of a definition of law contained in the work of Ivo of Chartres. In the great collection of canonical materials which is called the 'Decretum' of Ivo, and which was probably compiled by him, an interesting passage from St Isidore's 'Etymologies' is quoted. St Isidore describes the true nature of law as being *honesta*, just, possible, agreeable to nature, conformed to the customs of the country, suitable to its place and time, necessary, useful, clear, and devised for the common good of all the citizens, not only for that of some individual. This quotation is repeated in the 'Panormia', the handbook of canon law which is recognised as an undoubtedly genuine work of Ivo. These phrases set out the conception on which the canonical theory of the proper nature of law is built up. Law must be agreeable to nature, just, devised for the common good, must represent the custom of the country in which it is to be in force. That is, to express this in broader terms, law is not an arbitrary command imposed by a superior, but rather represents the adaptation of the permanent and immutable principles of "nature" and justice to the needs of a community, under the terms of the circumstances and traditions of that community.

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

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

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

The second principle is as important as the first. Human laws are regarded by St Isidore, in the passage here quoted, as based upon custom, and the variety of human laws is explained as due to the fact that different nations have different customs. Gratian accepts this principle, and uses the word *mores* to cover the whole range of human law, explaining these more fully by defining them *as mores jure conscripti et traditi*. In another passage of the same ' Distinction', he quotes St Isidore's definition of *consuetudo* as being that form of *jus* which is founded upon custom, and which is accepted as *lex* in the absence of *lex*, and St Isidore's observation that custom is equally valid whether it is drawn out in writing or whether it is only established by "reason", for, after all, it is "reason" upon which the value of lex, the written law, depends. From these phrases Gratian draws the conclusion that all law is really custom, that part which is written down being called *constitutio sive jus*, while that part which is not written is known as *consuetudo*. This is a far-reaching principle which is thus laid down by Gratian; it is no doubt implicit in the ancient Roman law, but it was not expressly drawn out, and it has very important consequences on the theory of the source of the authority of law.

Human law is, then, custom, whether reduced to writing or not. But this does not mean that Gratian thinks that any custom is entitled to be recognised as law. Having laid down the general principle which we have just discussed, he quotes Isidore's saying that jus is so called because it is just, and in the fourth 'Distinction' he goes on to consider the purpose, and therefore the essential quality, of law; and, citing another passage from Isidore, he defines the purpose of law as being to restrain men's audacity and their opportunities of injuring others; while he describes the nature of law in the terms of the same passage from St Isidore which we have already discussed as cited by Ivo of Chartres. In establishing laws, he says, we must be careful to consider whether they represent the principles of *honestas*, justice, possibility, and those other qualities described by St Isidore. We shall have to return to this question presently, when we consider in more detail the nature of the particular law of any State, the source of its authority, and the relation of this to custom. In the meanwhile it is enough to observe that when Gratian identifies human law with custom, this does not at all mean that he conceives of custom as having any force, except so far as it corresponds with the principle of justice. But in order to treat this subject adequately, we must turn to that tripartite definition of law which the canonists inherit from Isidore and the *corpus juris civilis*.

CHAPTER III.
THE THEORY OF NATURAL LAW

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

We must however again notice that while Gratian accepts the tripartite definition of law, this threefold division is subordinate to the twofold division of Natural or Divine Law and Custom, for the *jus gentium* and the *jus civile* are both included under mores, while natural law is equivalent to divine law. We must consider more closely what the canonists understand by *jus naturae* or *jus naturale*. Gratian cites the definition of Isidore, but does not himself furnish us with any technical discussion of this point, though, as we shall presently see, he discusses very important questions arising out of it. We have already quoted the words in which he describes the *jus naturae* as equivalent to that principle of the law and the Gospel which bids us do to others what we would that they should do to us, and to this we shall have to return. But before doing this we shall find it useful to turn to the work of Rufinus, one of the most important twelfth-century commentators on Gratian. In his comment on the phrases with which Gratian introduces his first 'Distinction', Rufinus has carefully stated the sense in which he understands the phrase "Natural Law". The *legistica traditio*, he says, has defined the conception of the *jus naturale* when it says that natural law is that law which nature has taught all animals, but the canonists, neglecting so general a conception, are concerned about its meaning in relation to matters which relate to the human race alone. The *jus naturale* is a certain quality implanted in mankind by nature, which leads men to do what is good and to avoid what is evil. This *jus naturale* consists of three parts—of commands, prohibitions, and *demonstrationes*. It commands men to do what is useful, as for example, "Thou shalt love the Lord thy God"; it forbids that which is hurtful, as for example, "Thou shalt not kill"; and it points out (*demonstrat*) what is expedient, as for example, that all things should he held in common, that there should he liberty for all mankind. We must presently consider how it comes about that some of the latter provisions of the natural law have been set aside. But it is of great importance first to observe the formal repudiation by Rufinus of Ulpian's definition, which makes "natural law" a matter of animal instinct. Rufinus returns to this in discussing a later part of the same 'Distinction', and reminds his readers how he has already warned them that the ancient lawgivers use the phrase *jus naturale* in a different sense from that in which the canonists use it. They (the old lawgivers) use this phrase in such a general sense that it would seem to be something common to all animals, while the canonists use it in a restricted sense as applied only to mankind.

We should compare with this the discussion of the subject by Stephen of Tournai, another of the important twelfth-century commentators on Gratian. He explains that the phrase *jus naturale* can be used in various senses : in that of Ulpian, as the principle or instinct common to men and all animals; as equivalent to the *jus gentium*; as equivalent to the divine law which God has taught men in the law and the prophets and the Gospel; in a still wider sense as that law which includes both human and divine law, and that instinct which is given to all animals; and finally, in a fifth sense, as that law which is by nature given to men and not to the other animals—the law which teaches men to do good and to avoid evil; this is a part of the divine law, and consists of commands, prohibitions, and demonstrations. In this last definition of the meaning of the *jus naturale* Stephen agrees with, is indeed probably following, Rufinus. In his analysis of the conception and his recognition that the phrase must have many senses, he suggests a comparison with the civilians. We have pointed out the recognition of the manifold significance of this term *jus naturale* in Azo's commentary on the

Institutes; whether Stephen, who had certainly studied the civil law at Bologna, had learned this mode of thinking from the civilians, or whether the civilians, like Azo, learned it from the canonists, we do not pretend to say.

Stephen's treatment of the subject is interesting, but we can hardly doubt that it is the definition of Rufinus which corresponds most closely with what is usually meant by the *jus naturale* in the works of the canonists. We have seen that Gratian, in dividing all law into natural and customary, identifies the *jus naturale* with the *jus divinum*. Its characteristic expression is found, he says, in the great phrase of the Gospel, "Do unto others what thou wouldest wish others to do unto thee". Natural law, therefore, is superior to all other law—it is primitive and unchangeable, all customs and laws contrary to the jus naturale are void. In another passage Gratian urges the agreement of natural law and the Scriptures, and concludes that natural law is supreme just as the divine will and the Scriptures are supreme. All constitutions, whether ecclesiastical or secular, if they are contrary to the *jus naturale*, are to be rejected. Ignorance of the civil law may sometimes be condoned, but ignorance of the natural law is always to be condemned in those of mature years. And finally, no dispensation from the natural law can be accepted, except in the case when a man is compelled to choose the lesser of two evils.

These are strong and sweeping phrases of Gratian, but they only express a judgment which is repeated by all the canonists of this time. The first commentator on Gratian, Paucapalea, restates Gratian's principles, the *jus naturale* is contained in the law and the Gospel, and commands us to do to others as we would that they should do to us; it began with the beginning of rational creation, is superior to all other laws, and admits of no variation, but is immutable. We have already quoted part of the important passage in which Rufinus discusses the character of natural law; in the same passage he goes on to treat of the relation of this to other systems of law. He had begun by saying that the *jus naturale* was a principle implanted in human nature, teaching men to do good and to avoid evil; but, he says, the power of this principle was so much weakened after the sin of the first man, that mankind almost came to think that nothing was unlawful; natural law was, in part, re-established by the Decalogue, and completely by the Gospel. This treatment of the subject is interesting, and is probably derived from the patristic discussions of the subject. In another passage he interprets a phrase of Augustine as making truth and reason equivalent to the precepts of the *jus naturale*. In another place he takes a reference of Gratian's to the Canonical Scriptures as implying that he holds them to be the same as *instituta naturalia*. Such is the authority and sanctity of the natural law, and we therefore find him repeating in emphatic phrases Gratian's principles, that all laws contrary to the natural law are null and void. In one passage he draws this out with much force; in these three points especially does the natural law differ from the law of custom or constitution—namely, in its origin, its breadth, and its dignity : Gratian had already discussed its superiority in origin and breadth, but now drew out again its superiority in dignity, saying that whatever custom or constitution there might be which was contrary to the commands and prohibitions of the natural law was null and void, for the Lord said, "I am the truth", not, "I am custom or constitution". And again, in a later passage, Rufinus says more emphatically still: "Whatever there may be in the laws of the emperors, in the writings of authors, in the examples of the saints, contrary to natural law, we hold to be null and void." Finally, he restates Gratian's principle that no dispensation can be given from the rules of the natural law, except in the case when a man has to choose between two evils, as for instance if a man has sworn to kill his own brother. Damasus, a canonist and civilian of the beginning of the thirteenth century, discusses the question of the authority of Natural Law in his "Burchardica", citing the authorities on each side, and himself, as we understand, concludes that the *jus naturale* is unchangeable, even by the Pope himself. And finally Pope Gregory IX, in one of his Decretal letters, adopts and confirms the principle that no custom can override the *jus naturale*, and that any transgression of it endangers a man's salvation.

A consideration of these passages seems to make it abundantly clear that these canonists look upon the law of nature primarily as equivalent to the general principles of the moral law—principles which are derived directly from God, and which are antecedent to and superior to all positive laws of any sort, whether ecclesiastical or secular. So far the subject is clear, and no special difficulty has presented itself; but we must now consider a real difficulty, which arises from the fact that the *jus naturale* has been said to be contained in "the law and the Gospel", while actually there is much in the "law" which is no longer obeyed. And again, the *jus naturale* is said to be immutable, while actually conditions of life now exist, and are allowed to exist, which are contrary to the principles of the *jus naturale*. We must consider these two questions separately; and first, How is it that the "Divine Laws" contained in the "law and the Gospel" have actually been changed?

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

We must turn to the second question. The *jus naturale* is said to be immutable. How is it, then, that conditions are allowed to exist which are contrary to this law? Gratian, in dealing with the institution of property, points out that there is a difference between the *jus naturae* and custom or constitution, for by the law of nature all things are common, and he illustrates this not only from the practice of the primitive Church, but also from the Platonic doctrine of the most just form of State. It is by the law of custom or of "constitution" that one thing may be said to be "mine" and another "thine". Gratian then cites the passage from St Augustine's treatise on St John, which maintains that property is the creation of the law of the State. Gratian points out the contrast between the *jus naturale* and the actual order of society in this matter, but he does not furnish us with any explanation. This omission is repaired by Rufinus, who deals with the matter very carefully. We have already discussed the first two sections of his treatment of the natural law in commenting on Gratian's first Distinction. We must now consider the rest of this important passage. After describing the character of the natural law as the moral principle implanted in man, and its division into commands, prohibitions, and *demonstrationes*, he argues that the force of this was so much weakened after the Fall that it had to be re-established in part by the Decalogue, and finally and completely by the Gospel. He then proceeds to show how the abstract and general character of the principles of the *jus naturale* made it necessary for additions to be made to it by good customs; and he gives as an illustration the institution of the rules and ceremonies of marriage. So far for the additions (*quod adauctum est*) to the law of nature which are to be found in the institutions of society. The subject of conditions contrary to the principles of the natural law (*quod detractum est*) presents greater difficulties. Rufinus explains this as follows. Referring to his analysis of the *jus*

naturale into commands, prohibitions, and *demonstrationes*, he explains this last phrase as indicating those things which the *jus naturale* neither forbids nor commands, but shows to be good; as a special illustration he mentions the liberty of all men and the common possession of all things : these phrases are taken from Isidore's definition of the natural law as quoted by Gratian. These conditions belong to the natural law, while under the civil law this man may be my slave, this field may be your property. Rufinus explains this by saying that such conditions, contrary as they may seem to the natural law, in reality carry it out. To take the case of slavery, some men living without a master followed their own unrestrained desires and committed all manner of crimes with impunity, and it was therefore ordained that such men should he made perpetual slaves. The object of this was that such men, who had been full of pride and were injurious to others so long as they were free, should be rendered humane, humble, and innocent by the discipline of slavery. No one can doubt that as pride and ill-will are contrary to the *jus naturale*, so innocence and humility are proper to it.

Rufinus's statement is interesting and suggestive; it is, of course, not in any sense original, for he is only putting into other terms the explanation of the contradiction between the law and institutions of nature, and the actual law and institutions of the world, which had been suggested by Seneca, and drawn out at length by the Fathers. Rufinus's statement serves to remind us that the mediaeval theory of society rests upon the assumption that the conventional institutions of society are the results of sin, and are intended to check and control sin. We shall come back to this when we deal with the theory of slavery and property.

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

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

CHAPTER IV.
THE *JUS GENTIUM.*

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

Gratian looks upon the *jus gentium* as one part of the customary law of mankind. As we have already seen, he has set out a distinction which, as we may gather, he considers to be more fundamental than the tripartite definition of law, the distinction between natural law and custom,—a distinction which corresponds to that between the Divine law which exists by nature, and the human law which exists by custom. The *jus gentium* is a form of customary law, distinguished from the *jus civile*, because the former represents the custom of mankind, the latter the custom of some particular State. This seems to be clearly implied by Gratian and by Rufinus. The law of nature, Gratian says, began with the beginnings of the rational creation, and continues unchangeable; the law of custom came after the law of nature, and began from that time when men commenced to dwell together; it was only later that the *jus constitutionis*, that is, a system of written law, began: the first example of this, Gratian, repeating Isidore, finds in the legislation of Moses, and this was followed by other legislators. Paucapalea repeats the greater part of Gratian's phrases with little change or addition of any significance. Rufinus also has an account of the beginnings of human societies, and of the origin of the general laws and customs of mankind, and he explicitly identifies these with the *jus gentium*. He describes how by the Fall man's sense of justice and capacity for knowledge were greatly impaired; but inasmuch as his natural powers were not wholly destroyed, he began to understand that he was different from the brute animals both in knowledge and manner of life, and he began to seek his neighbour's society and pursue the common service; the embers of justice which had been almost extinguished began again to burn, that is, the rules of modesty and reverence, which taught men to enter into agreement with each other,—and these are called the *jus gentium*, because almost all races of men obey them.

CHAPTER V.
THE THEORY OF SLAVERY.

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

The canonists inherited from the later philosophers of the ancient world, from the *corpus juris civilis*, and from the Fathers, the principle that by nature all men are free and equal, that slavery is an institution not of nature or the natural law, but of the *jus gentium* or the civil law. We have already considered this principle as held by the civilians of the Middle Ages, and it is not necessary to cite many passages to prove that this was the doctrine also of the canonists. The equality of human nature is indeed the doctrine which is assumed by them all as the fundamental principle of human life—that is, the equality of men, as being all the children of one Father in heaven.

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

This principle is regarded as determining the nature of the marriage relations of slaves, and a canon in Burchard's 'Decretum' lays down the rule that if a free woman knowingly married a slave, he was to be reckoned as her husband, "For, we all have one Father in heaven"; this is also contained in the 'Decretum' of Ivo. Ivo and Gratian include in their collections a canon which prohibits the dissolution of the marriage of slaves, on the ground that as God is the Father of all men, the same law is binding upon all in things related to God. We shall have to return to the question of the marriage of slaves; in the meanwhile these passages will serve to bring out clearly the fact that the canonists assume the principle of the equality of human nature.

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

by the law of nature all men were born free. We have already considered the important passage in which Rufinus discusses the question of the apparent contradiction between the law of nature and the civil law with regard to slavery. Rufinus does not express his views in the same strictly theological phrases as Isidore and the Fathers, hut his explanation of slavery is substantially the same. Natural law shows that freedom is a good condition, and slavery would at first sight seem to be contrary to this, hut its real purpose is to correct men's evil desires and criminal passions, and to produce those qualities of humility and innocence in which the natural law is fulfilled. Freedom is, indeed, that condition which is agreeable to natural law, hut men are not yet fit for that condition.

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

Regino includes in his collection some sentences from a canon of a Council of Toledo which strictly forbid a bishop to emancipate slaves who belong to the Church unless he gives of his own property to the Church; if any bishop should emancipate Church slaves except under these conditions, his successor is to reclaim them. Regino also cites a canon which forbids an abbot to emancipate slaves who have been given to a monastery, for it is unjust that while the monks do their daily agricultural work the slaves, should live in idleness. Burchard of Worms includes the first of these canons in his Decretum, while Ivo of Chartres reproduces both. Gratian states the same principles in connection with the ordination of slaves. He discusses the question whether the slaves of a monastery can he ordained, and points out that it may he argued that this is impossible, for no one can be ordained unless he is emancipated, and he cites as a canon of the eighth general council what is really a passage from the 'Regula Monachorum', attributed to St Isidore of Seville, which lays down the rule that no abbot or monk can emancipate a slave. He replies to this by urging that while it is quite true that the slaves of a monastery cannot be emancipated in such a sense that they could leave the monastery, they can be ordained and so emancipated under the condition that they are to continue in the monastery—that is, as we understand, under the condition that they are admitted as monks; and he cites a passage from Gregory the Great which expressly authorises the admission of a slave of the Church into a monastery. Gregory IX, in his Decretals, repeats the canon of Toledo, which we have already cited from Regino of Prum, the canon which forbids a bishop to emancipate slaves belonging to the Church unless he gives property of his own to the Church.

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

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

According to a canon in Regino's and Ivo's collections, if a slave is ordained by the bishop, knowing that he is a slave, but without the knowledge and consent of his master, he is to continue in his office, but the bishop is to pay double his value to the master ; if the bishop was ignorant that he was a slave, then those who testified to his character, or who presented him for ordination, are to pay this compensation. According to a canon in Burchard, which comes from the 'Capitula Ecclesiastica' of 818-19 A.D., a slave who procures his ordination by fraud is to be restored to his master; if he procured ordination, being himself ignorant of the fact that he was a slave, his master may grant him his liberty, and the slave will then remain in his order, or he may reclaim him as a slave, and he will then lose his order. This canon is also found in Ivo's 'Decretum', and was inserted as a Palea in Gratian's 'Decretum'. It would seem, however, that this canon does not represent the judgment either of Gratian or of his commentators. Indeed even Burchard and Ivo have also cited canons which represent another judgment. Burchard cites a canon which prescribes that though a slave who has been ordained is to be restored to his master, he is to continue in his order. Ivo cites a passage from a letter of Pope Gelasius I, which enjoins the restoration of the ordained slave to his master, but also provides that the slave who has been ordained priest, while he is to be sent back to his master, is to serve him as a priest; and he also cites another letter of Gelasius which does not allow a priest to be degraded, but punishes him with the loss of his *peculium*, while slaves in the inferior orders are simply to be restored to their masters. Gratian cites both these letters of Gelasius, and states his own judgment as being that, if a slave has been ordained without his master's consent, a priest is to be deprived of his "peculium", a deacon is to find a substitute, or, if he cannot do this, to be reduced to slavery, while those in other orders are simply to be reduced to slavery. There might seem to be some uncertainty about Gratian's meaning ; at first sight it would seem as though the priest were not to be restored to his master, but only to forfeit his "peculium", but the fact that he cites the passage from Gelasius which orders him to be restored to his master, but only in order to serve him as a priest, would seem to indicate that he approves of this, but does not understand this as equivalent to the reduction of the priest to slavery. Paucapalea restates the judgment of Gelasius (Epistle xx.) as to the priest. Rufinus sums up the whole matter in a passage introductory to Gratian. If, he says, a slave is ordained with the master's knowledge, and the master says nothing, the slave is free; if the slave is ordained against the declared wishes of the master, he must be reduced to slavery and lose his order, even if he is a priest, and he refers for proof to that canon of Burchard which we have already quoted,—it would seem that Rufinus did not know this as a Palea in Gratian's Decretum. This canon prescribes that a slave who has been ordained without his master's knowledge may be reclaimed by his master and degraded; Rufinus urges that if this were true of a man ordained to the priesthood without his master's knowledge, much more would it hold in the case of a man ordained against his master's declared will. Then, however, Rufinus considers over again the case of a slave ordained without his master's knowledge, and repeats Gratian's own judgment that in this case the man in subdeacon's orders, or in inferior orders, is to be reduced to slavery, the deacon is to find a substitute or to return to slavery, while the priest is to be punished only with the loss of his peculium, and is in

nowise to be reduced to slavery—unless, Rufinus adds, the man or his parents fled from their master, as in the case contemplated in Burchard's canon. Finally, he adds, some may maintain that the regulation represented by Burchard's canon is annulled by the decree of Gelasius on which Gratian's own saying is founded. These canonists evidently held what was substantially the same principles as the Fathers; if anything their views are rather more strict with regard to the rights of the master over his slave if he should have been ordained. It is, however, worthwhile to notice that some of the canonists have taken over from Justinian the principle that the master can only reclaim his slave who has been ordained within a certain time; Ivo includes in the 'Panormia' the provision of the Novels that if a slave is ordained without his master's knowledge the master can reclaim him, but only within a year. This rule is also cited by Gratian.

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

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

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

The Church gave the weight of its authority to the provisions of the Roman law which restrained the arbitrary power of the master and protected the slave, and lent the sanction of its own penalties to the enforcement of those laws, while in relation to the marriage of the slave it went further than the Corpus Juris Civilis. We have seen that both Placentinus and Azo deal very stringently with the master who ill-treats or kills his slave; they hold that a master is liable to be proceeded against for homicide, as though he had killed a freeman. Regino of Prum cites a canon

which imposed upon the Bishop in the visitation of his diocese the duty of inquiring whether any slave-owner had killed his slave without legal proceedings, and another canon which imposes the sentence of excommunication for two years upon any slave-owner who has done this. These regulations are repeated by Burchard of Worms. Regino also reproduces from the Theodosian Code a regulation that, in the division or sale of properties, care should be taken that husbands and wives, parents and children, should not be separated from each other. Gregory IX, in the Decretals, reproduces and amplifies the doctrine of the ancient Roman law, that a slave deserted or exposed in infancy or illness is to be reckoned as emancipated. Ivo and Gratian include in their collections canons which extend the protection of the Church to the freedman, and provide that any person who attacks their liberty, without a judgment of the courts, is to be excluded from the Church.

So far, the Church law does not do more than reinforce the civil law, but the most important aspect of the relation of the canon law to the condition of slavery is to be found in the treatment of the marriage of slaves with slaves, or of slaves with free people. We have just considered the rule which Regino takes from the Theodosian Code, that the slave husband and wife were not to be separated from each other; this is a humane conclusion from the principle that the marriage of a slave, if contracted under legal conditions, is indissoluble, like the marriage of free people. This principle is expressed very emphatically in a canon contained in the collections of Burchard, Ivo, and Gratian. It must, however, be noticed that according to this canon, if the marriage is to be indissoluble it must have been contracted with the consent of the master: a marriage without this consent is, we may infer, illegitimate.

This is expressly stated in the latter part of Regino's canon; the slave wife is to be bought or sold with her husband, unless she is the slave of another master; the law strictly forbids a slave to marry the slave of another master (presumably without the master's leave); such a marriage is to be held null and void, and to be reckoned as adultery. On this point we can trace a definite development in the canon law, for, in one of his Decretals, Hadrian IV laid down the rule expressly that, inasmuch as in Jesus Christ there is neither free nor slave, and the sacraments are open to all, so also the marriages of slaves must he not prohibited; even if they are contracted against the will of their masters, they are not to be dissolved by Church authority, but the married slaves must discharge their accustomed services to their masters. The canonists also deal carefully with the question of the marriage of free men or women with slaves. Burchard cites a canon which lays down the broad principles on which the matter was decided. If a free man marries a slave woman, not knowing that she was a slave, he is to redeem her from slavery if he can; if he cannot, he is free to marry another wife. If, however, at the time of marriage he knew that she was a slave, the marriage is valid; and so in the case of a free woman who marries a slave. This canon is reproduced by Ivo in the 'Panormia', and Gratian discusses the whole question carefully, and concludes in terms which agree with those of Burchard's canon.

Again, the Church offered a certain protection to the slave by its rights of sanctuary. In an appendix to the work of Regino of Prum there is a canon which lays down the rule that if a slave who has committed some fault flies to the Church, the master is to swear not to punish him for the fault, and he is then to be restored to his master; if the master breaks his oath he is to be excommunicated. This canon is repeated by Burchard, and by Ivo in the Panormia. Ivo's 'Panormia' contains another canon which sets out that not only the Church and its court, but also the house of the bishop, are to be reckoned as sanctuaries, that no one may venture to take from thence a fugitive slave or criminal, and that the rulers of the Church are to obtain for him a promise of immunity. This canon is repeated by Ivo in the 'Panormia', and in part by Gratian. These canons, however, must not be misunderstood: the Church offers a certain protection to the slave through the right of sanctuary, but the Church must not finally detain the slave, or allow him to escape from his master by seeking its protection. Ivo's 'Decretum' contains a canon drawn from a letter of Pope Gelasius I, which lays this down very

explicitly; the authorities of the Church must restore the fugitive slave, even against his will, to his master, after they have obtained from him an oath that he will not punish the slave; Gratian reproduces the canon, and Pope Innocent III lays down the same principle very clearly in the 'Decretals'.

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

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

CHAPTER VI.
THE THEORY OF PROPERTY.

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

There are several incidental references to the theory of private property and its origin in the earlier collections of the canon law, hut it is not till we come to Gratian that there is anything of the nature of a systematic exposition of the subject. It is, therefore, with his treatment of the institution that we begin. In defining the difference between the law of nature and the law of custom, Gratian says that by the law of nature all things are the common property of all men; and that this principle was not only followed in the primitive Church of Jerusalem, hut was also taught by the philosophers; it was thus that Plato excluded the desire for property from the most just form of State. Gratian takes his principle from the patristic theory, and illustrates this with that important passage from St Augustine, with which we have dealt in the first volume, in which it is very explicitly and emphatically laid down that private property is the creation of the State. In another part of the 'Decretum' Gratian cites an important passage from a spurious letter of St Clement in the pseudo-Isidorian collection, in which it is stated that the use of all things in the world ought to be common to all men, but through iniquity it has come about that men claim things as their private possessions, and the writer refers to Plato and to the example of the Apostles and their disciples.

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

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

another place where he explains that when, in the passage from the letter of St Clement (from pseudo-Isidore), it is said that it was by iniquity that men came to claim things as their private property, this may have been true originally, but now by long custom this has become lawful and unblameable. Stephen of Tournai, a little later than Rufinus, follows him in explaining how the *demonstrationes* of the natural law have been modified with respect to such principles as that of the common ownership of all things; but he also maintains that prescriptions and other modes of acquiring property have been sanctioned by the *jus divinum* or the canon law, which is divine, and that thus, while there is no private property by the *jus divinum*, that is the *jus naturale*, there is private property by the canon law which has been made by men, but with God's inspiration. We shall have to deal with the relation of the canon law to the *jus divinum* when we discuss the theory of the canon law itself; in the meanwhile we can only observe that Stephen clearly thinks that the canon law has given its sanction to private property, and that involves, in some sense at least, the authority of God. The conception is important, but it is not strictly novel, at least in substance, for it is, as we have seen, a part of the patristic theory of the great conventional institutions of human society that, while they are related to vicious impulses in human nature, they represent the divine remedies for these vicious characteristics.

Private property is then, according to the canonists, a thing legitimate and useful, resting upon the authority of the State, and, according to Stephen, upon the sanction of the canon law. This does not, however, mean that the principle that private property is not an institution of the natural law is of no importance,—is a mere abstraction which exercised no influence upon their conception of the rights and limitations of property. On the contrary, it would seem probable that two principles which the canonists lay down with regard to the ownership and use of private property are closely related to this theory. The first is, that no one has the right to take for himself more than he needs. Gratian cites a very important passage as from St Ambrose, which denounces as most unjust and avaricious the man who consumes upon his own luxury what might have supplied the needs of those who are in want, and maintains that it is as great a crime to refuse the necessaries of life to those who need, as to take from a man by force. In another place Gratian refers to a saying which he attributes to St Jerome—it is really from a spurious work—that the man who keeps for himself more than he needs is guilty of taking that which belongs to another. These are broad and far-reaching statements, but there are some qualifying phrases. In another Distinction Gratian quotes a sentence from St Augustine which is important as furnishing a practical commentary on such phrases as those which have just been cited. The rich, St Augustine says, are not to be required to use the same food as the poor, but must be allowed to use such food as their habits have made necessary to them : they ought, however, to lament the fact that they require this indulgence. Rufinus evidently felt that there was some difficulty in reconciling these phrases, and endeavours to explain them. His own judgment seems to be that the obligation of providing for those in want, and especially for those in danger of starvation, is absolute, and concludes that the man who does not help those who are dying of hunger, when he is able to do this, is actually their slayer. The second principle is stated in the Decretals, and is this, that a man can only be said to possess that of which he makes a good use; the man who makes a bad use of his property has really no right to his property at all.

These principles are most probably connected with the judgment that nature gave all things to men for the common use. It is true that the appearance of vice, and especially of avarice, made it necessary to establish the system of private property; but behind the right of private property there still remains the more general right of all men to what they need. The institution of private property may be necessary under the actual circumstances of human life, but it is really intended to set some restraint upon that instinct, and must not be taken as equivalent to a right to stand between a man and his needs. We shall in a later volume discuss the theory of property in St Thomas Aquinas; we may at once observe that he was not afraid to carry out these principles to the conclusion that the

charitable man who sees his fellow-man in want, and has not wherewith to help him, may without moral fault take the rich man's property and give it to the needy. The canonists, as far as we have seen, down to the time of the Decretals, did not draw this conclusion. On the contrary, Gratian cites a sentence from a sermon of St Augustine which strongly condemns the latter doctrine, and treats it as a suggestion of the devil. At the same time, it is perhaps worthwhile to notice that Aegina and Burchard cite a canon which suggests that the Church recognised that the moral offence of the man who was in want and stole another man's property was small,— the penance imposed in such cases is very slight.

CHAPTER VII.
THE NATURE OF SECULAR AUTHORITY.

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

There is little direct reference in these canonists to a primitive condition in which men lived without an organised social life, but there is enough to show us that they held the same view as that of the Fathers and such Stoics as Seneca and Posidonius, that behind the conventions of organised society there lay a time when men had lived without any definite and ordered social relation, and without any coercive authority. Gratian says that while the natural law began with the creation of rational beings, the law of custom arose when men began to live together, when Cain built a city, and again when, after the Flood, and in the time of Nimrod, men began to be subject to each other. This passage is reproduced by Paucapalea, the first commentator on Gratian, in the introduction to his work, and Rufinus speaks of lordship having begun with Nimrod, and having had its beginnings in iniquity. This is the same view as that of the Fathers, who all held that men were originally free from the coercive control of their fellow-men, and trace the development of coercive government to the appearance of sin in the world.

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

We have now to inquire what was the judgment of mediaeval political thinkers upon this subject. In our next volume we hope to discuss the theory as illustrated by the general literature of the eleventh, twelfth, and thirteenth centuries, and we shall then deal with the highly controversial writings which belong to the long struggle between the Empire and the Papacy. For the present we have to consider the mediaeval theory as represented in the canon law and the writings of the canonists. There is a famous saying of Hildebrand in a letter to Bishop Hermann of Metz, in which he uses very strong phrases as to the sinful character of the circumstances under which secular government first arose. Some parts of this letter are frequently quoted by the canonists; it is perhaps noteworthy that this particular sentence is not quoted by them. This may be merely accidental, but it is possible that they felt that these phrases were a little too crude and controversial to be suitable for technical collections of laws and legal arguments. Not indeed that there is anything in these sentiments of Hildebrand which is strange or unprecedented; he is only putting in rather rigorous phrase the doctrine not only of the Fathers but of the later Stoics—the doctrine, namely, that in the

primitive state of innocence there was no coercive authority, that this was a consequence of the loss of innocence and of men's sinful and vicious desire to lord it over each other, and this does not at all necessarily mean that Gregory VII denied the truth of the doctrine of the Fathers, that, while coercive government is a consequence of sin, it is also a divinely appointed remedy for sin.

The canonists, we may safely say, accepted the patristic doctrine of the origin of secular government; we must now consider their theory as to its actual nature and present value. Here they are, fortunately, not only emphatic, but clear. Secular government, they hold, is an institution which represents the divine authority; it is sacred, and the man who sets it at naught is really guilty of setting at naught the authority of God Himself. This judgment can be followed throughout the whole course of that part of the canon law with which we are dealing—that is, from the ninth century to the middle of the thirteenth.

Regino of Prum's work contains a canon which pronounces the anathema of the Church on any who venture to resist the royal power, inasmuch as this derives its authority, according to the Apostolic teaching, from God Himself. This canon is reproduced by Burchard of Worms; while he, Ivo, and a Palea to Gratian's Decretum cite passages from the Councils of Toledo which denounce the sentence of excommunication against all those who revolt against the king, inasmuch as he is the Lord's anointed. Ivo also cites a passage from a letter of Pope Anastasius II to the Emperor Anastasius, in which he speaks of the Emperor as being appointed by God Himself to reign over the earth as His vicar. Ivo and Gratian again bring out the general principle very clearly when they cite a passage from St Augustine which lays down the doctrine that obedience to the secular authority is commanded by God, even when that authority is in the hands of an unbeliever. Cardinal Deusdedit, in his collection of canons, cites those passages from Romans XIII. and 1 Peter II which assert emphatically the principle of obedience to the secular power as deriving its authority from God; and Burchard, Ivo, and Deusdedit also cite a passage from a letter of Pope Innocent I, which defends the exercise of justice in criminal cases as being derived from the authority of God Himself. Finally, the principle is laid down in the Decretals in a very important letter of Innocent III to the Emperor Alexius of Constantinople—a letter to which we shall have to recur when we deal with the relations of the ecclesiastical and secular powers. Innocent III here affirms clearly the doctrine that the authority of the king as well as of the ecclesiastic has been established by God Himself.

These passages will serve to bring out the principles of the canon law with respect to the nature of secular authority, and can hardly leave us in any doubt as to their character. But the matter is put beyond all question when we observe that in these canonical collections, just as in the writers of the ninth century, it is those definitions of Gelasius, whose importance we have endeavoured to set out in the previous volume, which furnish the complete statement of the theory, both of the nature of secular authority and also of its relation to the Church. Gelasius had carefully drawn out the conception of the two authorities which God had established in the world—the two authorities which had sometimes been united in pre-Christian times, but which in complete truth were united only in Christ Himself, who was both King and Priest. For Christ Himself had divided them—allotting to the priest his particular authority, and to the king also his,—in such a fashion that while each needed the other, each was independent within his own sphere.

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

It is very clear, then, that the canon lawyers of these times held that the secular and civil power is a Divine institution and represents the Divine authority. Whatever may have been said and meant in the course of the great conflict between the Empire and the Church which might seem to indicate a

disposition to doubt the Divine nature of the civil authority, nothing of the kind has been admitted into the canon law or is suggested by the commentators.

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

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

The canonists very clearly describe the nature of those functions of the State which give it this sacred character, namely, that it is its purpose or function to restrain and punish evil and to set forward justice. Burchard, Deusdedit, Ivo, and a Palea to Gratian all cite, in part or whole, that group of passages from St Isidore's 'Sentences' which describe the proper purpose of secular authority as being to restrain evil, and the proper character of the king as being that of one who does right, while they also lay it down that it is just that the prince should conform to the laws of his kingdom. Rufinus draws out at some length the important principle that an evil power—that is, the abuse of power—has no sanction or authority from God. He is discussing the meaning of some words of St Augustine's, in which he lays it down that all authority is from God, and represents either His sanction or His permission. Rufinus's comment upon the passage is to this effect. An evil authority or power is said to be permitted by God, and is therefore said to proceed from Him; but the fact that God permits sin does not mean that it proceeds from Him ; an evil authority can only be said to be from God in this sense, that God is the source of all authority, but not in the sense that He approves of its abuse. Rufinus draws this principle out in positive form when, in the same passage, he goes on to lay down the two characteristics of a good secular authority, without which no authority can be held approved; these are, legitimate institution and the supremacy of justice. It is true that his explanation of these two principles is highly technical, and largely concerned with the question of clerical exemptions, but it includes the principle of just and equitable action by the public authority, that is, action governed by the principle of the proper adjustment of punishment to fault, and of the elimination of all merely private interest in the action of the magistrate.

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

We have already considered the relation of positive law to natural law, and it will be evident that this is closely related to the question we are now considering, for, as we have seen, natural law is

to the canonists that body of principles which must govern the actions and relations of men in all the circumstances of life, and against which no human law or custom can prevail.

CHAPTER VIII.
CIVIL LAW AND CUSTOM.

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

We can now, therefore, consider the nature of law under the terms of the positive law of any one state. We have already discussed, in our second chapter, the general principles of the theory of law, as set out by Gratian, and especially that fundamental division of law into Divine or natural on the one side and customary on the other. It is true that under customary law more is included than the Civil law of any one state, for under this term falls the whole of that system which is called the *jus gentium*, the law which is composed of those conventional customs which are considered to be common to all mankind,—but wo need say no more about this now. Civil law is that body of rules or laws which belong to any one state : Gratian takes over from St Isidore the definition of the Civil law as that which any people or state makes for itself, for some human or divine reason, but this Civil law is, according to the classification which Gratian has elaborated on the basis of St Isidore's phrases, in the beginning simply custom. This is a conception of great importance, and though we have already dealt with the statement of this by Gratian, we must consider the matter again in connection with other passages in Gratian and in the works of other Canonists.

Burchard includes in his collection a phrase of St Augustine, in which it is said that in those matters as to which the Holy Scriptures have not laid down any definite rule, the customs of the people of God, or the *instituta* of former generations, are to be taken as law, and that this law is to be enforced like the Divine law. This phrase is repeated by Ivo, both in the 'Decretum' and the 'Panormia', and by Gratian. In a later chapter we shall have to consider the significance of this in relation to the theory of the Canon law: in the meanwhile, we are interested in it as indicating very clearly the importance of custom in relation to law. Again, Ivo in the 'Decretum' quotes from the Institutes of Justinian the phrase which describes that form of Jus which is established by the long-continued custom of those who are concerned. We have already quoted and discussed the very important passages in which Gratian draws out the principle that all law is, properly speaking, custom. Gratian looks upon Civil law as being in its origin nothing but the general expression of the custom of any society. We must now consider to what extent this conception is modified where there is in any society a person or body of persons who have legislative authority.

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

who has legislative authority, his legislation must be confirmed, and may be rendered void by custom. Gratian is here dealing with a question about which there was much discussion among the Civilians: they all maintained that custom originally had the force of law; while some of them also held, as Gratian does, that no law, by whomsoever promulgated, has any real validity unless it is accepted by the custom of those concerned.

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

These views may seem rather difficult to reconcile with each other, but as a matter of fact they are not absolutely irreconcilable, for Gratian may have held that while a law was not really valid unless those concerned did by their custom accept it, once they had thus accepted it custom alone could not abrogate it. This doctrine was maintained, as we have seen, by some of the Civilians. On the whole, it would seem that Gratian wavered between different views. When we turn to the commentators on Gratian, we find that they follow him in the general theory of the nature of law as custom, but that in some respects their theory may be different. Rufinus repeats Gratian's general principle that all positive law is really custom, whether it is written or unwritten. But he is clear that under the actually existing condition of his time, the authority of custom in abrogating laws was greatly limited. When Gratian, in a passage we have just quoted, lays down the broad principle that laws are abrogated by custom, Rufinus is careful to point out that custom only abrogates Canon laws with the consent of the Pope, just as custom only abrogates Civil laws with the consent of the Emperor, for the Roman people have transferred all their authority to him, and can therefore neither make nor unmake laws without his consent. Rufinus represents the same position as that of one school of Civilians. Stephen of Tournai follows Gratian in placing both the *jus gentium* and the *jus civile* under the category of *mores*. His treatment of the relation of custom to existing written law is interesting but a little ambiguous. He lays down dogmatically the principle that if a people, which has the power of making laws, deliberately and knowingly follows a usage which is contrary to a written law, this usage abrogates the law: this principle is also, we have seen, maintained by some of the Civilians. Stephen leaves the question whether the people in his time did or did not possess this power uncertain. It is interesting to observe in the Canonists the traces of these views of the Civilians,—Gratian holding the principle that legislation, by whomsoever promulgated, has no authority unless it is ratified by the usage of the society; Stephen holding that any society which retains in its own hands the power of making laws, does by its usage abrogate any law, if it acts deliberately and consciously; Rufinus maintaining that, at least in the case of the Roman people, the authority of custom has really ceased except so far as it is sanctioned by the Emperor.

When we now turn to the Decretals, we find the doctrine that Custom overrides all law except that of Nature and Reason; only this Custom must be sanctioned by a sufficient prescription. Gregory IX lays down this doctrine in words drawn from the famous passage in the Code, but with such additions as completely to transform its sense. While Constantine had recognised the great authority of long custom, but had also maintained that it could not prevail against reason or law, Gregory IX held that it could not prevail against positive law, unless it was reasonable, and founded upon a legal prescription—that is, a definite, legally recognised period of time. For the discussion of the important question of the appearance of this conception of a definite period of time as constituting a legally valid custom, we must refer to the very careful treatment of the matter by Professor Siegfried

Brie, in his work on the doctrine of the Law of Custom. To this we would also refer the reader for a full discussion of the significance of *ratio*: we are, indeed, under great obligations to this work in relation to the whole subject of Custom.

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

CHAPTER IX.
THE THEORY OF THE CANON LAW.

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

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

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

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

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

Christian world, and that of universal councils by later ones when the Church may have received new light.

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

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

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

Burchard has not, so far as we have observed, any direct references to this, but he reproduces an important canon which lays down the principle that the authority of summoning synods belongs to the Apostolic See, and that no council can be recognised as general which has been called without this authority. Ivo includes the same canon in the 'Panormia', and there is a similar one in his 'Decretum' and in Gratian. Ivo, both in the 'Decretum' and in the 'Panormia', and Gratian cite a canon saying that all commands of the Apostolic See are to be received as though they were confirmed by St Peter. He also (in the 'Decretum') cites a letter of Pope Nicholas I, which has reference primarily to the pseudo-Isidorian collection. It had been apparently suggested that these were not to be received as having canonical authority, because they were not contained "in codice canonum". Nicholas urges that this objection has no weight, that there is no difference between the authority of those decretals and decretal letters which had been hitherto included in the "codices canonum" and others. Ivo also includes in the 'Decretum' a letter of Pope Alexander II which asserts very emphatically that the *decreta* of the Roman See are to be accepted and reverenced by all sons of the Church, even as are the *canones*.

It was the great work of Gratian to take in hand seriously the task not merely of codifying the immense mass of material which had accumulated, but what was even more important, of analysing these materials, and of seriously facing the question of their relation to each other. But more than this, Gratian also for the first time among canonists set out to form some general philosophical conceptions of the ultimate nature of all law, and to apply these philosophical principles to the elucidation of some of the most difficult questions with regard to the whole body of the law of the Christian Church.

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

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

Gratian does not, as far as we have seen, explicitly apply this to canon law, but we think that it is quite clear that he implies such an application, and that while the canon law may contain rules which are directly representative of the divine "natural law", yet it is not to be identified with this. There are rules of the civil law and of the canon law which are directly representative of the natural law, but the natural law is not to be identified with either the civil law or the canon law. Not, indeed, that any law, whether civil or canon, is valid which contradicts the "natural law" : we have pointed out that Gratian is perfectly clear that all such laws are necessarily void; the civil law and the canon law must be in harmony with the natural law, but they represent not the mere assertions of it, but the applications of its principles to particular circumstances and times—applications which are not necessarily permanent, and whose authority is not the same as that of the natural law itself.

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

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

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

custom is, in his view, also a source of Church law, but he conceives of it as being invalid, as against actual written canon law; we must, however, bear in mind the principle which we have already seen Gratian to hold, namely, that written law must be approved by the custom of those concerned before it can become law. Canon law thus, in Gratian's treatment, has for its sources the authority of certain persons who are looked upon as having legislative authority, the decrees of councils, and custom.

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

We have already considered the theory of Natural law in Gratian and the other canonists, and we need not therefore discuss over again his theory of this subject. We must, however, again bear in mind that there are certain difficulties connected with this subject. The canonists, as we have seen, clearly understand by the natural law those general principles of moral obligations which man is supposed to recognise by his reason as binding upon him. This natural law is contained in the Scriptures, but this raises the difficulty that there are many laws in Scripture which are not now recognised as binding. Gratian explains this by the distinction between the moral and the ceremonial aspects of the Scriptures. Another difficulty lies in the fact that while the Natural law represents the immutable moral principles of the Divine law, as a matter of fact there are institutions of human society which seem to be contrary to these principles. Gratian himself points out the opposition, but does not suggest the explanation; but this is done by commentators like Rufinus, who distinguish between the commands and the *demonstrationes* of the natural law, and argue that while the latter represent the ultimate principles of moral relations, the actual conditions of human life, in virtue of the force of evil in human nature, require other regulations, and that institutions like property and slavery which are on the surface contrary to the principles of the Natural law are really the means by which men are to be trained to obey it. There are thus rules of human conduct which might seem contrary to the Scriptures and to Natural law, but this contradiction is to be explained by such considerations as those which we have mentioned; subject to such exceptions it remains true that any law, ecclesiastical or civil, is void, if it be contrary to natural law.

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

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

We pass now to the second source of canon law dealt with by Gratian—that is, the decretal letters of the Bishops of Rome. Gratian deals with this subject in the nineteenth Distinction. He formally states the question whether the decretal letters have authority when they are not found in the

collections of the canon law. In the first passage he cites, the question refers primarily to the pseudo-Isidorian decretals, whether, namely, these, which had not hitherto had any place in the collections of canons current in the ninth century, were to be received as having canonical authority; but the question Gratian raises is not their genuineness, hut whether, if taken as genuine, they are to be received as canons. He treats this by citing a number of passages from various Papal letters, and from the capitularies, which he takes as showing clearly that Papal letters have authority in the whole Church. He therefore concludes that the decretal letters have the same authority as the canons of councils. Gratian's position is quite clear, but he makes one important qualification. These decretal letters have the force of canons, unless they are contrary to the "evangelical precepts" or the decrees of earlier Fathers : a letter of Pope Anastasius II, which violated the law of the Church and was issued unlawfully and uncanonically, and was contrary to the decrees of God and to the regulations of his predecessors and successors, is repudiated by the Roman Church; and Gratian adds a tradition that Anastasius was struck down by the Divine judgment.

In order, however, that we may form a complete estimate of Gratian's judgment on this subject, we must take account of a very important discussion of the whole question which we find in the second part of the 'Decretum'. The discussion arises out of the question how far the Pope has the power to confer upon the *Ecclesia baptismalis* of a diocese the right to all the tithes in that diocese, and how far, if the Pope has once done this, it is lawful for him to exempt certain monasteries from the obligation of paying tithes to the *Ecclesia baptismalis*. It is argued, in the first place, that the Popes cannot confer upon the *Ecclesia baptismalis* such a privilege, inasmuch as according to the ancient canons the tithes are to be divided into four parts— one for the bishop, one for the clergy, one for the repairs of church buildings, and one for the poor. This raises the whole question of the authority of the Pope to override the ancient canons by the grant of such a privilege, and this involves the question of the relation of his authority to that of the canons. Gratian first cites a number of authorities which would seem to show that the Pope is bound to maintain the canons. Some of these are so strong that we shall do well to notice them before considering Gratian's own conclusions. One of them is a passage from a letter of Pope Urban I, in which he asserts very emphatically that the Roman pontiff has authority to make new laws, but only when the Lord, or His apostles, or the Fathers who followed them, have not laid down any rule: when they have done this, the Pope cannot make any new law, but must rather defend these laws at the risk of his life: if he were to endeavour to destroy that which they had taught, he would fall into error. Almost more emphatic is a fragment from a letter of Pope Zosimus I., which asserts that even the authority of the Roman See can do nothing against the statutes of the Fathers.

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

Roman See. In the decrees of some councils it is specially stated that these are issued subject to the proviso that the Roman Church may ordain otherwise, or with the reservation of the apostolic authority ; it must therefore be understood that canonical rules with respect to tithes or other Church affairs are made subject to the authority of the Roman Church to ordain or permit otherwise. *Privilegia*, therefore, granted by the Roman See are not really contrary to canonical order.

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

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

Gratian, then, is perfectly clear that the Pope has an authority which is legislative as well as judicial. But it is important to understand what is, in Gratian's view, the nature of this legislative authority of the Church and the Pope, and how it is related to other authorities. In one passage he raises an interesting question with regard to the relation of the canons of the Church and the interpreters of Scripture. The authority of these depends upon their spiritual enlightenment, upon their knowledge and wisdom, and in this respect, as Gratian says, it may be urged that the works of such Fathers as St Augustine or St Jerome are superior to those of some of the Popes. Does this mean that the sayings of these Fathers hare an authority greater than that of the Papal decrees or judgments? Gratian replies by pointing out the distinction between knowledge and jurisdiction, and urges that in determining legal cases not only knowledge but jurisdiction is necessary, and thus while some interpreters of Scripture may equal the Popes in knowledge, they are inferior to them in authority with regard to the decision of legal cases. Gratian does not, so far as we have seen, draw this out in a complete analysis of the various aspects of the authority of the Church, but the discussion is sufficient to prove to us that Gratian does not look upon the authority of Church law as being of precisely the same nature as the authority of Church doctrine.

This does not mean that the canon law has not authority over all Christian men. On the contrary, the man who refuses to accept and to obey it is said in a passage of a letter of Pope Leo IV, quoted by Ivo in the 'Decretum' and 'Panormia', and by Gratian, to be convicted of not holding the faith. The canons, then, are binding upon all Christian men, but again Gratian makes an interesting observation upon their nature: they are indeed authoritative, but they exist for certain definite reasons, and when these cease to exist then the laws also cease. Gratian gives as an example the canonical rule that laymen may not be elected as bishops, while as a matter of fact various great saints, like St Ambrose and others, were chosen as bishops while they were still laymen. He concludes that the reason of the rule was that the layman, not having been trained in the ecclesiastical discipline, cannot well teach it to others: when, however, a layman was superior in the character of his life to the ecclesiastics, as was the case with St Ambrose, the rule was not binding.

Such, then, in its main outlines, is the theory of Gratian with regard to the canon law. Its sources are the custom of the Church, and the authoritative promulgation of rules and laws of ecclesiastical order by general councils or by the Popes. Behind these there lies the authority of the Natural law and of the Scriptures: these may be represented in the canons, but are not to be confused with the canons; they are rather the norm by which the validity of any canon may be tested. The canons of the Church belong to the same category as the civil law of the State; they do not represent an absolutely final authority, but are rather the expression of the authority residing in the Church and its proper officers for the government of the society, subject always to the authority which lies behind the society. But they are binding upon all the members of the society; to refuse to obey them is to refuse to recognise the authority of God, from whom this authority is derived.

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

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

This summary is interesting, not because it modifies in any important point the principles of Gratian, but because it brings out clearly the mode in which he was understood. In the first place, it is noticeable that Paucapalea looks upon canonical law as having the same varieties as secular law. Canon law is not to be identified with Natural law. A part of it is so, and that part is prior to and superior to all others. In the second place, it is very noticeable that Paucapalea looks upon custom as having a place in Church law. And again, Paucapalea recognises the decrees of the Pontiffs and Fathers as having the same canonical authority as the decrees of councils, and as even preceding them in point of time.

The only other matter of importance in Paucapalea's treatment of the theory of canon law is a brief discussion of the relative value of different authorities in the Church: this occurs in connection with a difference of opinion between St Jerome and St Augustine as to the ordination of those who had been twice married, once before and once after baptism. Paucapalea solves the question by citing a sentence which he thinks comes from St Isidore, in which it is said that if there is a difference between two councils, that council should prevail which is the older, or has greater authority; and that the authority of the Pope (*apostolicus*) or of bishops is greater than that of a presbyter, even though the personal merit of the presbyter may be higher.

We turn to Rufinus and Stephen of Tournai. And first we must recall to our reader that very elaborate and careful discussion of the subject of natural law by Rufinus, with which we have already dealt. Rufinus holds that the natural law is to be identified with that moral principle which bids a man do what is right and avoid what is evil. It is this principle, of which man had in part lost his knowledge through the fall, which was again set up, incompletely, in the Ten Commandments,

and perfectly in the Gospel. It is therefore in its essence immutable, and it is supreme over all systems of law, and no dispensations against it can be granted, unless in some extreme case of necessity.

Canon law, according to Rufinus, arose with the growth of the Church, and the need of order and of the adjustments of disputes between ecclesiastical persons, for which the Gospel did not sufficiently provide. Regulations were made for these purposes by the apostles and their vicars and the other ministers of the Church, and these are called canons.

Stephen of Tournai uses the phrase *jus Divinum* sometimes in the same sense as Gratian, but sometimes he also uses it to describe the whole body of Ecclesiastical law. He is aware that Gratian uses the phrase as equivalent to the *jus naturale*, and in this sense he distinguishes it from the *jus canonicum*, but in one place he speaks of property existing by the *jus Divinum* or by the *jus canonicum*, "which is Divine". He explains this, however, by saying that while by the *jus Divinum*, that is the *jus naturale*, there is no private property, by the *jus canonicum*, which is made by men, but with the inspiration of God, there is such a thing as private property. It seems clear that he agrees with Gratian that, in the primary sense, canon law is not the same as the *jus Divinum*, but he suggests that it may be called a part of this in some secondary sense,—it has been made with the inspiration of God. In another passage he uses the phrase *jus Divinum* to describe the whole body of religious law, whether pre-Christian or canonical, and in discussing the origin of this system of law he says that it began with the beginning of the world, and describes Adam's charge against his wife as marking the beginning of the legal process. Others, he says, have held that the organisation of judicial proceedings began with the law of Moses; but others again begin the treatment of the *jus Divinum*, with the primitive Church. When persecution ceased, under Constantine, the Fathers of the Church began to meet together in councils and to enact canons for the regulation of ecclesiastical affairs.

This is followed by a description of the various authorities from whom canon law has proceeded, and we must now consider this aspect of the theory of Stephen and Rufinus.

Some ecclesiastical laws, Rufinus says, are the decrees of the greater councils of Nice, Constantinople, Ephesus, and Chalcedon; others, of lesser councils; others, again, are Apostolic canons, or decrees of pontiffs, or they represent the authority of the expositors of Scripture. The decrees of the four greater councils and the Apostolic canons can under no circumstances be violated, except by way of relaxation of their rigour against certain persons and against certain offences, and he cites by way of illustration the Nicene canon against the ordination of the man who has been twice married, and the Apostolic canon that a presbyter guilty of fornication must be deposed. But whilst the prohibitions of these authorities cannot generally be altered, it is different with regard to that which they permit. The Nicene council, for example, permitted priests to live with their wives, a thing now prohibited (*apud nos*). The decrees of the lesser councils, of the pontiffs, and the judgments of the expositors of Scripture can, for sufficient reason, be changed by the supreme Patriarch.

Stephen's treatment is similar, but rather more detailed and different in some respects. After describing the origin of ecclesiastical law in the passage we have just quoted, he goes on to distinguish between general and provincial councils: General councils are those which include bishops from all parts of the world, and are held in the presence of the Pope or his legate, while provincial councils are the meetings of the bishops of a province summoned by the primate or archbishop. The canons of general councils must be obeyed everywhere, those of provincial councils are only binding upon those who are under the jurisdiction of the bishops of the province. Among the general councils there are four which are pre-eminent, those of Nice, Ephesus, Chalcedon, and Constantinople: their authority is almost equal to that of the Gospels. The name canon belongs properly to the decree of assemblies of bishops. By "decreta" are meant those decrees on Church matters which the Pope gives in writing in the presence and with the authority of the cardinals.

"Decretalis epistola" is a letter which the Pope writes to some bishop or ecclesiastical judge who is in doubt, and who has asked the advice of the Roman Church. Canons are called "decreta" and "decreta" canons. These are the ordinances by which ecclesiastical affairs must be decided. The order of the authority of these rules should be carefully considered: the first place is held by the evangelical precepts, next come the sayings of the apostles, then the before-mentioned four councils, then the other councils, then the *decreta* and *decretales Epistolae*, and last the sayings of the holy Fathers—St Ambrose, St Augustine, St Jerome, and others. In cases of difference between these, it is important to remember that they may be arranged under four heads—counsels, precepts, permissions, and prohibitions; and even the precepts and prohibitions are not all alike,—some are perpetual, some changeable.

Stephen's discussion is notable specially for its definition of the nature of papal *decreta* and *decretalia*, and for its classification of the authority of the various canonical rules. The definition of the papal canons is interesting, and probably of some importance, but we have not found any parallel discussion of it in the works which we are now treating. As to the circumstances under which the canons may be altered, he discusses this point in much the same terms as Rufinus. That which is contained in the Gospels, in the words of the apostles and in the four general councils, and that which belongs to the articles of the faith, without which a man cannot be saved, these things cannot be altered; other canonical rules may be changed, but not these. Yet there are some possible modifications of the canons of general councils, and even of the apostolic canons. On this point there is no difference between him and Rufinus.

Canon law, then, if we omit for a moment the regulations which are directly taken from the Scriptures, represents the legislative authority of the Church and of the Roman See, but that legislative authority is not entirely free and unhampered. Rufinus points out that there is one very important difference between secular and ecclesiastical law—that is, that while in secular jurisprudence new laws always override the old. this is not the case in ecclesiastical law, for, on the contrary, it is frequently the case that the old laws cannot he overridden by new. The principle (*ratio*) of secular law is not the same as that of the divine laws. He is here drawing out the principle which is contained in his classification of the canonical sources, and which is repeated by Stephen, that in some points the Church has not authority over its own legislative system.

We must for a moment consider the significance of the omission, in these classifications, of one important source of canon law, that is, the custom of the Church. We might at first sight be inclined to think that this is due to some tendency to depreciate the importance of this element, and it is, of course, possible that something of this may be the case here, but in other places Rufinus makes it clear that he follows Gratian in admitting the importance of a general custom of the Church. In the earlier part of that passage of which we have just cited the conclusion, Rufinus discusses the question of *prejudicatio*—that is, as I understand, the antecedent invalidity of certain legislation. His immediate subject is the question of dispensation, to which we shall presently return; and after saying that some laws can be dispensed with and others not, he says that some laws *prejudicantur*, either because they are opposed to some previous constitution or to some custom; and then resuming the subject a little later, Rufinus inquires what canons in particular *prejudicantur*, and mentions first those which clearly contradict either general custom or the *constitutio* of some greater authority, and he mentions as an example of *prejudicatio* by general custom that decree of Pope Telesphorus which Gratian had said was invalid because it had never been received by the custom of the Church.

It is clear that Rufinus had no intention of differing from the doctrine of Gratian with regard to the importance of the authority of custom as a source of canon law, but it is, of course, possible that he may have differed from him or from other canonists with regard to the actually existing force of custom. Rufinus was clear that if custom now abrogates canons, it only does so with the consent of the Pope, just as, he says, now that the Roman people have transferred their legislative authority to

the emperor, their custom can only abrogate the civil law with his consent. There are also some canons of the ancient Fathers, such as those of Nice, which cannot be changed even by the Pope or by custom.

There is nothing in the work of Stephen of Tournai to indicate his attitude clearly. In one place, indeed, he speaks somewhat disparagingly of custom,—this is when he says that Gratian had set about his work because, through mere ignorance, the Divine law was falling into disuse, and the various churches were living rather by custom than by canon law: this, he says, was deemed by Gratian to be perilous, and therefore he set about the collection of the laws of the councils and Fathers. But it would be foolish to take this as a serious criticism on the place of custom in the system of canon law.

We turn now to consider the treatment by these commentators of the legislative authority of the Pope. We have already seen in the classification of the sources of the canon law by Rufinus and Stephen, that the decreta or decretalia of the Pope have the authority of law, and we have just quoted the passage from Rufinus in which he says that just as civil laws cannot be made or abrogated without the consent of the emperor, so also canons cannot be made or unmade without the knowledge and assent of the Pope. The authority of the Pope is therefore necessary for all legislation, and he has also the power of promulgating canons by his own authority. In other passages Rufinus says he has the authority of making and interpreting the canons, and explains this as being due to the primacy of the Roman Church.

Stephen, as we have seen, while describing canons as being in the strict sense the decrees of general councils, adds that the Papal decreta and decretalia are also called canons, and in another passage he says that the Popes alone have authority to make canons. This might mean that the Popes are now the sole legislators, as Justinian claims that the emperor had become; but this seems hardly consistent with Stephen's own earlier statement as to the authority of general councils held in the presence of the Pope or his legates, and it seems most probable that Stephen is only contrasting the legislative authority of the Pope with the absence of legislative authority in the writing of the Fathers.

However this may be, Stephen clearly agrees with Gratian and Rufinus that the Papal decreta and decretals have the force of canons. In one passage he uses a phrase to describe the relation of the Popes to the canon law, which he probably drew from the civil law. He speaks of him as *legibus ecclesiasticis absolutus ut princeps civilibus*, but adds that he keeps the laws most carefully. This phrase of Stephen should be compared with the passage of Gratian on the relations of the Pope to the canon law, which we have considered, but what exactly Stephen understood it to mean it is difficult to say—as difficult as it is to interpret the phrase with regard to the emperor in the civil law. We have elsewhere suggested that probably the phrase finds its best interpretation in the parallel of the dispensing power of the crown, and it is probably in the same direction that we must look for the explanation of the phrase in relation to the Pope.

The Pope has then the authority of making and unmaking canon law, but this authority is not unrestricted. Rufinus restates the judgment of Gratian, that the Pope cannot make canons against the authority of the Gospels or the decrees of the Holy Fathers, and again cites the case of the invalid decree of Pope Anastasius. Neither custom nor the authority of the Apostolic See can abrogate the statutes of the ancient Fathers which were promulgated with full authority for the preservation of the whole Church, and are preserved by the reverence of almost the whole world—such as the canons of Nice and other similar canons. It is true that there is no passage in Stephen which is exactly parallel to this, but there is no reason to suppose that he would have differed; it is after all only the direct application to the Pope of these general principles, in which Stephen agrees with Rufinus, that certain parts of the canon law—*e.g.*, the canons of the four first general councils—cannot be abrogated by any later authority.

We conclude that Rufinus and Stephen agree entirely with Gratian in holding that the Pope has the same legislative authority as the general councils of the Church, and that his co-operation is necessary for them; while his legislative authority has the same limitations as their authority, namely, that there are some parts of the Church law which cannot be abrogated or overridden by any new legislation.

We turn to the question of dispensation. Rufinus deals with this very carefully in one passage. He first defines dispensation as a special relaxation of canonical law, made by him who has authority to do this for some good reason. He then adds that there are some canons from which there can be no dispensation, and others which can be dispensed with. Those canons are not dispensable which are directly founded upon the moral law or the Gospel or the institution of the Apostles, and he gives as examples, the fulfilment of a vow, the prohibition to marry a second wife while the first is alive, the law that a man who is not ordained cannot ordain another or celebrate mass, the law that a man must not purchase ecclesiastical offices. No necessity of circumstance or time can ever enable a man to violate these without sin; some invincible or unavoidable ignorance may perhaps excuse him. The reason for this, Rufinus says, lies in the fact that these rules are all part of the natural law, and against this no dispensation is valid. Other canonical rules, which were promulgated and confirmed only by the authority of the holy Fathers or their successors, can be dispensed with, and he gives as examples, the rule that monks should not celebrate mass in public, or that a man who has done public penance or been twice married should not be admitted to the ranks of the clergy.

We may compare with this another passage in which Rufinus lays down the same principle that there can be no dispensation from the natural law, admitting only one exception—that is, when a man has to choose between two evils, as, for instance, if he has sworn to kill his brother; and in yet another passage he says no dispensation can be granted against the New Testament. This is an important statement of principle, important in its reference to the natural law, and also in its exposition both of the extent and of the limits of the dispensing power. The importance of the subject will be recognised by any who have any acquaintance with mediaeval history.

We wish that we were able to discuss the theory of the commentators on Gratian more completely; unfortunately only a few of these are as yet accessible in a printed form. We shall not be in a position to discuss fully the development of the theory of the canon law on such a vital point as that of the legislative authority of the Pope till the mass of unprinted material has been fully examined. Especially do we regret that we cannot use the ‘Summa Decreti’ of Huguccio. The only portions of this important work which we have been able to use are those fragments quoted by Schulte in his work ‘Die Stellung der Concilien’’ &c. Among these we find some important phrases on the authority of Papal decretals. Huguccio discusses the regulations as to the circumstances under which a case may be taken from the inferior courts to Rome, and he concludes by saying that he trusts the ancient decrees and the new councils rather than the decretals; and again, on the same subject, he says that appeals, even before the trial of a case, are actually heard in Rome, but he is concerned, not so much with what is actually done, as with what ought to be done. These passages illustrate an interesting attitude towards the Decretals, but whether it is more than an isolated opinion we are not in a position to say. It is perhaps worthwhile to notice that in another passage, which Schulte has quoted, Huguccio suggests that in one of his Decretals Pope Alexander is speaking rather as a teacher who is giving his opinion, than as Pope.

One other canonist, Damasus, at a rather later date, but still earlier than the publication of the Decretals of Gregory IX, has some important remarks on the authority of modern Decretals of Popes. Of this Damasus two works have been printed, one on the civil law and one on the canon law. The latter, which is known as the ‘Brocarda’ or ‘Burchardica’, consists of a series of discussions, in which a thesis is propounded, all the relevant authorities are quoted, first those in favour, then those against it, and finally a *solutio* is added. The thesis with which we are now concerned is this, that

when there is a difference between various constitutions, it is not the later but the earlier—those, that is, which are nearer to the Apostolic simplicity and truth—which should prevail. Damasus cites a number of passages in favour of this view, and a smaller number against it, and then concludes that if there is a contradiction between some constitutions of recent Popes and the general canons which are approved by the authority of Holy Scripture, the latter must prevail, as being agreeable to the Divine will and the principle of equity. It must be remembered, he says, that the former Popes had the same power as the modern, and have greater authority on account of their antiquity: he is, indeed, worthy of anathema who endeavours, with whatever excuse, to destroy those things which are well ordered. He refuses to accept the authority of the comment on the canon *postea quam*, because these are the words of Gratian, not of the canon, and he puts aside another passage because there the opinion of Jerome, which is supported by the testimony of Scripture, is superior in authority to that of the Council.

This passage is interesting, but its significance must not be exaggerated: we have already seen that Gratian and the commentators whom we have been considering are careful to state that there are ancient canons which no authority can change.

When we finally turn to the theory of the Canon Law in the Decretals, we must begin by observing that in the main they assume the general principles which we here discuss; they do not go over them again, we think that they take them for granted. Two points, however, require some notice. The first is the question of the place of custom in Canon Law. We have already discussed this in a previous chapter, and we need therefore only repeat that, whatever ambiguity there may be in the position of Gratian or his commentators, the theory of the Decretals is clear—namely, that custom, if it is "rationabilis et legitime praescripta", that is, if it is not contrary to "reason" and it has continued for a legally defined period of time, overrides even positive written law.

The second matter is the treatment in the Decretals of the legislative authority of the Pope. For this we must take account not only of the Decretal letters contained in the collection of Gregory IX, but also of at least one or two which appeared in earlier collections. Between the time of the publication of Gratian's 'Decretum' and the publication of Gregory IX's collection of Decretals, five collections or compilations of Decretal letters had been put out—the first two and the fourth on the responsibility of private persons, but the third and the fifth by the authority respectively of Pope Innocent III and of Pope Honorius III.

The papal letters prefixed to these collections were of considerable importance in determining the character and the future development of canon law. In the first of these Innocent II. writes to the masters and scholars dwelling at Bologna, and sends them a collection of Decretal letters made and arranged by P. Beneventanus, and authorises them to use these both in the courts and in the schools. In the other, Honorius writes to Tancred, the Archdeacon of Bologna, sending him a collection which he had caused to be made of judgments by himself or his representatives, and he instructs Tancred to have these formally published for use both in courts and schools.

With these we must now compare the letter prefixed by Gregory IX to the great collection of Papal Decretals which now forms the second part of the 'Corpus Juris Canonici'. This is addressed to the doctors and scholars of Bologna. Gregory explains that he has caused Raymund, his chaplain and penitentiary, to make this selection of the constitutions and Decretal epistles of the former Popes,—the number and variety of these had been a cause of confusion in the courts; and he has added some constitutions and Decretals of his own. He desires that this collection alone should be used in the courts and schools, and strictly forbids any one to make any further collection without the authority of the Apostolic See.

The importance of this letter and of the collection of the Decretals by Gregory IX is certainly very great. The Decretals, to which were added later on the "Sixt" and the "Clementines", became for all practical purposes the lawbooks of the Church: it is true that the 'Decretum' of Gratian came

in some way to be treated as the first part of the 'Corpus Juris Canonici' but the Decretals became the principal law-book of the Church, and the commentaries on the 'Decretum' now gave place to the commentaries on the Decretals. But this is not the same as to say that these letters mark a new departure in the theory of canon law. We have already seen that Gratian quite clearly places the legislative authority of the Pope alongside of that of the councils, and that the commentators whom we have discussed, except Huguccio, clearly take the same view. We cannot, therefore, recognise that the letters make any change in the theory of the legislative authority of the Pope, though they may be said to represent a great development in the importance of his position as legislator.

Two phrases of the Decretals we may finally take as representing the completed Roman theory of the canon law. The first is indeed of a considerably earlier date than the publication of the Decretals by Gregory IX. It is a phrase of Pope Paschal II on the subject of the oath of fidelity and obedience to the Pope which was required by an archbishop before he could receive the "pallium". Paschal says that some people urged that this was not ordained by the councils. He indignantly repudiates the notion that the councils had imposed any laws upon the Roman Church, for it was the Roman Church which called together the councils and gave them authority. This is a strong statement, but it should be compared with Gratian's elaborate discussion of the relation of the Pope to the canon law in the 25th "Causa". The other phrase is one of Innocent III, who speaks of the Roman See as the fountain from which laws are derived,—a terse mode of expressing the conception of the legislative authority of the Roman See.

CHAPTER X.
THE THEORY OF THE RELATION OF CHURCH AND STATE.

I.

We have endeavoured to set out the theory of these canonists with regard to the divine nature of secular authority. We have endeavoured to show that they clearly follow the Gelasian traditions of the two authorities as being both derived from God, and as having been separated by Christ Himself, who alone was both King and Priest. There is a passage in Stephen of Tournai which sets this out so clearly that we shall with advantage notice its terms. In the one commonwealth and under the one king there are two peoples, two modes of life, two authorities, and a twofold organisation of jurisdiction. The commonwealth is the Church, the king is Christ, the two peoples are the two orders in the Church, that is, the clergy and the laity, the two modes of life are the spiritual and the carnal; the two authorities are the priesthood and the kingship, the twofold organisation is the divine law and the human. Give to each its due and all things will be brought into agreement.

Stephen's phrases are a summary of the Gelasian tradition, and, as we have endeavoured to show, this is the theory represented by the canon law as a whole. But Stephen's concluding words have a somewhat ironical sound, for a writer of the end of the twelfth century must have been well aware that it was just exactly here that the great problem of the eleventh and twelfth centuries had lain. It was easy to say that each authority should receive its due; the difficulty had been to determine what this was. As we have pointed out, the theory was simple enough. The difficulty lay in the application, or rather, within the theory itself there lurked the profound difficulty of the adjustment of the relations of the two authorities within the one society. For Gelasius had said that while each authority was independent within its own sphere, yet the persons who held such authority were subordinate each to the other within their respective spheres. It was indeed here that the difficulty had arisen. We have endeavoured to show how in the ninth century there was a general agreement as to the theory of the separation of the powers, but that as a matter of fact each authority had come to have a great deal to say in the sphere of the other.

It may indeed be suggested that this attempt at the separation of the authorities was impossible: there have been political theorists who have argued thus, who have maintained that it is impossible in theory as in fact to separate the spiritual and the temporal authorities. For ourselves such a judgment seems to be both unphilosophical and unhistorical. However this may be, the difficulty of delimitation proved to be enormous.

We cannot write the history of the great controversy of these centuries: this has, indeed, been often done, though, as it seems to us, a complete treatment of the subject has not yet been produced, and will not be possible until the whole civilisation of these times has been more completely examined. When we come to deal with the controversial literature of the eleventh and twelfth centuries we shall have occasion to point out some of the more important aspects of this history. In the meanwhile it must suffice to say that while in the ninth century each authority interposed in the sphere of the other, with comparatively little friction, by the eleventh century all this was changed, and we find each authority repudiating with vehemence the claims of the other to interfere in its concerns, while each endeavoured to vindicate and sometimes to extend such authority as it had actually been exercising.

We deal in this chapter with the relation of the Canon law to the supposed tendency of the Church to claim, not only superiority, hut in some degree at least supremacy, over the State. The question of the development of this tendency in the Canon law may he conveniently considered under four heads—first, the tradition of cases in which the Papacy had actually or apparently exercised some such supremacy; secondly, the development of the theory of the consequences of excommunication ; thirdly, the theory that Peter, and therefore his successors, had received from

Christ authority over the temporal as well as the spiritual power; and, fourthly, the interpretation of the Donation of Constantine. When we have examined these we shall he in a position to examine the more or less formal statements of the Decretals upon the subject.

In our first volume we have pointed out that the great Churchmen, and preeminently the Pope, had sometimes, as a matter of fact, and were supposed to have frequently exercised a very great and at times a commanding influence upon the appointment and deposition of kings and emperors. The fact is not to he disputed that they had sometimes exercised such a power, and, as we have pointed out, the secular authorities in the ninth century sometimes at least quite frankly recognised this

These traditions are well known to the canon lawyers: in a passage of that famous letter of Gregory VII to Hermann, the Bishop of Metz, which is cited by Ivo in the 'Decretum' and by Gratian, it is related how the Popes deposed the last of the Merovingian race, and put Pippin in their place, absolving the Pranks from their oath of allegiance to the former king. Cardinal Deusdedit in his collection of Canons cites the words of the Synod of Rome of 877, in which Pope John VIII, with the other bishops, the Senate, and the whole Roman people, elected Charles the Bald as emperor, and he cites from Anastasius 'Bibliothecarius' the tradition that it was Pope Gregory who led the revolt of Italy against the iconoclastic emperors, and renounced allegiance to them.

When, therefore, Innocent III in his Decretals maintains that it was the Popes who had transferred the empire from the Greeks to the Germans, he was only repeating a tradition which was in accordance with many others, and which had some reasonable colour of justification.

The canonists then represent clearly the tradition that the Pope had actually exercised a large authority over the appointment and deposition of emperors and kings : we need not discuss how far this tradition was historically justifiable—in part undoubtedly it represented actual events; we are here only concerned with the fact that the tradition existed, and represents one element in the canonical theory of the relation of the Church and the Papacy to the secular power.

We find the second element in the canonical theory, in the development of the theory of the results of excommunication. With this is closely connected the question of the authority of the Church in absolving a man from an illegitimate oath. It is well to notice at the outset that Stephen of Tournai mentions that there are some who maintain that properly speaking the Pope does not absolve a man from his oath, but simply declares that he is absolved, the oath, that is, being of itself null and void. It is not clear whether Stephen takes this view himself, but it may fairly be said that the principle lies behind the attitude of the Church in the Middle Ages to this question. The earlier canonists put the matter simply, that evil oaths should not be kept,—that it is better to commit perjury than to keep a wicked oath.

The principle is reasonable, and it was natural under the terms of the mediaeval conception of society that it should have been held that the Church should determine which oaths were as a matter of fact proper to be kept. The ultimate consequence of this theory and its practical outcome in the attitude of the later Middle Ages to obligations deliberately undertaken we do not here discuss. The principle is clear that the Church was held to have the power to declare when an oath was null and void.

This principle assumed a great political significance when it was brought into connection with the theory of the consequences of excommunication. The history of this is a large subject, which we cannot stop to consider at length. It is enough to notice that in the earliest of the canonists whom we are considering—that is, Regino of Prum in the ninth century—the consequences of excommunication are already very emphatically drawn out, though with reference directly to monastic institutions only. No one is to pray, to speak, or to eat with an excommunicate person; those who do so incur the same sentence. Regino and Burchard of Worms cite formulas of excommunication which again serve to bring out very clearly the nature of the sentence and its effects upon the actual as well as future condition of the excommunicate person, and especially the

principle that he was in such a sense cut off from all the ordinary relations of life, that no one could live with him in those relations without incurring the same condemnation. We need not multiply citations to bring out the fact that this was the theory of the mediaeval Church.

We have in our first volume pointed out that, in spite of certain ambiguous phrases, there can be no doubt that the Church clearly maintained that the king or emperor was in his own person subject to the ecclesiastical jurisdiction of the Church like any other person, and therefore, in extreme cases, to excommunication. Ivo in his 'Panormia' cites part of a letter in which Gregory VII vindicates the right of the Church to excommunicate even the supreme temporal ruler, and cites various real or traditional examples of this: there can be no doubt that Gregory's conclusion was historically justified. There was here nothing new or revolutionary.

The emperor or king was then, in the theory of Church law, liable to excommunication for just cause, like any other person, and like every other excommunicate person was to be avoided and shunned. But this fact would easily bring with it consequences of a still larger kind: the excommunication of a king or emperor would make any relations between himself and his officials, and even his people in general, almost impossible. It was only natural that in the end men would ask whether the oath of allegiance to such a ruler could really be binding.

It is from the standpoint of this theory that we have to examine the claim of the Church and Pope to absolve a man from the obligation of an oath taken to the king or emperor. Gregory VII absolved the subjects of Henry IV from their oath of allegiance to him, and Ivo in the 'Panormia' quotes from the decrees of Gregory's council held in Rome A.D. 1078, the words in which the general principle is laid down. Again, Ivo in the 'Panormia' cites a phrase of Pope Urban II, in which the principle is still more generally stated that oaths of fidelity made to one who was afterwards excommunicated are of no obligation. These passages are again cited by Gratian in the 'Decretum'. Gratian himself draws out the conclusion from these principles in general terms when he says that the Pope absolves men from their oath of fidelity when he deposes the rulers.

It is important to notice the comment of Rufinus. He urges that it is necessary to observe that an oath may be of two kinds: it may be made to the ruler as a man, or it may be made to him as holding a certain office. In the first case, the oath is always binding on him who has taken it, unless the ruler is excommunicated, in which case he must not keep his oath of fidelity. In the second case, if the ruler is legally and canonically deprived of his office, then the oath is of no further obligation.

It is clearly, then, a principle of the canon law of these centuries that a ruler can be excommunicated, and that this carries with it the consequence that his subjects can be, or rather are, ipso facto, released from their oath of allegiance to him.

We turn to the third aspect of the canonical theory, the conception that Peter, and therefore his successors, had received from Christ authority over the temporal as well as the spiritual kingdom.

This appears first in the Canon law in Gratian's 'Decretum'. In the twenty-second Distinction he collects the passages which show that the Roman Church had authority superior to that of all other Churches. He begins by citing a part of what he considers to be a letter of Pope Nicholas II to the Milanese (this is really a letter of Peter Damian to Hildebrand, preserved in the Acts of the Convention of Milan of A.D. 1059-60). In this letter it is laid down that it was the Roman Church which had created patriarchal and metropolitan dignities and the sees of bishops, and which had determined the rank of all the Churches, while the Roman Church was founded by Christ Himself, who committed to Peter the laws both of the earthly and heavenly empire. It does not appear how Gratian understood these last words, or what importance he attached to them, for he makes no comment upon the passage: it must be noticed that the words occur incidentally in a passage which otherwise is concerned with the relation of the Roman Church to other churches.

This passage is commented on by Rufinus and by Stephen of Tournai. Rufinus deals with it in a somewhat elaborate fashion. He interprets the phrase *terreni simul et celestis imperii jura* as

meaning that he has authority both over the clergy and over secular persons and things: the vicar of Peter thus has the *jura* of the earthly kingdom. But, he says, we must distinguish between the *jus auctoritatis* and the *jus amministrationis*: the *jus auctoritatis* is that which a bishop exercises over all ecclesiastical matters; the *jus amministrationis* is that which the "yeonomus" (administrator of the temporalities of the diocese) exercises—he has the authority to administer affairs, but only issues commands to others by the authority of the bishop. The Pope has "quoad auctoritatem, jus . . . terreni imperii", for it is he who by consecration confirms the emperor in his earthly kingdom, and admonishes the emperor and other secular persons if they misuse their secular office, and absolves them when they repent. The prince has the authority after the Pope (*post ipsum*) of rule over secular persons, and *preter ipsum* has the duty of administration: for the Pope should not deal with secular matters, nor the prince with ecclesiastical matters, in accordance with the canon "cum ad verum ventum est" (Gelasius's statement of the division of the two powers cited in Dist. XCVI, c. 6). Rufinus adds that others understood the canon to refer to the fact that Christ gave Peter authority that what he should bind or loose on earth should be bound or loosed in heaven.

It would seem that Rufinus is anxious to preserve the principle that the Pope has the supreme authority over secular matters, but also to suggest that this authority is limited to confirming the election of the emperor, and to correcting the emperor and other secular rulers if they misuse their authority. He is anxious to bring the phrase into agreement with the principle which had been laid down by Gelasius, and which was still regarded as authoritative. The fact that he cites another interpretation, even though it is not his own, seems to show that he felt the phrase to be a difficult one.

Stephen of Tournai also suggests two interpretations—the first, that the Pope has authority both over laymen who govern worldly affairs and over the clergy who have the charge of heavenly matters, for the successors of Peter consecrate priests and crown the emperor; the second, that the Pope has such authority that what he binds and looses upon earth is bound and loosed in heaven.

The 'Glossa Ordinaria', commenting on the passage, says that the Pope has both swords, the spiritual and the temporal.

What conclusion then are we to draw? It is impossible to say certainly in what sense Peter Damian used the phrase, or in what sense Gratian understood it. Rufinus clearly thought that it meant that in some sense the Pope, as the successor of Peter, had authority over secular affairs as well as over secular persons; but being aware of the emphatic terms of the Gelasian statement, he wishes to reduce the practical meaning of the phrase as far as possible, and he therefore suggests that it is best understood as explaining the authority by which the Popes consecrate and confirm the emperors, and their right of interfering if these misuse their power. Stephen is probably condensing the statement of Rufinus, and very probably would have assented to his interpretation, though of this we cannot be certain. Both Rufinus and Stephen are aware that the phrase may be taken in another and a more general sense, and intimate that other writers had taken it so. The 'Gloss' interprets it as referring to the power of the two swords. We have found no reference to the phrase in the other canonists with whom we deal or in the Decretals.

We turn to the fourth point we have mentioned, and we must now consider the place of the Donation of Constantine in the Canon law. In our first volume we pointed out that, whatever ambiguities there may be as to the original purpose of the Donation, one thing is very clear, and that is, that no writer in the ninth century suggests that it means that the Pope has temporal authority over the Empire in the West. We cannot here discuss the history of the Donation in mediaeval literature in general; we shall recur to this in a later volume. But we must consider its place in the canonical literature. Regino of Prum does not cite it. In Burchard there is a passage which contains the statement that Constantine left Rome, which had been the seat of the imperial authority, and granted it to St Peter and his successors. The passage belongs to the literature connected with the Donation,

but does not contain the important phrases. Ivo of Chartres cites the same passage in the 'Decretum', but he also cites the Donation itself, including the words in which Constantine is said to have transferred to Pope Sylvester not only Rome, but all the provinces of Italy and the West, and both passages recur in the 'Panormia' and in the collection of Cardinal Deusdedit. As these canonists make no comment on the passages which they cite, it is impossible to say in what sense they understood it. When we come to Gratian, it is certainly interesting to find that he omits it altogether from his collection. It stands, indeed, in all the editions of Gratian, but it is contained in two Palese—that is, two of those canons which were inserted by a later hand. It is, indeed, impossible to say precisely what importance we are to attach to this omission, but it is certainly remarkable, for the Donation is contained not only, as we have just seen, in Ivo and Deusdedit, but also in the collections known as 'Anselmus', and 'Caesareoaugustana', and all of these collections were used by Gratian. Of the two Palese which have been inserted in Gratian, the first sums up the general purport of the Donation, saying that the Emperor Constantine granted the crown and all the royal dignity in the city of Rome, in Italy, and in the Western parts, to the Pope, while the second gives a large part of the text of the Donation itself, including the most significant phrases.

Gratian's first commentator, Paucapalea, who has been thought to be the author of the 'Palese', is the first canonist whose treatment of the Donation is explicit. Commenting on the twenty-second Distinction, he explains that Byzantium is called New Rome because Constantine transferred thither the Roman imperium, for Constantine, on the fourth day after his baptism, gave to the Pontiff of the Roman Church a *privilegium*, by which he handed over to him the crown and all the royal dignity and the "palace" of the Lateran, and all his glory; and further, he handed over his kingdom, declaring that he had thought it meet to transfer the seat of government (*imperium*) to the East, and to build in the province of Byzantium a city called by his own name, in which to place his imperium, inasmuch as it was not just that where God had placed the *principatus* of the priests and the Christian religion, there the earthly emperor should hold his seat and power. Paucapalea's own interpretation of this is completely set out later in his work. In commenting on the ninety-seventh Distinction, he says that while it has above been shown that the emperor is not to usurp the rights of the pontiff, nor the pontiff those of the king, yet, when the emperor has transferred all his power to the supreme pontiff he has renounced his rights and dignities. Constantine did this when, on the fourth day after his baptism, he handed over to the Pope his crown and all his royal dignity in the West. Besides this, he made many gifts, including the palace of the Lateran, and granted to the Pope the right to make consuls and patricians of the Roman clergy. Finally, he surrendered his whole kingdom and power when he said that he had thought it meet to transfer his imperium, to the East, inasmuch as it was not just that the emperor should have his seat and power where God had established the principatus of the priests and the Christian religion. Here we have a distinct exposition of the meaning which Paucapalea attached to the Donation. This is especially emphatic, because Paucapalea refers expressly to the Gelasian principle of the division of the two authorities, and, as expressly, argues that the Donation, presumably because it was a voluntary surrender by Constantine of his authority in the West, is not inconsistent with this. Paucapalea understands the Donation as conveying to the Popes all the imperial authority, not only in Italy, but in the whole of the West.

The position of Paucapalea is clear, but it does not appear that any of the canonists with whom we are dealing followed him. Rufinus, commenting on the twenty-second Distinction, shows that he is acquainted with some part at least of the Donation, for he explains the title of New Rome as having been applied to Constantinople, owing to the fact that Constantine transferred to it the Roman imperium, and he quotes the words of the Donation, "Congruum esse . . . habeat potestatem", but he makes no comment on this, or on the "Paleae" in Distinction XCVI.—if indeed he found them there. Stephen of Tournai makes no reference at all to the Donation or the Paleae. Damasus was acquainted with the Donation, but expressly repudiates the notion that it could have the effect of permanently

transferring the imperial authority in the West to the Popes. Some people, he says, maintain that the emperor holds the sword from the Pope, because Constantine left the imperium to the Roman Church, but it is more true to say that he holds it from God, as St Augustine says (referring to Dist. VIII, 1), and it does not appear either that the Pope received the imperium or that Constantine could have bound his successors. There is no reference to the Donation either in the Compilations or in the Decretals, so far as we have seen.

Paucapalea is therefore the only canonist of those with whom we are dealing of whom we can say that they both knew the Donation and interpreted it as conveying the imperial authority in the West to the Pope. As we have seen, it was known and included in the collections of the canonists before Gratian, but we have no knowledge as to the sense in which it was understood by them. Why Gratian should have omitted it from the 'Decretum' we cannot say. Rufinus and Stephen may not have found it in their copies of the 'Decretum', for we cannot be sure whether the Paleae were included in them. Damasus knew the Donation but repudiated its authority. We cannot say why there should be no reference to it in the Decretals.

It is possible that there was some doubt in the minds of the canonists as to the genuineness of the Donation. We shall return to this question when we deal with the Donation in connection with the general literature of these times. Its genuineness had been doubted as early as the beginning of the eleventh century, as we know from a constitution of the Emperor Otho III, if we may assume the authenticity of the document, which is generally admitted.

At any rate, whatever may be the reason, we cannot say that the canon law and the canonists, with the exception of Paucapalea, till after the time of the Decretals of Gregory IX, used the Donation for the purpose of establishing the superiority or supremacy of the Pope over the secular authority.

We have then under these four heads examined the question how far the canon law claimed supremacy for the spiritual over the temporal power: first, the tradition of cases in which the Popes had actually appointed or deposed kings; second, the development of the theory of excommunication to the point that it implied that the Church had the authority of deposing kings and emperors; third, that isolated phrase in Gratian, which might mean that Peter received from our Lord Himself power both spiritual and temporal; and fourth, the interpretation of the Donation of Constantine. It is clear that while the canonists claim for the Pope authority to exercise discipline over all temporal rulers, to the extent even of deposing them, they are not clear or unanimous with regard to the theory that the Pope as the successor of Peter holds a supreme authority over both powers.

It is now possible to examine those phrases of the Popes which were considered by Gregory IX and his advisers worthy of a place in the authoritative collection of the Decretals. It is indeed of real importance to consider these statements, which were formally adjudged to be deserving of a place in the system of the canon law, apart from the phrases which various Popes may have used at other times. It is extremely important to distinguish between phrases recognised as representing the carefully considered judgment of the authorities of the Church, from phrases which may have been used in the heat of controversy, which may have represented the actual feeling of the moment but were not finally considered adequately representative of the judgment of the Church.

The statements which we have now to examine are with one exception contained in Decretal letters of Pope Innocent III; and we will do well to remember that there were few of the great Popes of the Middle Ages who set the ecclesiastical power higher, and who actually exercised a greater influence in Europe.

We begin by examining a letter which he addressed to the Emperor Alexius of Constantinople, on the relations and the relative dignity of the temporal and spiritual authorities. Alexius had apparently complained that Innocent had written of him in severe terms, and apparently had appealed to St Peter's phrase, "Be subject to every ordinance of man for the Lord's sake" (1 Pet. II. 13), as

indicating that the empire was superior in authority and dignity to the priesthood, and that the emperor had criminal jurisdiction over priests as well as over the laity. Innocent energetically repudiates these contentions, and specially urges that though the emperor is supreme in temporal matters, this only affects those who hold temporalities from him: the Pope is superior in spiritual things, which are superior to the temporal even as the soul is to the body As to the claim to criminal jurisdiction over the clergy as well as the laity, this is not just, for this jurisdiction is limited to those who use the sword.

He cites various passages of Scripture to show that the priest is superior to the king, and finally compares the authority of the Church to the sun and that of the king to the moon. God has set in the firmament of the heaven, that is, in the universal church, two great lights, that is, two great dignities, the pontifical and the royal authorities. But as the sun which presides over the day is greater than the moon which presides over the night, so is the Pontiff greater than the king.

This passage brings out clearly some important points with regard to the conception of the relative position of the two powers. Innocent sharply repudiates the notion that the secular authority is superior to the Pope : he acknowledges that the Emperor is supreme in temporal matters, but the Pope is supreme in spiritual things, which are far greater, and—a point of great importance—Innocent clearly holds that the clergy are only subject to the secular power so far as they hold temporalities from that power, and only in relation to these temporalities, and they are, therefore, not subject to him in criminal matters. But, finally, in spite of the fact that Innocent holds that the spiritual power is immensely superior in dignity to the secular, he restates the Gelasian theory, that both powers, the secular as well as the spiritual, have been established by God, and he expresses this in the terms current in the ninth century, that these two powers are within the Church. It is noticeable, therefore, that Innocent avoids here all suggestion that the spiritual power is supreme over the secular within the sphere of the latter.

We find that this position of Innocent is maintained consistently in other important Decretals which deal with the matter. There is a very remarkable illustration of this in a Decretal dealing with the dispute as to the election of Philip of Swabia and Otto to the empire. Innocent III had interfered in this case to annul the election of Philip and to confirm the election of Otto. At first sight it would seem as though this were obviously an assertion by the Pope of his authority over the secular power, and of a claim to take the appointment into his own hands and to supersede the electors. But Innocent is at great pains to disclaim this construction of his action. Some of the princes had complained that the Papal legate had taken upon himself the office of an elector or "cognitor", and maintained that this was wholly illegitimate. Innocent denies that he had done this, and says that his legate had only acted as a "denunciator",—that is, he had declared Philip to be unworthy and Otto to be worthy to receive the empire. Innocent recognises that the electors have the right and authority to elect the king, who is afterwards to be promoted to the empire; they have the right by law and ancient custom, and the Pope must specially recognise this, as it was the Apostolic See which transferred the empire from the Greeks to the Germans. But, on the other hand, Innocent urges that the princes must recognise that the right and authority of examining the person elected belongs to the Pope, who is to anoint and consecrate and crown him, for it is a general principle that the examination of a person belongs to him who is to lay hands on him, and the princes cannot maintain that if they elected, even unanimously, a sacrilegious or excommunicated person, the Pope would be obliged to consecrate and crown him. Finally, he claims that if the electors are divided, he has the right to decide in favour of one of the parties, and urges that this was done in the case of the disputed election of Lothair and Conrad.

It is interesting to observe bow carefully Innocent guards his own action, and disclaims the intention of overriding the legitimate rights of the electors. His claim, in fact, no doubt amounts to an enormous invasion of the rights of the electors of the empire—that is, his claim to determine which

of the candidates should be acknowledged in case of a disputed election; but, as we have pointed out, there were important precedents for his claiming a great and even a paramount share in determining the election. His refusal to acknowledge an excommunicated person was only a natural extension of the principle that excommunication involved deposition. It is very significant that he makes no claim to any abstract political supremacy over the empire; his silence is indeed very significant, for, as we have seen, there was at least one phrase in the canonical collection of Gratian which seemed to imply that the successors of Peter had received this authority from Christ Himself.

This conclusion is confirmed by the terms of another important Decretal letter of Innocent, written to the French bishops, defending his claim to arbitrate between the French and English kings. He begins by repudiating the notion that he desires to disturb or diminish the jurisdiction or authority of the French king, while he expects that the French king, on his part, will not interfere with the Papal jurisdiction and authority. The Lord in the Gospels had bidden an injured person appeal to the Church, and the king of England asserted that the king of the French had transgressed against him, and that he therefore had appealed to the Church, and the Pope, therefore, could not refuse to hear him. He disclaims all desire to judge as to the question of the fief, and he recognises that any question of this kind belongs to the feudal lord— that is, in this case, to the king of the French, unless, indeed, the jus commune had been altered by a special *privilegium* or by custom; but he claims the right to decide as to the "sin", for it cannot be doubted that jurisdiction on this point belongs to the Pope. The French king should not consider it derogatory to his dignity to submit in this matter to the Apostolic judgment; and he appeals to the words of the Emperor Valentinian and to a decree of the Emperor Theodosius, which, as he says, had been renewed by the Emperor Charles, under which any party to a suit might, even without the consent of the other party, appeal to the bishop. No sane person, he continues, can doubt that it is the duty of the Pope to rebuke men for mortal sin, and if they refuse to submit, to subject them to ecclesiastical censure: it cannot be pretended that kings are exempt from this jurisdiction. If this is true of all sins, how much more must it be true with regard to a transgression against peace, and he appeals to the warning of the Gospel directed against those who refuse to receive the messenger of peace. Further, he reminds him that the king of the French had used the help of the Pope against Richard of England. Finally, he urges that a treaty had been made between the kings and confirmed by their oaths, and that this had been violated, and that no one could doubt that the question of the violation of an oath belonged to the Church. He has therefore, he says, appointed his legates to enquire into the matter, and if they found the complaint of the King of England to be a just one, to take such steps as he had authorised, and he admonishes the bishops to receive and carry out the judgment.

The claim which Innocent makes is no doubt one of great magnitude, but it is very necessary that we should observe carefully the grounds upon which Innocent rests it, and notice again the omission of all claim to act as one who possessed a political authority superior to that of the temporal sovereign. His claim is based on two principles—first, the religious one, that any question of transgression or sin by one man against another belonged to the Church's jurisdiction, and therefore especially any transgression against peace, and any question concerning the obligation or violation of oaths ; secondly, on the appeal to a legal ordinance, which permitted any party in a civil suit at any time to take the case from the civil court to that of the bishop. Innocent says that this law had been made by Theodosius and renewed by Charles the Great: the latter statement is incorrect, being based upon the spurious collection of Capitularies of Benedictus Levita (II. 366); but it seems that the original source of the constitution is a genuine law of Constantine. It is contained in the constitutions of Sirmond, and Hanel and Maassen have argued that this one is genuine, though they think that it was repealed by Arcadius and Honorius (Cod., I. 4. 7), and by a Novel of Valentinian (III. 34. 1).

Whatever may he said as to the grounds upon which Innocent bases his claims, it is quite clear that we have here no pretension to a general political supremacy. It is perhaps worth while to put

beside this a Decretal of Alexander III, and another of Innocent III, which, in regard to smaller matters, seem to illustrate the same principle. In the first of these Alexander III deals with a case in which certain knights had been summoned before the Bishop of Trier about some matters concerning the fiefs which they held from a secular lord. Their lord forbade them to answer about the secular fiefs in the bishop's court, and the bishop excommunicated them. Alexander III annulled the excommunication, and ordered the case to be determined by the feudal lord: only in case he should act unjustly does he order the matter to go to the ecclesiastical court. In the second, Innocent III orders the Bishop of Vercelli to declare null and void any letter which may be produced from the Holy See dealing with matters which belong to the secular courts of Vercelli. Only if the consuls and commune of Vercelli refuse to do justice to those who appeal to their court, then suitors may have recourse to the court of the bishop or the Pope, and this is permitted, especially because at that time the empire was vacant, and there was no secular superior to whom they might appeal for justice. It is worthwhile to notice how in both these cases the Popes, while maintaining the principle that the Church was bound to protect those who were oppressed or unjustly treated, yet emphatically set aside any attempt on the part of Church authorities to supersede the ordinary process of secular justice.

In two Summas described by Schulte, the Pope is called "verus imperator", and in one of them it is said that the emperor is his vicar. It is clear that this judgment does not correspond with that of the Decretals.

CHAPTER XI.
THE THEORY OF THE RELATION OF CHURCH AND STATE.
II.

In the passage quoted at the beginning of the last chapter, Stephen of Tournai speaks of the two peoples, the clergy and the laity, who dwell within the one state or commonwealth of the Church. To the careless reader this might seem to imply that the secular authority is subject to the ecclesiastical. This would be a complete misunderstanding of his meaning; the Church, in the sense in which he uses it here, is not to be confused with the ecclesiastical organisation of which the Pope is the head. For Stephen is careful to say that the head of the Church, in the sense in which he is here using the word, is Christ, while the priesthood and the kingship are the heads of the two authorities which are within the Church. Stephen is putting into his own phrase the principle of the Gelasian theory of Church and State.

We have in the last chapter discussed the question how far this conception had been abandoned by the canonists in the eleventh and twelfth centuries, and its place taken by the theory that the Pope was supreme in secular things over the secular as well as over the ecclesiastical authority; and our examination has led to the conclusion that, whatever view may have been maintained in the heat of controversy, the Canon law of the period we are considering does not admit this principle, and the great Popes, so far as their judgment is embodied in the Canon law, repudiate this conception.

This does not mean that the authority of the Church is not of greater dignity than that of the State. Gelasius had confined himself to pointing out that the responsibility of the priest was greater than that of the king; while Hincmar of Rheims added that the dignity of the bishop is greater, for he consecrates the king. The Canon law holds to the conception of the greater dignity of the spiritual power; its general principle is well expressed in a phrase quoted by Ivo and Gratian as from Gregory Nazianzen, which lays stress upon the superior dignity of that authority which deals with the soul over that which only deals with the body. In the last chapter we have quoted that phrase of Innocent III in which he compares the spiritual power to the sun and the temporal to the moon. These phrases illustrate the growing sense of the superior dignity of the ecclesiastical authority, but they do not mean that the Church claims authority over the State.

The whole matter would indeed have been simple and easy if the spiritual society could be separated from the secular,—indeed Stephen's rather easy phrases would have been adequate if we could imagine this to be possible; in fact, of course this was impossible, for in fact the two jurisdictions ran across each other, or, to put it more correctly, the layman and the cleric were each subject not only to the one authority, but in some measure at least to both, and the two systems of law sometimes at least deal with the same subjects. The difficulties of the relations of Church and State in the Middle Ages arose in large measure from the very nature of things, while in a large measure also they were the results of historical conditions whose character we have considered in relation to the ninth century in the first volume, and which we shall have to consider in relation to the tenth, eleventh, and twelfth centuries in a future volume. We cannot now anticipate this discussion, but we must bear in mind the fact that the eleventh and twelfth centuries were full of the clamour of the great controversy between the Empire and the Papacy, between the Kings and the Bishops, and that the real difficulty in the adjustment of this controversy lay, not so much in the fact that each side put forward unreasonable claims, as indeed they sometimes did, but much rather in the fact that the two jurisdictions did really cross each other, and that in the conditions of the society of that time it was very difficult indeed to find a satisfactory adjustment of claims which in themselves, or at any

rate as related to the conditions and circumstances of those times, were reasonable. For that matter, the difficulty has not disappeared even in our time.

We have in the last chapter dealt with the supposed claim that the Pope was supreme over the State both in spiritual and temporal matters. We must now consider the more general relations of the authorities of Church and State.

We begin by considering the theory of these canonists with regard to the relations of Canon law and secular law. We have already discussed their conception of the Canon law itself, and it will be evident from this that whatever may have been the theory or practice of the ninth century, the Canon law recognises no authority of the secular power over Church law. The civil ruler has no authority over Canon law, but rather he cannot abrogate Canon law; he has no authority to make laws in regard to ecclesiastical matters,—such regulations, even though well-intentioned and designed for the good of the Church, are void, and must he repudiated. There is no doubt about the theory of the canonists: the Church has its own legislative authority, and its own system of legislation, which is wholly independent of the secular authority and of secular law. This principle is, so far, nothing more than the application of the Gelasian theory of the two authorities with their two spheres.

But now we come to a more difficult question, and that is, How far is the secular law subordinate to the law of the Church? The consideration of this question requires much care if we are to keep clear of mistakes into which even some very competent historians have fallen. One thing is perfectly clear in the theory of the canonists, and that is, that the secular law is inferior and subordinate to the law of God, and that no secular authority can lawfully make laws which are contrary to the law of God. This is very positively expressed in a phrase of the Pseudo-Isidorian decretals which is cited by Burchard of Mainz, by Ivo, and by Gratian, and more tersely in another phrase quoted by the same canonists. This principle is one about which there was no substantial difference in mediaeval society. But the principle must not he misunderstood,—the law of God is not the same as the Canon law of the Church. We have discussed this subject in a previous chapter, and now only recall the necessity of careful distinction between the Divine law in the strict sense of the term, and the positive Canon law of the Church. In considering the relation of the Canon law to the secular law, we must not confuse the authority of the Canon law with that of the law of God.

Canon law is binding upon all members of the Church, whether laity or clergy: those who do not obey it are to be held as though they repudiated the faith. This is very forcibly put in a passage from a letter of Leo IV which is cited by Ivo and by Gratian. There is no doubt about the principle that the layman as a member of the Church must obey the Canon law, with regard to all those matters which belong to the sphere of the Canon law. And more than this, there are strong phrases in the canonists which lay down the principle that all constitutions (i.e., secular ones) contrary to the Canons and to the decrees of Rome are void.

But,—and here we must be very careful,—this does not mean that the Canon law has any place or authority in secular matters : there is, indeed, no suggestion in any of these writers of any such notion. An examination of the context of the passage just quoted from Gratian will show that he is here only considering the question of the relation of the secular law to ecclesiastical affairs. It has been suggested that Gratian implies in these passages that if there is a conflict between the two systems of law, the secular must necessarily give way. There is no reason to think that the question in this general sense is present to Gratian's mind at all in these passages. It will be useful to compare with these phrases of Gratian the comment which Rufinus makes upon this "Distinction". He observes that the statement, that secular laws which contradict ecclesiastical law are to be set aside, requires some analysis. There are two kinds of ecclesiastical law: the one is "merum"—that is, it is founded upon the divine ordinance, or that of the holy fathers,—such is the law of tithes; the other is "adjunctum vel mixtum"—that is, it really depends upon human law,—such is the law of

prescription and other similar matters. Ecclesiastical laws, which are "mera", cannot be annulled by the laws of the emperor; but of those ecclesiastical laws which depend upon the imperial legislation there are some which can be thus annulled.

It is plain that Rufinus recognises the fact that the two systems of law have each their own province, but that the two provinces are not wholly separate,—that there are at least some cases in which the Church regulations are related to secular laws, and that at least in some of these cases it lies with the secular authority to continue or to abrogate certain rules. Rufinus does not discuss the question who is to decide in cases of a conflict between the two systems of law. On the whole, it does not appear that these canonists present any definite theory upon this subject: their general principle is clear, that each system of law is supreme within its own sphere.

Among the earlier writers the one who seems to come nearest to asserting the authority of the canons over the laws is the author of 'Petri Exceptiones'. We have quoted an important passage from him in the first part of this volume, and it is worth noticing that he speaks not merely of the legal authority of the canons of the first councils, but also holds that a new canon may abrogate an earlier law.

There is also one passage in the Decretals which seems to assert the claim that where there is any doubt to which jurisdiction a particular question belongs, the matter should be referred to the Pope. This passage occurs in a decretal of Innocent III: he had been asked by the Count of Montpellier to legitimatise his illegitimate children, and, while refusing to do this, sets out the grounds upon which he considered that the Papal See was competent to deal with the question. The treatment is complicated, but, as it seems, Innocent claims that the Roman See has always, and in all places, power to legitimatise as far as the qualifications for spiritual offices are concerned, but does not normally claim authority to legitimatise for secular purposes, such as inheritance, except in those territories which are subject to the temporal authority of the Pope. Where, however, there is no secular authority to which recourse can be had, as in the case of the King of France, who recognises no superior in temporal things, the Pope could deal with the matter if the King chose to submit it to him, though the King in the judgment of some had no need to do this, but could have dealt with the matter himself. The King of France had applied to him in such a case, and he had complied with his request. So far Innocent seems to make no very advanced claim. But he then goes on to say that not only in the patrimony of the Church—that is, in the Papal States—but also in other territories, in certain cases, the Pope exercises temporal jurisdiction "casualiter". He explains this by saying that he does not wish to interfere with other men's rights, and he recognises that Christ bade men give to Caesar what was Caesar's, and refused to decide the case of the man who asked him to judge between him and his brother about their inheritance. But, he continues, in Deuteronomy the principle is laid down that in difficult and obscure cases the matter should be referred to the decision of the priest, and that his judgment should be accepted. He urges that the Pope occupies the position of the priest in the Deuteronomio legislation, and that this principle applies especially to those cases where there is any uncertainty whether the matter belongs to the ecclesiastical or the secular authority.

This is a far-reaching claim, and in the course of the thirteenth century furnishes one of the starting-points for the most extreme claims made by some writers, that the Pope possessed in the last resort all temporal as well as all spiritual authority. But that Innocent III himself contemplated such an interpretation of his claim seems very doubtful, especially in view of the great caution with which, as we have seen, he expresses himself. Still it remains true that Innocent III does in this passage, clearly though incidentally, set forward the claim that in cases of conflict between the spiritual and the temporal jurisdiction, the spiritual power is to decide. It must, however, be remembered that the incidental statement of such a view in a passage in the Decretals does not justify the assertion that it was an established principle of the Canon law that in cases of conflict between it and the secular law, the Canon law was necessarily to prevail. The normal view of the Canon law down to the thirteenth

century is that the sphere of the two systems of law are distinct, and that each is supreme in its own sphere.

If there were grave difficulties in adjusting the relations of canon law and secular law, it was even more difficult under the terms and traditions of mediaeval society to adjust the relations of the clergy and the laity to the two authorities. It cannot seriously be questioned that Gelasius and the ecclesiastical writers of the ninth century clearly recognised that in secular matters the clergy were subject to the jurisdiction of the secular power. But there had gradually grown up in the later centuries of the ancient empire a great system of exemptions of the clergy from the jurisdiction of the ordinary secular courts, and these exemptions continued and developed in the new states which grew up on the ruins of the ancient empire in the West. In an earlier chapter of this volume we have discussed the treatment of these exemptions by the civil lawyers, and have pointed out the extent to which they were founded upon the legislation of the emperors from Constantine to Justinian. We must now consider the mode in which these matters were discussed and the conclusions which were maintained by the canonists and the Canon law.

It is not necessary to discuss the question of the procedure in ecclesiastical cases where the clergy were concerned. No canonist suggests that in such cases any one but the bishops had jurisdiction. The really difficult question arises as to civil and criminal cases in which the clergy were concerned. It would take a long time to go through all the canons referring to the subject; but the very detailed discussion by Gratian will serve to give a sufficiently clear impression of the general position of the canonists. In the first Question of the eleventh Cause Gratian has collected a great mass of canons bearing upon the subject, and adds his own observations and conclusions. He first cites many authorities which seem to show that the ecclesiastic must not be brought before the secular courts unless he has first been degraded. To this, he says, it has been replied that while the clergy, as far as their office is concerned, are only subject to the bishop's authority, they are under the emperor so far as relates to their estates, for it is from the emperor that they have received them; and he refers to that famous passage which is quoted in 'Distinction' VIII. 1, in which Augustine maintains that property is held only by the laws of the emperor. Gratian then cites a number of canons which seem to teach that the clergy must pay taxes to the emperor, and that the bishops are not to interfere in secular matters, and says that it is therefore contended that in civil cases the clergy are to go to the secular courts, while they are not to be taken to the secular courts in criminal cases unless they have been degraded. But he urges emphatically that, plausible though this may seem, the canons and the secular law do actually forbid that the clergy should be brought before the secular courts either in a civil or a criminal matter, and cites a number of canons which assert this principle. And, finally, he concludes that unless in a civil case the bishop refuses to deal with the matter, and until in a criminal case the cleric has been degraded, the clergy must not be brought before either a civil or a criminal court.

This conclusion of Gratian does fairly represent the whole tendency of the Canon law in this period: the treatment of the subject by Rufinus and Stephen of Tournai is for the most part the same.

The clergy are thus, in the normal canonical theory, exempt from the jurisdiction of the secular courts. We have, in considering the matter, already touched upon the question of the taxation of the clergy by the secular authority, but we must consider this a little further. The treatment of the subject by Gratian is not very full, and is incidental to a discussion of the canons which prohibit the bearing of arms by the clergy, but it will serve to illustrate the canonical view. Gratian holds that those ecclesiastics who live on tithes and first-fruits are free from all secular taxation. As to those who hold estates and houses, he first suggests that they are liable to pay taxes, but then raises the question whether even these properties are liable to taxation, and, after quoting some authorities which seem to justify the view, he finally concludes that the clergy are only to pay taxes on those things which they have bought or have received as gifts from living persons. Gratian's treatment is both

inadequate and obscure, but it may suffice for our present purpose, which is, not to discuss the question of the taxation of the clergy in the Middle Ages, but to consider the theory of the canonists as to the relation of the clergy to the secular power.

When we have recognised the whole effect of the immunities of the clergy from the jurisdiction of the secular courts, and from taxation of certain sorts, we can ask whether we are to conclude that the canonists held that the clergy were not properly subject to the secular authority. Such general phrases as those of Stephen of Tournai which we have quoted might almost seem to suggest this. But such a conclusion was not actually drawn by the canonists. We have just seen that Gratian admits that on certain kinds of property the clergy must pay taxes, and he seems to give as the reason for this that certain kinds of property are held by the clergy under the sanction of the secular power. In virtue of this fact then at least, the clergy, so far as they held such property, are subject to the secular power. This seems to be what was meant by Innocent III in that decretal which we have cited in a previous chapter, when he says that the emperor has superiority in temporal things, but only over those who hold temporal things from him. It is not clear from the passage as it stands whether Innocent meant to admit that some of the clergy held temporal things from the emperor, but he probably did so, while he in the same passage emphatically repudiates the criminal jurisdiction of the secular power over the clergy, on the ground that this only extends over those who use the sword.

The principle that in some sense the clergy are normally subject to the temporal power is very clearly maintained by Rufinus in a passage in which he asserts that the Pope is in no sense subject to this authority, but that the metropolitan is subject with respect to secular matters. Damasus, indeed, goes much further, and maintains that as Christ and His apostles were subject on earth to the emperor, so must their successors also be subject, and he repudiates the doctrine that the Pope has the two swords. Damasus, however, would seem to have belonged to the anti-papal party, and his statements must be taken as representing that position. On the whole, it seems to be fairly clear that the Canon law, as late as the Decretals of Gregory IX, knew nothing of a theory that the clergy are outside of the sphere of secular authority. As ecclesiastics they may be so, but as men they are, in some degree at any rate, subject to it.

The two "peoples", then, of the clergy and the laity, are not to be conceived of as living wholly separate from each other under different jurisdictions. The clergy are in some measure under the secular authority, and the laity under the ecclesiastical. But it is also clear that the clergy have some special rights and obligations of intervention in secular affairs. We have in the last chapter discussed the question whether these canonists believed that the Church exercised supremacy over the State, and we have seen reason to conclude that this was not normally the case. We must now, however, be careful to notice that the Canon law does maintain that the Church has the right and the duty to intervene in certain cases for the defence of those who have been unjustly treated by the secular power.

We can trace this principle throughout the canonists with whom we are dealing. Regino, Burchard, and Ivo cite a canon which lays upon the bishops the duty of remonstrating with those judges and others who oppress the poor, and bids them, if their intervention should be ineffectual, address themselves to the king, that he may restrain the oppressor. Burchard and Ivo add a canon bidding the bishops excommunicate those judges and powerful men who oppress the poor, if they will not listen to their protests. But this is not all: Ivo summarises the provisions of the Novels that if any suitor suspects the governor of the province, he is entitled to demand that the bishop should sit with the governor to hear the case. We have already pointed out that this is the doctrine also of some of the civilians. To this is probably related the claim that in civil cases one party to a suit could take the case from the secular court to that of the bishop even against the will of the other party. This is quoted by Deusdedit, by Ivo, and by Gratian, and part of the passage is cited by Innocent III in that

letter which we have already discussed. As we have pointed out, the passage is contained in the Constitutions of Sirmond, and is a genuine law of Constantine, but was probably repealed by later legislation. No re-enactment of it can be traced in any genuine legislation of Charlemagne, but it is among the spurious Capitularies of Benedictus Levita. There is no trace of any recognition of this by the civilians ; indeed its provisions go far beyond what they recognised. But the general principle of the recourse to ecclesiastical authority in defect of justice was recognised by them, and was clearly based upon the legislation of the ancient empire.

The Decretals are generally careful to limit the claim of the spiritual court, with respect to secular matters, to the case of defect of justice. We have already quoted two passages which illustrate this; but as the matter is so important, it is worth while to take note of some other passages. In a Decretal letter addressed to the Archbishop of Rheims by Alexander III, in answer to a question of the Archbishop whether an appeal could be legitimately made from a civil court to the Papal See, he says that such appeals could be made by those who were subject to the Pope's temporal jurisdiction; but though the custom of the Church might permit such appeals even in other cases, the strict law did not allow them. Again, Innocent III refused to allow a certain widow to bring her case into the spiritual court unless it related to matters which belonged to the ecclesiastical judges, unless the secular court refused to administer justice to her.

The matter was doubtless one of great difficulty : a recourse of some sort to the bishop had no doubt been permitted in the later centuries of the ancient empire, and had been adapted to the elaborate organisation of the administrative and judicial system of those centuries, and during the period when the new political organisations of the Middle Ages were only slowly taking shape, an appeal to the ecclesiastical protection was natural, and probably not resented. But as mediaeval civilisation became organised and the secular power developed a coherent machinery, the intervention of the ecclesiastical authority in secular matters became more and more difficult to harmonise with the regular working of government. By the twelfth and thirteenth centuries, customs which had once worked without difficulty were becoming matters of serious controversy. But we cannot here discuss this subject fully: it cannot be properly dealt with in relation merely to the Canon or the Civil law.

The matter may very well here be concluded by noticing some sentences of Stephen of Tournai, which illustrate the hesitation and uncertainty which was coming over the minds of many practical men. Stephen comments upon a passage quoted by Gratian from Pseudo-Isidore, which lays down, in broad terms, the right of any oppressed person to invoke the protection of the Church, and then adds that it was a disputed question whether a layman could appeal in secular law-cases to the Pope. Some said that no such appeal could be made, while others maintained that this could be done, for even the emperor acknowledged the Roman Church as his mother, and the Pope as his father, for it was from him that he received the imperial crown.

The claim that the ecclesiastical officers had not only the right but the duty of intervening in secular affairs seems to us especially important, as illustrating the fact that it was impossible to secure a complete separation between the two spheres of the spiritual and the temporal authorities. In some cases, at least, the ecclesiastical authority could intervene with regard to matters which primarily concerned the secular authority; or, to put the matter in another way, matters which seemed at first sight of purely temporal significance might frequently prove to have a relation with principles with which the spiritual authority was primarily concerned. Stephen of Tournai's facile phrases about the separation of the two spheres were misleading rather than illuminating.

It is important to observe that in another direction still this receives important illustration. There are traces even in the Canon law of the eleventh and twelfth centuries of the principle that the laity had some, if an undefined, share in the government of the Church. We do not here discuss the question of patronage and investiture: these matters are so closely connected with the great

controversy of the times that the canonical treatment of these subjects can only be considered along with the general history and literature of that subject: we hope to deal with the matter in another volume. But it is worthwhile to notice here that even the canonical collections of the eleventh and twelfth centuries contain passages which imply that the laity, formerly at least, had sometimes possessed the right to be present at the Synods of the Church. Some of the canonists reproduce older regulations which imply the presence of the laity at some Church assemblies. Burchard of Worms quotes the thirteenth canon of the Council of Tarragona, which enjoins upon metropolitans to summon to their synods not only the cathedral and diocesan clergy, but also some of the laity. Ivo cites a canon of the Fourth Council of Carthage in a form which implies that laymen might be present at synods, and bids them speak only on the permission of the clergy. These reminiscences of an older system of Church authority have some importance as indicating that even in the canon law of the eleventh and twelfth centuries there was still some tradition that the laity had some place in Church authority. This is further illustrated by the citation, both by Deusdedit and Gratian, of a sentence from a well-known letter of Pope Nicholas I to the Emperor Michael, which repudiates indeed the claim of the Emperor to take part in the discipline of the Church, but admits that the Emperor and all the laity may perhaps have some claim to be present at those synods which deal with the faith, inasmuch as this is a matter which is related not only to the clergy but to all Christian people. Such phrases may be difficult to reconcile with the general tendencies of the Canon law in the eleventh and twelfth centuries, but we must take account of them in estimating the whole character of the mediaeval position.

We have seen that the Canon law does not deny that the clergy are in secular matters subject to the authority of the secular power, though it insists upon the importance of certain important exemptions of the clergy from the jurisdiction of the secular courts and from certain kinds of taxation. It is not necessary to bring forward evidence to show that the layman is in spiritual matters subject to the jurisdiction of the Church. We have in the last chapter dealt with the question of the excommunication of emperors or kings: if the supreme secular ruler was thus subject in spiritual matters to the spiritual authority, there could be no doubt as to the position of the private layman. We have found no trace in those canonists whose works we have been able to use of any recognition of the principle asserted by John Bassianus and Azo, that when the layman was brought before the spiritual court the secular judge was to sit with the bishop. We shall recur to this matter in a later volume, when we deal with such well-known regulations as those of William the Conqueror in England, or of the Constitutions of Clarendon, that the king's tenants in chief and ministerials, and the men of the king's boroughs and domains, might not be excommunicated without the king's consent, or at least until the matter had been brought before the king or his Justiciar.

But it is necessary here to take account of an aspect of the canonical theory of excommunication which we have not yet had occasion to consider, and which is sometimes overlooked. We have in the last chapter briefly illustrated the tremendous nature of excommunication, and its far-reaching consequences. But we must now be very careful to recognise that the power of excommunication was not an arbitrary power, but could only be exercised for lawful reasons and in a lawful manner. An unreasonable or unjust sentence of excommunication had not in the canonical theory any final validity: it might be right that a man should submit to it until it could be revised by competent authority, but such a sentence had no effect before God. The canonical writers are quite aware of this principle,—indeed they discuss the matter very carefully, and lay down some conclusions without hesitation.

Cardinal Deusdedit has a very important summary of passages from the patristic writings dealing with the subject. An unjust excommunication injures him who inflicts the sentence rather than him who is sentenced; the Holy Spirit by whom men are bound or loosed will inflict on no man

an undeserved punishment; justice annuls all unjust sentences; the man who is unjustly sentenced will be recompensed.

Gratian discusses the subject in the third Question of the eleventh Cause, and cites an immense number of passages bearing upon it. He first quotes many canons which seem to show that a sentence of excommunication, whether it is just or unjust, must be respected by the person condemned until he has brought his case before a synod of bishops. But he then points out that there are also canons which seem to point to another conclusion—that is, that an unjust sentence is not to be obeyed; and he cites a number of canons which might seem to prove this, and asks how these canons are to be reconciled with each other. He points out that a sentence may be unjust for various reasons: it may be unjust in consequence of the intention of the judge, or in consequence of some impropriety in form, or in respect of the ground which is alleged for it; and he cites a number of canons bearing more or less upon these various causes. Gratian's own conclusions are not very clearly expressed, but he seems to mean that an unjust sentence of excommunication, though it has no validity before God, must be respected, both by the excommunicated person and by others, until it has been brought before the competent authority, except in the case where a person has been excommunicated because he will not commit some wickedness.

There is an important passage in Stephen of Tournai which sums up the canonical view of excommunication. It must be observed, he says, that a sentence of excommunication can be regarded in three ways. A man may be excommunicated before God and the Church, when a man has justly been cut off from the Church on account of his crimes; or he may be in the position of one who is excommunicated before God, and is therefore not a member of His body, which is the Church, although he had not been cut off from the Church by its sentence; or again, a man may be excommunicated before the Church, but not before God, if the sentence of excommunication is unjust and founded upon no true cause.

Finally, it is important to observe that the Decretals draw the same distinction between the validity of excommunication before God and before the Church. Innocent III in one passage does not hesitate to say that there may be cases where a Christian may know that a certain action will be a mortal sin, though it may not be possible to prove this to the Church, and that in such a case he must rather submit to excommunication than commit the mortal sin; and in another place he lays it down explicitly that while the judgment of God is always true, the judgment of the Church may be erroneous, and that thus a man may be condemned by God who is held guiltless by the Church, and may be condemned by the Church who is guiltless before God.

It needs no elaborate argument to demonstrate the great importance of this distinction between the formal and outward, and the real validity of the censures of the Church. Mediaeval history is full of examples of the defiance of these censures by men who had no thought of repudiating the spiritual authority of the Church. It would, however, be impossible to deal with this subject completely without passing from an examination of the theories of the Canon law into the discussion of the general history of these centuries, and that must be reserved for another volume.

CHAPTER XII.
SUMMARY.

We have now endeavoured to consider some of the most important aspects of the political theory of the Civil and Canon lawyers down to the middle of the thirteenth century. Enough has been said to show the immense importance of distinguishing the tendencies of that period from those of the period which followed it; for the more closely we study the movement of ideas in the Middle Ages, the more clear does it become to us that we must distinguish very sharply between the views of those great thinkers who in the thirteenth century endeavoured to construct a coherent and logical system out of the infinitely complex elements of mediaeval life and thought, and the judgments of those earlier writers of the eleventh and twelfth centuries who represent an intellectual and political civilisation which was growing and changing too rapidly to allow them to stop and attempt to marshal their ideas in a systematic order. The great systematises do no doubt represent the Middle Ages, but only in this sense, that they endeavour to fix and define, and therefore in some measure to stereotype, what had been a thing living and growing and continually changing. For there are few periods in the history of the world when the movement of circumstances and ideas was more rapid, and there is nothing which still obscures any real apprehension of*the Middle Ages more effectively than the notion that these centuries were a period of fixed opinions and unvarying conditions.

In this volume we have dealt with some aspects of the political ideas implicit or formally expressed in a literature whose conceptions are directly founded upon antiquity, the civilians building primarily upon the ancient jurisprudence, the canonists primarily upon the Christian Fathers : they represent, therefore, some of the most important elements which the Middle Ages inherited from the ancient world.

If now we ask ourselves what are the most significant conceptions which they present, we may well begin with that majestic conception of law, presented to us both by civilians and canonists, as representing not the mere will or power of a community or ruler, but rather the attempt to translate into the terms and to adapt to the conditions of actual life, those ultimate principles of justice and equity by which, as they believed, the whole universe was controlled and ordered. In the civilians this is related primarily to the discussion of the nature and meaning of *aequitas* and *justitia,* and secondarily to their treatment of the *jus naturale*; while the canonists deal with it chiefly in relation to the *jus naturale* and its character as the standard to which all laws must conform, the norm or test to be applied to all institutions.

It is out of these conceptions that there grows the necessity of distinguishing between the world as it actually exists, and the ideal or perfect conception of the world and human life. And, again, canonists and civilians have alike inherited from the later philosophy of the ancient world and from the Fathers the conception of the distinction between the natural conditions of human life, which they think of as primitive, and the conventional institutions under which men actually live. Many of these conventions are in themselves to be reprobated, but are accepted as being the means by which men's vicious and criminal tendencies may be controlled, and they may be trained for the ideal.

We have dealt with the treatment of the institutions of slavery and property as illustrating this conception, but the theory of the State both in the canonists and civilians is also related to it. To them both the State is a sacred institution that is necessary and sacred as the means of establishing such a measure of justice and order as is attainable in this world.

The canonists do not indeed look upon it as natural in the stricter sense, but rather as a conventional institution, made necessary by men's vices, but still a sacred and divine remedy for those evils, and with this judgment the civilians probably agreed. They represent not so much the

Aristotelian theory of the State, as that modification of it presented by some at least of the Stoic writers. It has indeed been urged by some writers of eminence that the ecclesiastical theory of the State denied its sacred character, and, following some supposed theory of St Augustine, held that the State did not really represent the authority of God. We shall have to return to this question in later volumes, and shall then try to reduce the complexities of mediaeval thought to some reasonable proportions. In the meanwhile, we must content ourselves with saying that this is not the conception of the canon law, not even of the Decretals, and that whatever may be the final conclusion about the general principles of the Middle Ages, the canonists at least as well as the civilians held to the principle of the sacred character of the State.

The civilians, as far as we can understand them, shared in these conceptions, but we also find in some of their writings an interesting attempt to establish the conception of the State as resting upon the natural relation between the whole society or *universitas* and its members. It would seem that we have here a more organic conception of the nature of political society, as necessarily arising out of the constitution of human nature and the principles of social relations. And alongside of this and in close relation to it we have to recognise the great importance of the fact that the civilians repeated for the Middle Ages the principles of the Roman jurisprudence that the only source of political authority was the whole community, the *universitas* or *populus*. In our first volume we have pointed out the great significance of the fact that this was the normal theory which the ancient world handed on to the Middle Ages and the modern world. This, was not the less important, because the conception coincided with the native traditions of the barbarian societies; the doctrine of the civilians stated clearly and explicitly what was implicit in the new constitutions.

There are indeed other aspects of the theory of the ancient jurists which do not correspond with the traditions of the new societies, and here the influence of the civilians is more complex, and it requires some care and some discrimination to estimate the whole nature of this. We have seen that they were divided upon the question whether the Roman people, in transferring their authority to the emperor, had wholly parted with their original authority. Some of them maintained that this was the case, and here we have what was undoubtedly a new and alien element in the mediaeval tradition. Some of the civilians maintained that the people having transferred their authority had done this once and for all, and that even their custom had lost its original force in making and abrogating law ; and that thus the emperor was left as the sole and absolute legislator. This conception was new to the Middle Ages, and indeed it did not attain any great importance in these times : its development belongs to the period of the Renaissance, when, in the breaking up of the general fabric of mediaeval civilisation, the personal monarchies which reached their full development in the seventeenth century began to take definite shape. Some share in this development is probably to be traced to the influence of some of the civilians.

It is, however, a great mistake to suppose that this was the only or the most general view of the civilians, for many of them, including the great Azo, held quite another view, and maintained that the people had never really parted with their authority, that the ruler held a delegated authority which was not unlimited, while the people always continued to control all legislation by their custom, and might even if they chose reclaim the authority which they had entrusted to the ruler. And, as we have seen, Irnerius, Roger, and Azo are very clear in holding that the emperor, even though entrusted by the *populus* with legislative as well as administrative authority, could only exercise this with the counsel and consent of the Senate, which Azo, at least, held had received its authority from the *populus*. Their doctrine is generally related to the phrases of Theodosius and Valentinian in the Code, but we are left with the impression that we may here suspect also the influence of the contemporary constitutions.

The canonists have little to say directly upon this subject : some of them, indeed, like Rufinus, agree with those civilians who hold that custom has no longer any legislative authority, except with

the consent of the ruler; but on the whole the great importance attached to custom in the canonical theory of law, and the final decision of the Decretals that custom, under the condition of a legal period of prescription, always retained the force of law, seem to throw the weight of the canon law on to the same side as the civilians like Azo.

It is difficult to summarise what we have said as to the theory of the relations of the two authorities of Church and State; but we may once again point out that in order to understand their relation in the Middle Ages we must begin by taking account of the fact, which is brought out with special clearness in the work of the civilians, that a great part of the exemptions of the clergy from secular jurisdictions and obligations, and a good deal of their claim to intervene authoritatively in secular affairs, is really to be traced to the deliberate organisation of society in the later empire, and especially by Justinian. And finally, we think that an examination of the subject will have made it clear that while the Church had come to claim a tremendous authority in relation to the empire, it is not the case that the Church as represented in the deliberate judgments of the Canon law claimed to be supreme over the State. The normal doctrine of the Canon law down to the time of the Decretals is the same as that of the fifth and the ninth centuries, that the two authorities, the ecclesiastical and the civil, were equally and separately derived from Christ, and that strictly each was supreme in its own sphere.

BOOK. III.
POLITICAL THEORY
FROM THE TENTH CENTURY TO THE THIRTEENTH

PREFACE TO BOOK III.

In this volume we resume the study of the development of political theory in its immediate relation to the historical events and conditions of the Middle Ages at the point where we left it in the first volume. I venture to hope that historical scholars will agree that it has proved to be of real service to deal with the political ideas inherent in feudalism in close relation to this development.

I should wish to express once again my obligations to the admirable work of Mr R. L. Poole, the most learned of English students of the Middle Ages, who more than thirty years ago, in his 'Illustrations of Mediaeval Thought', pointed out the great significance of the position of Manegold and John of Salisbury in the development of mediaeval political theory. The detailed study of the political literature of their times has only served to bring out more clearly the justice and insight of his recognition of their place and importance.

As this work advances I become more and more conscious of the difficulty of handling such large and diverse materials, and I am therefore very grateful to those scholars who have been so kind as to help me with their technical knowledge of particular aspects of the literature; and I wish therefore to express my most sincere thanks to Miss Pope of Somerville College, who has very kindly examined all the references to Mediaeval French writers, to Professor Meynial of Paris, and Mr E. Barker of New College, who have read the proofs of Part I., and to Mr F. Urquhart of Balliol, who has read the proofs of Part II.

The printed texts of Bracton are obviously very defective, and I have used the text of the Bodleian MSS., Digby, 222. Professor Woodbine, in the first volume of his edition of Bracton, has indeed thrown some doubt upon Maitland's judgment of the value of this text, but I have thought it best in the meanwhile, pending the appearance of Professor Woodbine's text, to use it. I am under great obligation to Mr G. C. Winstedt of Magdalen College and the Bodleian Library for furnishing me with its readings throughout.

A. J. CARLYLE.

Oxford, 1915.

INTRODUCTION.

In the last volume we endeavoured to determine the nature of the influence of the ancient world on the political theory of the Middle Ages, as it is represented in the systems of mediaeval Roman and Canon law. It seemed well to consider these elements of mediaeval theory first, because in order to appreciate rightly the nature or characteristic developments of political thought, we must first consider carefully how much had been inherited from the ancient world, and also because with the help of these more or less systematic works we can distinguish more easily between the normal opinions of men and abnormal or eccentric views.

We must now face the task of trying to determine what were the characteristic political theories of those centuries of the Middle Ages during which all ideas were in a state of ferment, during which nothing was fixed or systematic, but every day as it brought new conditions so also it brought new theories, new ideas, often in such bewildering abundance as to make it difficult to estimate their value.

We turn in this volume first to the consideration of the characteristic conceptions of feudalism and their influence on the development of political ideas, and we have found that in order to deal with this effectively we must carry our study down to the end of the thirteenth century. For the rest we deal with the political theory as illustrated in general literature only to the end of the twelfth century, for in the thirteenth century the great schoolmen began to reduce the world of ideas and theories to a systematic form. The work of these great systematic thinkers was indeed often admirable and enlightened, and we propose in later volumes to deal with this, but there has been in our judgment some tendency to misunderstand mediaeval thought, because it has been studied too exclusively in these systematic writers. There has been a tendency to conceive of it as representing a completely articulated system of fixed principles and logical deductions from them. This is true, strictly speaking, only of the thirteenth century, and even then only of the great schoolmen. The literature of the centuries from the tenth to the twelfth century represents no such systematic mode of thought; the men of these times had indeed in the writings of the Christian Fathers a great body of theories and principles which had a constant influence upon them, while their habit of life and feeling was grounded in the traditions of the new Teutonic societies, but in neither of these had they an ordered and articulated system of political thought, but rather a body of principles, significant indeed and profound, but not always easily to be reconciled with each other. The history of the social and political ideas of these centuries is the history of the continual discovery of the relation of the traditions and principles which men had inherited to the actual circumstances of the time.

Our main difficulty in handling the matter is due not to the want of materials, for there is almost an over-abundance of these, but rather to the variety and complexity of the materials, and to the difficulty necessarily inherent in the attempt to set out in some systematic terms the conceptions of men who were not systematic thinkers, while they were acting and thinking energetically and often audaciously. And if the materials are abundant, the political ideas themselves are somewhat bewildering in their complexity. It has sometimes been thought that the political theory of the Middle Ages was simple and clear, because it was dominated by the principle of the unity of the world under the supremacy of the spiritual power. But the real truth is very different. We do not doubt that these conceptions had a real importance, but there were other aspects of the theory of society which were at least equally important, and which were more permanent in their importance. We cannot rightly apprehend the character of mediaeval civilisation if we conceive of it as something isolated from the continuous movement of Western life, for indeed as it was in a large measure founded upon the civilisation of the ancient world, so also it contained the elements of the modern.

Let us try to sum up briefly the general characteristics of the political ideas with which the men of the Middle Ages set out.

It is evident to any student of the political thought of the Middle Ages that it was immensely influenced by the traditions of the Christian Fathers—it is from them that it directly and immediately derived the forms under which it expressed its own conceptions. The formal political theory of the Middle Ages is dominated by the contrast between nature and convention; to the Fathers and to the great majority of medieval writers, until St. Thomas Aquinas and the recovery of the Aristotelian Politics, all the great institutions of society are conventional and not natural. Men are, in this view, by nature free and equal, and possess the world and the things in it in common, while coercive government and slavery and private property are conventional institutions which were devised to correct the vices of human nature when it lost its first innocence. These great formal conceptions indeed control the terms of political theory until the end of the eighteenth century, until Rousseau and Burke and the beginnings of the modern historical method. In the first volume of this work we have endeavoured to set out in detail the characteristics of this mode of thought, and we can here only refer the readers to this.

If, however, we are rightly to appreciate the relations of mediaeval thought to that of the ancient world, we must remember that although these theories came to the Middle Ages primarily through the Christian Fathers, they were not distinctively Christian conceptions, but rather the commonplaces of the later philosophical schools, and the Fathers learned them in the schools and universities where they were educated. The forms of the political theory of the Middle Ages represent therefore an inheritance from the Stoics and other philosophical schools of the Empire.

We must consider a little more closely the character of these theories. To the Stoics and the Christian Fathers the institutions of society were conventional, not natural, and they understood the natural as being in the first place the primitive. But the natural was to them something more than the primitive, it represented something which was also essential and permanent. It was necessary for the due order of human life that men should rule over each other, and the Fathers added to this the conception that in some sense slavery was a punishment as well as a remedy for human vice. But both philosophers and Fathers maintained that the freedom and equality of human nature continued to be real. Their conception of human nature was radically distinct from that which is represented by the Aristotelian philosophy. To them there was no such thing as a naturally servile person, for the soul of man was always free. This principle is indeed the exact reverse of that of Aristotle. He found the ground and justification of slavery in his judgment that only some men were in the full sense rational and capable of virtue, while others were not properly and fully possessed of reason, and could not therefore in the strict and complete sense of the word possess virtue. Whatever may have been the foundation of this judgment, the judgment had disappeared before the Christian era, and Cicero had in a famous passage, summing up the philosophical judgment of his time, repudiated it in the strongest terms. Seneca, a hundred years later, repeats the judgment in a memorable phrase. Men's bodies, he says, may be enslaved, the mind is free. These principles are also those of the Christian faith. To St Paul slavery is a merely external and accidental condition, the slave is just as capable of the highest life, the life of communion with God, as the freeman. His great words, "There can be neither Jew nor Greek, there can be neither bond nor free, there can be no male and female : for ye are all one in Christ Jesus", represent the principle of all Christian writers. We have in the first volume pointed out how emphatically these principles are restated in the literature of the ninth century, and in the second volume how they are repeated by the Roman jurists and the Canonists of the Middle Ages.

It is not, however, only slavery which was held to be conventional, the same thing applies also to private property. In the primitive and innocent conditions of human life there was no such thing as private property, but all things were common. Private property is the result of man's greed and avarice, and is justified only as a limitation of this. Private property is indeed lawful, but it is the creation of the State, and is determined and limited by its authority; and while the institution is

lawful under the sinful conditions of human nature, the good things which God has given men through nature are still intended for the use of all. When the rich man assists the poor he is doing an act of justice, not of charity.

The institution of government is also conventional, and not natural. To the Stoics and the Fathers the coercive control of man by man is not an institution of nature. By nature men, being free and equal, were under no system of coercive control. Like slavery, the introduction of this was the result of the loss of man's original innocence and represented the need of some power which might control and limit the unreasonable passions and appetites of human nature. This was the doctrine of the Christian Fathers, but it was also the doctrine of the Stoics as represented by Seneca, and it is impossible to understand the mediaeval theories of government if we forget this. It was not till Aristotle's Politics were rediscovered in the thirteenth century that St Thomas Aquinas under their influence recognised that the State was not merely an institution devised to correct men's vices, but rather the necessary form of a real and full human life. The formal conceptions of the Middle Ages were, however, on this point little affected by St Thomas. It is evident that the conception of the conventional and "unnatural" character of the state was too firmly fixed to be shaken even by his authority, and that it passed with little alteration into the political theory of the sixteenth, seventeenth, and eighteenth centuries, and that, as we have said, it was not until Rousseau in the 'Contrat Social' recovered the organic conception of the state, and till the rise of the historical method of studying institutions, that this mode of thought passed away; and it lingered on in the nineteenth century in the form of the "police theory" of the state of Herbert Spencer and the English radicals.

The formal theory of nature and convention in the Middle Ages represents the principles of the post-Aristotelian philosophy, as mediated by the Christian Fathers. We must refer the reader to the second volume of this work for a discussion of the place of these conceptions in the Roman and Canon law of the twelfth century.

So far, then, we have been dealing with conceptions which dominate the theories of the Middle Ages, and which had come to them through the Fathers, but which were not strictly speaking distinctively Christian, but rather represented the general principles of the post-Aristotelian philosophy. The political theory of the Middle Ages was also however profoundly affected, or rather controlled, by certain conceptions which were distinctively Christian in their form, if not in their origin.

The first of these is the principle of the autonomy of the spiritual life, which in these ages assumed the form of the independence of the spiritual authority from the control of the temporal. We have endeavoured in the first volume to give some account of the nature and early forms of this conception. It finds characteristic and permanently important expression in the phrases of the letters and tractates of Pope Gelasius I, in which he lays down the great principle that the spiritual and the temporal authority each derives its authority from God, and that each is independent of the other within its own sphere, while each is dependent in the sphere of the other. We have in the second volume endeavoured to give some account of the treatment of this principle by the Civilians and Canonists of the twelfth and thirteenth centuries. We shall have to consider in detail the relation of these principles to the theory and structure of mediaeval society. We shall have to deal with the theory and the practical nature of the relations of the spiritual and temporal powers in the Middle Ages, to plunge into the great conflict of the Papacy and the Empire, to try to disentangle the real and vital significance of that great dispute whose clamour fills these centuries.

But before we do this we must remind ourselves of the real nature of the problem, the real and fundamental principle which lies behind the confused noise of factions. Behind the forms of the great conflict we have to recognize the appearance in the consciousness of the civilised world of principles new and immensely significant. For behind it all there lies a development of the conception of

individuality or personality which was unknown to the ancient world. We cannot here pretend to measure fully the gulf which lies between the Platonic and Aristotelian philosophy and that of the Stoics, and the other later philosophical systems, but it cannot be doubted that the gulf is profound. The phrases, for instance, in which Seneca describes the self-sufficiency of the wise man may be exaggerated and overstrained. No one, he says, can strictly be said either to benefit or to injure the wise man, for he is, except for his mortality, like God himself; he is indeed bound to the service of the common good, but if the conditions of life are such as to make it impossible for him to take part in public affairs, he can withdraw into himself and still serve the same cause by developing his own nature and character. The phrases may be overstrained and rhetorical, but they represent a sense of individual personality which is immensely significant, an apprehension of aspects of human life which are sacred and inviolable, independent of the authority, and, in his view, even of the support of society.

The changes which can be traced in the history of Western thought can be observed with equal clearness in the Semitic literature of the Old Testament. There are few sayings more significant than those indignant words in which Ezekiel repudiates the traditional conceptions of Israel. "The soul that sinneth, it shall die. The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son: the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him". The solidarity of the primitive and ancient group was giving way before the development of a new apprehension of individuality.

It is this apprehension to which a new impulse and force was given by our Lord and his disciples. To them the soul of man has an individual relation with God which goes beyond the control of the society. The principles of the Christian religion represent, on this side, the same development as that of Ezekiel and the Stoics, and it is on this foundation that the civilisation of the medieval and modem world has grown up. This does not mean that religion has no social aspect, or that the political societies have no moral or spiritual character, but it does mean that men have been compelled to recognise that the individual religious and moral experience transcends the authority of the political and even of the religious society, and that the religious society as embodying this spiritual experience cannot tolerate the control of the State. There are aspects of human life which are not and cannot be under the control of the laws or authority of the State.

It is true that the great individualist development has often been misinterpreted and exaggerated, and the greatest task of the modem world is to recover the sense of the organic unity of human life, that sense of unity which to the Christian faith is equally vital with the sense of individuality. The recovery of that sense of unity by Rousseau and Burke does indeed represent a great moment in the development of human apprehension, and separates the political thinking and action of the nineteenth century by a great gulf from that of the preceding centuries.—We are once again Aristotelian, but with a great difference, for the apprehension of individual personality remains with us.

It is these convictions which lie behind the great struggles of the spiritual and temporal powers in the Middle Ages, the greatness of the conflict is some measure of the immense difficulties which beset then, and even now, the attempt to disentangle the sphere of religion from those aspects of life which are under the control of the State. For it must not be supposed that this was an easy thing to do. In the first volume we have endeavoured to point out how in the ninth century, while men clearly recognised in principle the distinction between the sphere of the two great authorities, yet in actual practice the two authorities constantly overlapped. These difficulties became far greater in the centuries which followed, and we cannot measure the significance of the events which took place, or estimate the real character of the theories which were put forward, unless we continually take account of this.

The political theory of the Middle Ages then inherited a great conception of the independence of the Church, and we have here the first conception which was distinctively Christian, at least in form.

There is, however, another conception which the Middle Ages inherited from the ancient world which is also distinctively Christian in form if not in substance. This is the principle of the divine nature and origin of political authority. We have dealt with the origin and nature of this conception in the first volume, and have in the second volume examined the treatment of the subject by the Civilians and Canonists of the twelfth century, and it is unnecessary to say more about it here, as we shall have to consider its significance very carefully in this volume. But we must be under no misapprehension, whatever may have been the precise significance of St Augustine's treatment of the nature of secular authority, and the extent of its influence, the tradition which had come down to the Middle Ages was substantially clear and emphatic, and that was that the secular power is a divine institution and derives its authority from God.

This conception had been interpreted by some of the Fathers, and notably by St Gregory the Great, as meaning that the authority of the secular ruler was in such a sense divine that it was irreligious and profane to resist, or even to criticise it. The theory of the "Divine Right" of the King is a patristic conception whose influence in the Middle Ages we shall have to consider, although it was not till the period of the Renaissance that it can be said to have received its full development, and it was then related to the development of the absolute monarchy in Europe.

Such, then, are in general outline the principles of political theory which the Middle Ages inherited by direct and continuous tradition from the ancient world, and these influences must be clearly and sharply distinguished from those which came to them in the twelfth century through the revived study of the Roman jurisprudence, and in the thirteenth century through the rediscovery of Aristotle's *Politics*. We have dealt with the former of these influences in the second volume, the latter we must leave till we can deal with the thirteenth century in a later volume. It was in the main through the writings of the Fathers that the continuous tradition came, but, as we shall have occasion to see, it was reinforced throughout these centuries by the energetic study of the Latin authors whose works had survived. We have seen that in many most important aspects this continuous tradition represents rather the general political ideas of the last centuries of the ancient world than distinctively Christian conceptions.

We must now observe that the order of society in Western Europe was based largely upon principles which belonged to the new societies. There has been and there still is much controversy on the exact degree of the independence of the Teutonic constitutions and political principles. The great constitutional historians of the middle of the nineteenth century, like Waitz and Stubbs, assumed that the ancient world had little or no influence in determining the characteristic forms and principles of the government of the Teutonic state. In the latter part of the nineteenth century a very learned and capable body of historical scholars, of whom the chief were, on the Continent, Fustel de Coulanges, and in England, Seebohm, argued that in reality much which had been thought to be Teutonic was merely an adaptation of the forms and principles of the provincial administration of the later empire. We do not need for our purpose to attempt a dogmatic decision of the controversy, though we cannot conceal our own conviction that the balance of historical research and discussion has turned strongly against the Romanist view. For our purpose it is enough that we should observe the nature of the principles which were implicit in the structure of the new societies, and which found a large measure of reasoned expression in the literature especially of the ninth century.

Some of these principles are of great significance. The first and fundamental principle implicit in the organisation of the new societies is the supremacy of the law or custom of the community over all its members, from the humblest free man to the king. And the second is that there could be no succession to kingship without the election or recognition of the community. There is here indeed an

obvious parallel, but also an obvious divergence in the structure of the Teutonic societies, as compared with that of the Roman empire. It was indeed the fundamental principle of the Roman jurists that the source of all political authority was the Roman people, that the emperor held his authority only because the Roman people had been pleased to confer it upon him. But there was this far-reaching difference between the Roman legal theory and the principles of the Teutonic societies, that the Roman theory was a theory of origins, while the Teutonic principles were those of actually existing conditions. It was not merely that the Teutonic king required the consent or recognition of the community for his accession to power, but that he was not over the law, nor its creator, but under it. The Roman doctrine of the legislative authority of the emperor has no counterpart in the principles of the Teutonic societies, the law was the law of the community, not of the king. It is true indeed that in the earlier Middle Ages there was normally no such thing as legislation in the modern sense, the law, strictly speaking, was nothing but the traditional custom of the community, and legislative acts were, properly speaking, nothing but authoritative declarations of custom. As the changing conditions of mediaeval life finally made deliberate modification of these customs inevitable, such action was taken, though reluctantly, but could only be taken with the assent, expressed or tacit, of the community.

Here are indeed political principles or ideas of the highest moment, derived not from the traditions of the ancient world and empire, but rooted in the constitutional practice of the new societies. We have endeavoured to set out the evidence for the predominance of these conceptions in the first volume, but their significance cannot be fully appreciated without a study of the more important works on the constitutional history of the various European countries in the early Middle Ages.

It is in relation to these principles that we have to study the appearance of the doctrine of the social contract; that is, the conception of an agreement or bargain between the people and the ruler. In the popular mind this conception is supposed to belong to the seventeenth and eighteenth centuries, but the real truth is that it is a mediaeval conception, and that it arose primarily out of conceptions and circumstances which were characteristic of mediaeval society. This principle or theory has some place in ancient literature, especially in Plato's 'Laws', and a phrase of St Augustine's has been sometimes quoted as related to it, though probably without any sufficient justification, but there is no evidence that there is any continuity between the Platonic theory and that of the Middle Ages. We have in the first volume pointed out the circumstances out of which we think it arose, and, as we shall have to deal with it in detail in this volume, we need only here say that it seems to us clear that its origin is to be traced to the promises of obedience to the law, and of good government taken by the king on his accession. It was in the eleventh century that the conception found a formal expression, but the principles which lay behind the formal expression were already in existence, and were firmly rooted in the constitutional order of the early Middle Ages.

In approaching the subject of the nature of the political theory of the great central period of mediaeval civilisation, from the tenth to the thirteenth centuries, we must then first be careful to observe the nature of the general principles which the men of that time had inherited. These principles were complex, and no complete or systematic treatment of them was made until the thirteenth century. It may indeed be doubted whether the various elements were capable of being brought into an organic relation with each other, but we must not here anticipate the discussion which belongs to later volumes. Whether in the end these various conceptions were capable of being fused into an organic whole or not, we must recognise that they all have a real and significant place in mediaeval theory. The great formal conception of the distinction between nature and convention, which came from the post-Aristotelian philosophy in which the Christian Fathers were trained; the principle of the equality and freedom of men which arose out of this and the Christian tradition; the immensely significant conception of the necessary freedom of the spiritual life and the spiritual

authority which specially represents this; the conviction of the sanctity of the political order; the principle of the supreme authority of the law or custom of the community, and of the King as responsible to govern according to the law,—these conceptions or principles dominated the sentiment and the theory of all mediaeval society.

Our present task is to consider the development of these conceptions under the actual circumstances of European society from the tenth to the thirteenth centuries, and to inquire how far they may have been modified or superseded by other principles. For the new times brought new conditions, new and important forms of political and social relations. We shall have especially to consider how far the development of feudal ideas, and the organisation of European society on the basis of feudal tenure, may have modified or overlaid earlier principles; how far again in the great conflicts between the spiritual and the temporal powers the conception of the sanctity and autonomy of either may have been questioned or denied. The development of mediaeval society was very rapid, and the intellectual development was even more rapid than that of the organisation of society. The greatest difficulty indeed with which the historian has to contend, in trying to interpret the Middle Ages to the modern world, is the impression that the civilisation of these times was stationary and rigid, that the mediaeval world was unlike the modern, specially in this, that it was unchanging, while we perpetually change. This tradition is primarily derived from the ignorance and prejudice of the men of the new learning and the Renaissance, and lingers on, not in serious history, but in the literary tradition, and in the prejudices which arose naturally enough out of the great struggles of the Reformation and the Revolution. If we are to study the Middle Ages intelligently, if we are to appreciate their real relation to the modern world, we must dismiss from our minds these notions of a fixed and stereotyped society, we must rather recognise that there have been few periods in the history of the world when the movement of thought and of life was more rapid than in the twelfth and thirteenth centuries.

When we attempt to trace the history of political ideas in the Middle Ages, we are at once confronted with the fact that, after the active political reflection which is represented in the literature of the ninth century, there follows a considerable period from which very little indeed of political theory has survived in literature. From the end of the ninth century till the middle of the eleventh the references to the principles or ideas of politics are very scanty indeed. We have indeed to remember that it is probable that a great deal of literature, especially in the vernacular languages, has disappeared, but it is at least a probable conclusion from what has survived that there was not much reflection upon social and political questions, and that it was not till the middle of the eleventh century that the great political agitations in Germany, and the development of the great conflict between the Papacy and the Empire, compelled men to question themselves as to the principles which underlay the order of society.

This does not mean that during this time no important changes were taking place in the structure of European society ; on the contrary, in some respects the period was one of great and significant development. It was during these years that feudalism was taking shape and form, establishing itself as a system of social and economic and military organisation, and in some degree affecting the structure of government. How far the growth of feudalism affected the principle or theory of political organisation is the first important question which we have to consider.

It was during these years that European civilisation was being rescued from a second great wave of barbarism, which threatened for a time to overwhelm it. For upon the confused faction fights which distracted Western Europe while the great empire of Charlemagne was breaking up, there fell the torrent of the second barbaric invasion. The Norsemen on the North and West, the Magyars on the East harried and plundered, and for a time it seemed as though the work of the preceding centuries would be completely undone; and indeed Europe very nearly relapsed into anarchy, and Church and State were almost overwhelmed in a common destruction. But the victory of Alfred over

the Danes, of Otto the Great at the Lechfeld over the Magyars, and the limits within which the Norse invasion of France was finally contained, mark the fact that the new civilisation was stronger than the forces which attacked it, that the now barbarians had to reckon with a civilisation which was not worn out like that of the Western Empire which the forefathers of the Franks and the Englishmen had overthrown five centuries earlier, but with one which was living and powerful and capable of a rapid recovery and growth. The new invasions did indeed leave profound traces behind them, but the greatest and most powerful of the invaders, the Normans who settled in North-Western France, proved rapidly that they were capable not merely of conquest, but that they could contribute greatly to the progress of the very civilisation which for the moment they had shaken.

The development of feudalism was in great measure the result of the downfall of the Carolingian civilisation, but the effects of this can also be traced in the relations of the Papacy and the Empire. The breaking up of the Empire of Charlemagne might indeed seem to have set the Papacy at liberty, but actually it left it under the tyranny of the barbarous factions of the Roman nobles, and its degradation was even deeper than that of the State. It was rescued from this in the tenth century by the Ottos, and in the eleventh by Henry III, but the conditions of its deliverance held in themselves the seeds of disaster. The emperor exercised, and for the time with excellent results, a very large measure of control over the Church, and especially over the appointment of its chief ministers, but it was impossible that the Church should in the long run acquiesce in this. The principle of its necessary independence was too firmly rooted in its history, and it was the attempt to recover and vindicate this which led to the great conflict of the Papacy and the Empire, of the spiritual and temporal powers in the various European countries. This conflict in its turn contributed a great deal to compel men to consider and make explicit the fundamental principles of the structure and organisations of society, and thus to produce those energetic and audacious developments in political theory which we have to consider.

We have, then, to deal with three great subjects—first, the nature of the principles implicit in feudalism, and the effect of these principles upon political ideas; second, the characteristic political conceptions of the eleventh and twelfth centuries as related to the development of the general political and social structure of Western civilisation; and thirdly, the forms and theories of the relations of the temporal and spiritual authorities. It is indeed true that we cannot isolate these various aspects of mediaeval life and thought from each other, but they do in some measure really represent the operation of different forces, and we have to consider how far it may be true that they tended to give rise to different conceptions or principles. We shall have to make the effort finally to bring our reflections upon them together, and to form some unified view of their effect upon the principles of medieval life, but for the time being we have found ourselves driven to deal with them separately.

We have found that the adequate treatment of the subjects has required so much space that we have decided to deal with feudalism and the general political ideas in this volume, and with the relations of the temporal and spiritual powers in the next.

We deal with feudalism first, not because it was in our judgment the most important element in the structure of mediaeval society, but because it has often been thought to have been so, and because this at least is true, that whatever its influence may have been, it represented a new element in civilisation. In dealing with it we shall be obliged to transcend the limits of time which we have set to the general scope of this volume. For the significance of feudalism in relation to political theory cannot adequately be discussed without taking into account the great feudal law books of the thirteenth century; and, what is more important, the system of feudalism represents an organic development culminating in the latter years of the thirteenth century, which cannot be understood unless we take account of the whole process of its development. We are, of course, aware of the risk

that we run of reading back the conceptions of the thirteenth century into the eleventh and twelfth, and we shall do our best to guard against this risk.

PART I.
THE INFLUENCE OF FEUDALISM ON POLITICAL THEORY.

CHAPTER I.
PERSONAL LOYALTY.

There is perhaps no subject in medieval history which is so difficult as that of feudalism. Its origins are still obscure and controverted, its development belongs largely to the tenth century, and there are few periods of medieval history where the sources of our information are so scanty and so fragmentary, and in the literature which has survived there is only a little that can be said to bear directly upon feudalism. And, finally, its real nature and essential characteristics have been so confused by the laxity of literary usage that it is difficult to say what is meant by the word.

Feudalism is a system of personal relations, of land tenure, of military organisation, of judicial order, and of political order. It affected the life of every class in the mediaeval community, from the villein to the king or emperor, and it even affected profoundly the position of at least the greater clergy, the bishops and abbots. There are, indeed, few aspects of mediaeval life which were not touched by it, and it is therefore natural that it should be thought that it must have profoundly modified both the institutions and the political ideas of the Middle Ages.

It is not our part here to deal with the first of these subjects, the influence of feudalism on the institutions of the Middle Ages, its direct effects upon the forms of the great constitutional development which culminated in the Parliament of Edward I and the States-General of Philip the Fair, and the parallel developments in other European countries. We cannot even attempt to summarise the results of the work of the constitutional historians, for any summary would probably mislead rather than illuminate. But it is possible to say that while feudalism left for centuries deeply marked traces on the social and political structure of European society, and while the great systems of national organisation did indeed take into themselves elements which belonged to feudalism, they also represented principles which in their essential nature were independent of and even contradictory to some specific characteristics of the feudal system. In the end the king or the parliament, or both, came to be directly related to all the individuals who compose the State, and in their authority the local and personal authorities and jurisdictions of feudalism were finally lost. The royal justice at last absorbs all feudal justice, in the administrative authority of the crown all the areas of feudal administration are merged, and the legislative authority of parliament asserts itself as supreme over all feudal traditions and customs. The king and the parliament represent the nation, and the unity of the nation finally transcends all the separatist tendencies of feudalism.

It may even be said that the best example of this can be found in that country where at first sight feudalism might seem to have triumphed, for the unity of the German kingdom was finally destroyed, and the great fiefs became practically autonomous provinces. But it was not feudalism which triumphed, but territorialism. In the territorial areas there developed the same centralised authority and administration as in England or France, and it was no doubt that very fact which accounts for the failure of the constitutional movement of the close of the fifteenth century.

We have to deal here not primarily with institutions, but with the question how far feudalism affected the political ideas of the Middle Ages, how far its influence coincided with the traditions which they inherited, and furthered the development of social and political ideas which were already

present, or how far it may have tended to neutralise or modify them. We must be prepared to find that the influence of feudalism was very complex, and that it may have tended in different directions.

We begin by pointing out what may seem a paradox, that feudalism represents two principles which in their ultimate development may seem contradictory, but which yet affected the minds of the men of the Middle Ages at the same time. The first principle is that of personal loyalty and devotion, the second is that of the contractual relation.

The first principle is that which is represented especially in the poetic literature of the Middle Ages, and which has thus passed naturally enough into the literary as distinguished from the historical presentation of the Middle Ages in modern times. We are all familiar with the romantic representation of mediaeval life as dominated by the sentiment of chivalrous loyalty and devotion. How much of exaggeration there is contained in this we shall presently see, but there are elements of real truth in it. And, more than this, these sentiments have a real and permanent importance in political as well as in social life. Human life in its deepest and largest terms cannot be lived upon principles of utility and contract. Whether in the family or in the nation the actual working of human life is impossible without the sense of loyalty and devotion.

This is the first principle of feudalism, and the second may well seem contradictory to it. For nothing could seem further apart than the conception of personal loyalty and the conception of bargain or contract as the foundation of human relations. And yet there is no escape from the conclusion that in the last resort feudal relations were contractual relations, that the vassal was bound indeed to discharge certain obligations, but only on the condition that the lord also discharged his obligations to the vassal. Here again it is evident that we are dealing with a principle which is reasonable and just, for in the long run human relations are impossible unless there is some reasonable recognition and fulfilment of mutual obligations.

The principles may seem contradictory, and indeed they were hard to reconcile, but it is also true to say that they were not only held together and constantly reconciled in practice, but also that the political thinkers of the Middle Ages were aware of certain great rational principles which lie behind these conceptions, and in which they found a reasonable reconciliation of them.

For this is the truth about feudalism. At first sight it seems very strange and unintelligible. We find it difficult to understand how men could think and act thus, but if we are a little patient we find it becoming intelligible, and finally we see it not as wholly unnatural and abnormal, but as representing a phase of social and political development which lies indeed behind us, but whose conditions we can understand, and we shall see that in a measure these apparently strange principles have a continuing significance even among ourselves.

The difficulty of understanding feudalism has been immensely increased by the habit of conceiving of it as a homogeneous system, complete and perfect at some definite time and place. It becomes much more intelligible when we begin to see that under the one term there are contained ideas which were very different from each other, and that as it had slowly grown up, so it was perpetually developing and changing. The feudal idea as it is presented to us in the epic or romantic poetry is something quite different from that which is represented by such a characteristic set of law books as those which make up the Assizes of Jerusalem, or by Beaumanoir, and when we look a little more closely we begin to understand this, and to see that the conceptions of the epics and romances of the twelfth and thirteenth centuries represent sometimes the tradition of the past, sometimes an elaborate and artificial convention rather than the actual reality.

There has indeed often been a very serious misunderstanding even among scholars as to the value of the artistic representation of manners and customs. In some poetry, as for instance in the earlier mediaeval epic, the picture of external life and manners of men and women, is highly realistic, and supplies us with very valuable information as to the conditions of contemporary society. In other forms of literature, and especially in the romance of the twelfth and thirteenth

centuries, it is evident that we are dealing with an art which is in great part, in its relation to the circumstances of life, conventional and traditional, and which even in its essential sentimental or emotional interest represents an abstraction of human life, valuable indeed and profoundly moving and significant, but still an abstraction rather than a realistic treatment. The great fighting man of the epic literature, and the frank, highhearted, and sometimes implacable woman, upon whom often the whole movement of the story depends, these are real figures of men and women, and they live in the real world. But the romantic hero or heroine, absorbed in their emotions, far removed from the actual circumstances of daily life, are placed in a world which is mainly unreal and conventional. The transition from the Beowulf or the Icelandic Sagas to the Arthurian romance is the transition from idealised and heroic reality to an elaborate convention.

It is necessary to use the evidence of mediaeval poetry with great caution, and to make careful distinctions between the value of different forms of it as illustrating the customs and ideas of any one time.

We cannot here attempt to discuss in detail the origin of feudalism, the subject has been handled with great learning by a number of historians, but we can say with great confidence that its origin was extremely complex. Comitatus, Commendatio, and Beneficium, these are the main elements of the relation of lord and vassal, and each of these had an important part in the development of the whole system. From the Comitatus there came the devotion of the band of followers to their leader in war, the almost indissoluble tie which united the "companion" to his chief in faith and loyalty, and this may have been the first, as it was certainly among the most important, of the elements out of which the feudal relation grew. It is this aspect of the relation that we find specially illustrated in the epics and romances, while its influence can also be traced in certain principles of the feudal law hooks. The process of Commendation by which a hitherto independent person became dependent on some powerful man or ruler in return for the protection that he could afford to him, was probably the means by which the feudal relation was most widely extended. The gradual transformation of a relation, which was originally almost wholly personal, into a great system of land tenure on the basis of military or of "base" service, which in its turn became a system of political relations, this is connected with the Beneficium. It is out of these complex and incoherent elements that the feudal system was gradually formed; something of each goes to make up the whole system as we see it from the tenth to the thirteenth centuries, and they are all represented in the literature and legal systems of these times.

It is not necessary to deal at length with the conception of personal loyalty and devotion, it will be sufficient to indicate its nature by means of an example from the literature of the twelfth century.

One of the most interesting illustrations of the influence of the conception is to be found in the French Chanson de Geste, the 'Raoul de Cambrai','which belongs probably to the latter part of the twelfth century. When Raoul is knighted he takes as his squire Bernier, the illegitimate son of Ybert of Ribemont. Raoul obtains from the King of France a grant of the lands of Vermandois, which had belonged to Ybert's family, and invades the country in spite of the protests of Bernier. He sacks and burns the town of Origny with its monastery, and Bernier's mother perishes in the fire. Bernier vows revenge, and joins his father; and, in the battle which follows, kills Raoul. But the significant thing is the reluctance with which he turns against Raoul; in the first flush of his passion over his mother's death he does indeed refuse all Raoul's attempts to make amends, but afterwards he endeavours to make peace, and when he has given him the fatal wound he weeps and laments that he should have turned against him who had knighted him, and, in spite of his grievous wrongs, he can find no joy in his vengeance. Through all his life the thought of what he had done haunts him, and there is a tragic fitness in his end, for after many years Raoul's uncle kills him near the place where long before he had killed Raoul.

Nothing can illustrate more vividly the essential character of the traditional feudal conception as it is expressed in the poetry of the Middle Ages. In spite of the dreadful wrongs of which Raoul had been guilty, in spite of his brutal and overbearing character, in spite of the wanton murder of his mother and the other nuns of Origny, Bernier feels that he has committed an unheard-of crime in turning against his lord, to whom he feels himself bound by ties even more sacred than those of nature.

Illustrations of the personal loyalty and devotion of vassal to lord could be indefinitely multiplied from the mediaeval poets, but no useful purpose would be here served by doing this. Only it is important to remember that they do not represent a principle peculiar to France, but rather a universal and highly significant aspect of the organisation of European society in the Middle Ages. The feudal relation was not one of mere dependence, or of mere advantage, but one of faith and loyal service, and the whole conception is admirably summed up in the famous phrases of the letter of Fulbert of Chartres written in 1020 A.D. to the Duke of Aquitaine. He that swears fidelity to his lord must have in his mind these six words, "Incolume, tutum, honestum, utile, facile, possibile", he must do what he can to keep his lord's body unharmed, to keep his secrets and strongholds, to maintain his rights of jurisdiction and all his other dignities, to keep his possessions safe, to see that he does not make that difficult or impossible to his lord which is now easy and possible. Fulbert adds that these obligations are mutual, and we shall have more to say upon this point presently.

These conceptions were not merely traditional or merely ideal, and we should observe that they have their place also in the more technical expression of feudal principles in the law books, and as late as the thirteenth century.

We have in the Assizes of Jerusalem a very full treatment of the mutual obligation of vassal and lord to which we shall constantly have to recur; for the moment we can fix our attention on one passage in the work of Jean d'Ibelin, which forms a very important part of the Assizes. In this passage he has described the mutual nature of the obligations of lord and vassal, and then points out that there are some obligations which are peculiar to the vassal. The vassal owes his lord reverence as well as faith, and must do some things for him which the lord is not bound to do. He must be ready to act as a hostage to deliver his lord from prison, and if in battle he sees his lord disarmed and unhorsed he must if necessary give him his own horse in order to enable him to escape from danger, and again he must be ready to act as security for his lord's debts to the extent of the value of his fief. The lord must indeed in his turn do all that he can to help and deliver his vassal who has thus imperilled himself for him, and to compensate him for the losses he may have suffered; but there is a real and marked difference in the nature of the obligations, they are indeed mutual, but they are not quite the same, and the element of reverence, which the vassal owes, is distinctive and important. It is noteworthy that both Glanvill and Bracton, while describing the feudal obligations as mutual, both treat the element of reverence which the vassal owes as distinctive.

The principle of personal devotion and fidelity to the lord forms, then, a very important part of the tradition of medieval society, and we must take careful account of it in trying to estimate the characteristic conceptions of the Middle Ages with respect to the nature of political association. And we must also observe that we have here something quite different from those principles of political relation and obligation which we have so far considered. These sentiments of personal loyalty must not be confused with the principles of political society either in the form in which they had come down from the ancient world through the Fathers, or as they were implicit in the political structure of the Teutonic societies, so far as we have considered them hitherto. It is no doubt true that in the Teutonic societies, as distinguished from the developed political organisations of the ancient world, there survived traditions and sentiments which were related to the conception of the chieftainship of a tribe, and one of the chief difficulties in dealing with the history of feudalism is to disentangle the tribal from the feudal sentiment. In some mediaeval states, and especially in the German kingdom,

the influence of tribal sentiment and tribal loyalty is difficult to measure, and it is probably true to say that the feudal relation only partially overlaid it.

However this may be, these sentiments of personal loyalty and devotion to the immediate lord to whom a man had sworn his faith and service constitute a new element in the tangle of ideas and organisations, out of which there slowly emerged the national state of modern times. And it was an element which was very difficult to reconcile with the national idea and the national constitution. The loyalty of the vassal to his immediate lord was one of the most characteristic elements of the chaos of the tenth century, and it was only very slowly that this loyalty was transferred to the national king.

If we turn back again to the French epics of the Middle Ages we sometimes find that they represent alongside of the profound devotion of the vassal to his immediate lord an almost unmeasured contempt for the king or overlord, and we can find an illustration of this in the same Chanson de Geste, the 'Raoul de Cambrai', which we have already cited. The death of Raoul, which we have already described, is followed by a long conflict between his house and that of Bernier, until, after a long struggle, Gautier, the nephew of Raoul, and Bernier are reconciled with each other. The King of the French is vexed at the reconciliation, and both parties then turn on the Kang and denounce him as the real author of the feud. When the King threatens to take his father's lands from him, using many violent words, Bernier flatly defies him, and there follows a long war between the nobles and the King, who is represented throughout as playing a mean but unsuccessful part. The nobles do indeed hold their hand when the King is defeated, because he is their lord, but in the main nothing is more emphatically marked than the difference between the deep sense of obligation and loyalty of the vassals or companions to their immediate lords, and the loose and uncertain deference which they owe to the overlord or King.

Enough has been said to indicate the nature of feudalism conceived of as finding its principle in the sense of personal loyalty, of an almost unlimited obligation of the vassal towards his lord. This conception has a place even in the technical legal works of the Middle Ages, but it is especially emphasised in the poetry, in the epics and romances. It is to a large extent upon this that there has grown up the literary tradition of mediaeval society as based primarily upon the conception of an unswerving loyalty, a romantic personal devotion which overrides all other obligations and principles. But the whole truth is very different from the literary tradition. When we turn from the poetry to the law books we find ourselves in another world, we find a conception of society which is much nearer to the actual conditions and ideals of the Middle Ages.

CHAPTER II.
JUSTICE AND LAW.

We have dealt with that aspect of feudalism which would seem to present a conception of social or political relations very different from those which we have hitherto considered, and we must recognise that we have here a principle which has exercised and still exercises a great influence in the actual working of political and social relations. When, however, we set out to examine the structure of feudal society more completely, we find that this principle of personal obligation and fidelity is only one of many principles, and that the normal conditions of mediaeval society were not determined by such considerations alone. No doubt the feudal system as a whole did materially affect the development of the method of government in the Middle Ages, but our own impression is that it did not really alter the conception of the nature of political society to the extent which might be supposed, and that in the end its influence w as in the main to strengthen the normal tendencies in the development of constitutional order.

There is still a vulgar impression that in the Middle Ages men looked upon authority as irresponsible, that they conceived of the ruler as a person who exercised a capricious and almost unlimited authority over his subjects, and that men had little knowledge of, or care for, any rational principles of social organisation.

We have endeavoured in the first volume to point out how wholly incorrect such an impression proves to be when confronted with the energetic and abundant literature of political thought in the ninth century, and in the last volume we have dealt with the carefully considered theories of government of the Civilians and Canonists, especially of the twelfth century. It may be imagined that while this is true, the feudal system, in its insistence upon the merely personal element in social relations, had undermined these reasoned judgments, and had diverted the attention of practical men from the consideration of the principles of political order. It is no doubt true that the compilers of the feudal law books were primarily practical men, trying to set down the details of the customs and regulations of medieval society, and not theorists in jurisprudence or politics ; but this in some ways only brings into sharper relief the fact that the system which they were describing embodied very important and more or less determinable principles, and that they were in a large measure conscious of these principles and tenacious in maintaining them. As we shall see, so far from its being true that they conceived of authority as something arbitrary and capricious, they conceived of it as a thing very sharply defined and very severely limited. The truth is that the characteristic defect of the system of medieval society was not that it left too much liberty for arbitrary and capricious action, but that it tended to fix both rights and obligations to such an extent as to run the risk first of rendering government unworkable, and secondly of rendering the movement and growth of life impossible.

It is of course perfectly true that medieval society often seemed to oscillate between an uncontrollable and arbitrary despotism, and an anarchical confusion, but this was due, not to the want of a clear conviction of the rights and duties of rulers and subjects, but to the absence of an effective instrument of government. The history of medieval society constantly impresses upon us the conviction that the real difference between a barbarous and a civilised political system lies in the fact that the latter has an almost automatically working administrative and judicial machinery, while the former is dependent upon the chance of the presence of some exceptionally competent and clear-sighted individual ruler.

The truth is that the men of these times were in no way inferior to us in their sense of reverence for law, or in respect for the great principles of human life, of which law is the embodiment, but that they had no efficient civil service and police to secure the smooth execution of law. They

apprehended very clearly the principles of political and social order, but it has taken all these centuries to work out an adequate instrument for giving them practical effect.

To the men of the Middle Ages, as to every serious thinker upon politics, the principle which lies behind every form of the authority of the state is the principle of justice. The justification of authority is that it represents the principle of justice; the purpose of it is to maintain justice. There is a passage in one of the French epics of the twelfth century which is very characteristic of the temper and judgment of the Middle Ages. The purpose of God, the writer says, in making the king, is not to satisfy his appetite or to enable him to rob the poor, but that he should tread down all wrongs under his feet, and that he should hearken to the complaint of the poor man and do him right.

This judgment that authority stands for the maintenance and vindication of righteousness lies behind the whole structure of feudal law. It is admirably expressed in a phrase of the Assizes of the Court of Burgesses of Jerusalem: "La dame ni le sire n'en est seignor se non dou dreit", and "mais bien sachiés qu'il n'est mie seignor de faire tort". The authority of the lady or lord is only an authority to do law or justice —for the phrase implies both—they have no authority to behave unjustly. Here is a great principle stated with a certain epigrammatic force. It is true that this principle was not novel, but corresponds with the traditions of the Roman and Canon law, and no doubt arose directly out of those political principles of the Teutonic societies which we have already considered, as they are expressed in the writers of the ninth century. But, though the principle was traditional, the whole contents of the Assizes show very clearly that it was no merely formal tradition, but rather that the organisation of such a typical feudal state as the kingdom of Jerusalem represented the effort to secure its reality.

It is worth our while to consider the character of the whole passage from which these words are taken. If any man or woman, knight or burgess, has obtained a judgment of the court, and the king or queen endeavours to prevent its execution, this is a sin against God and their oath. For the king has sworn to maintain the good usages and customs of the kingdom, to protect the poor as well as the rich in the enjoyment of their rights. If he now breaks his oath he denies God, and his men and the people should not permit this, for la dame ni le sire n'en est seignor se non dou dreit."

Here is indeed an admirable summary of the principles of government, and of the relations of rulers and subjects; we shall presently consider this more closely under the terms of the place of law in the political principles of feudalism, but in the meanwhile it is important to observe how clear and well defined is the general conception of the nature of political authority. The feudal lawyers do not generally discuss abstract principles, but it is easy to see that behind the detail of regulations there lay the assumption that these represented some principles of what was reasonable and equitable, that political authority represented moral and religious as well as purely legal obligations.

Some of the law books, and especially the Assizes of the Court of Burgesses, were strongly influenced by the revived study of the Roman law, and in these we find a more definite attempt to deal with the abstract nature of justice. These Assizes begin with a paraphrase of the first title of the Institutes of Justinian, and it is interesting to see how the compiler blends religious and legal conceptions to express his meaning.

The whole conception of the feudal lawyers is summed up in a very important and significant passage in Bracton's treatise on the laws of England. The king, he says, must, at his coronation, swear three things—first, that he will do what lies in him to secure that the Church and all Christian people may have peace in his time; secondly, that he will forbid rapine and wrong-doing among all classes of the people; thirdly, that in all his judgments he will ordain equity and mercy as he hopes for mercy from God. The king is indeed elected for this very purpose, that he should do justice to all men, and that through him God may distribute His judgments, for it would be useless to make laws if there were not some one to enforce them. The king is God's vicar upon earth, and it is his duty to

divide right from wrong, the equitable from the inequitable, that all his subjects may live honestly, and that no man should injure another.

In power, indeed, he should excel all his subjects, for he should have no equal nor superior, specially in administering justice. For the king, inasmuch as he is God's vicar and servant, can do nothing except that which he can do lawfully. It is indeed said that what pleases the prince has the force of law, but at the end of this law there follow the words, "cum lege regia, quae de imperio lata est," &c., that is, not everything is law which may be thought to be his will, but only that which is determined upon with the intention of making laws, with the authority of the king, with the counsel of his magistrates, and after due deliberation and discussion.

The authority of the king is the authority of law (or right), not of wrong. The king, therefore, should use the authority of law (or right) as being the vicar and servant of God on earth, for that alone is the authority of God; the authority of wrong belongs to the devil, and not to God, and the king is the servant of him whose work he does. Therefore when the king does justice he is the vicar of the eternal King, but the servant of the devil when he turns aside to do wrong. For the king has his title from the fact that he governs well, and not from the fact that he reigns, for he is a king when he governs well, but a tyrant when he oppresses the people entrusted to him. Let him therefore restrain his authority by the law, which is the bridle of authority, let him live according to law, for this is the principle of human law that laws bind him who makes them, as it is said, "digua vox maiestate regnantis est legibus se alligatum principem profiteri," and again, "Nihil tam proprium est imperii, quam legibus vivere", and "maius imperio est legibus submittere principatum", and "merito debet retribuere legi, quia lex tribuit ei, facit enim lex quod ipse sit rex."

Bracton's words are an admirable summary of the principle that all authority represents some essential principle of justice and equity, that an unjust authority is no authority. We shall frequently have occasion to refer to this passage, for it contains much which requires comment. It is obvious that his phrases represent many influences besides that of feudal tradition and custom, he is well acquainted with some important passages in the Roman law, either by direct knowledge of the Corpus Juris, or through the intermediary of great civilians like Azo, and he is also much influenced by certain aspects of the patristic tradition, and especially by reminiscences of St Isidore of Seville. But his position is fundamentally that of all feudal law; whatever may have been the importance of the principle of personal loyalty and devotion in mediaeval society, it was no part of the thought or feeling of serious and practical men that these obligations were independent of reason and justice.

No doubt the adjustment of these principles to each other has always proved and will always prove difficult, and, as we shall see, a good deal of the complexity of feudal law arises from the difficulty of finding an adjustment of traditional sentiments with the practical needs of an organised and civilised community, but this had to be effected, and it was found in the gradual transference of the conception of loyalty from the individual lord to the nation and its head.

"La dame ni le sire n'en est seignor se non dou dreit". Here is the whole principle of government in a phrase, but the phrase itself suggests to us that this is not a merely abstract principle, that the conception of right or justice is not a merely abstract principle but that it had also a practical embodiment. To the mediaeval mind the law was the practical form of justice, and it is in the due maintenance of law that men found the security for justice and for all good in life. There is an excellent statement of this conception in the prologue to one of the Norman law books, the 'Summa de Legibus', which is thought to belong to the middle of the thirteenth century. The author looks upon law as created in order to restrain men's unbridled desires and the conflicts which these would cause if unchecked; it is God, the lover of justice, who has created princes in order that they may restrain the discord of men by definite laws.

To the feudalist, indeed, law is in such a sense the foundation of authority, that where there is no law there is no authority. In the terms of a famous phrase of Bracton, "There is no king where will rules and not law."

Bracton is indeed careful to maintain that all men are under the king, while he is under no man, but only under God; but he is under the law, for the law makes the king. And he is under the law precisely because he is God's vicar, for Jesus Christ whom he represents upon earth willed to be under the law that he might redeem those who were under the law; and thus the blessed Virgin Mary, the mother of the Lord, did not refuse to submit herself to the ordinances of the law. The king should do likewise, lest his authority should be unrestrained; there is no one greater than the king in administering justice, but he should be as the least in receiving the judgment of the law.

We shall have to recur to this passage, and to deal with some sentences which follow those we have here cited, as well as with other passages related to this matter. In the meanwhile it is sufficient to observe the emphatic assertion that kingship is impossible without law, and that the king is not only under God but also under the law. It may perhaps be suggested that the evidence of Bracton as to the principles of feudalism cannot be accepted without much caution, for his work belongs to that time when feudal relations were giving way before national. Caution is no doubt necessary, but in this ease we need have no scruple in taking Bracton's phrases as representative of the general system of feudal law, for these are precisely the principles which are set out in all the earlier feudal law books.

It is this principle which is emphatically expressed in the forms attendant on the coronation of the medieval king. We have in the first volume dealt at some length with the great significance of the coronation oath in the earlier mediaeval societies; it was equally important in the feudal State. Jean d'Ibelin describes at length the circumstances attendant on the succession to the kingdom of Jerusalem. The king is to swear that he will help the Patriarch of Jerusalem and protect the liberties of the Church, that he will do justice to widows and orphans, that he will maintain the ancient customs and assizes of the kingdom, and that he will keep all the Christian people of the kingdom according to their ancient and approved customs, and according to the assizes of his predecessors in their rights and "justises", as a Christian king and a faithful servant of God ought to do. And what the king swears all the men of the kingdom are also to swear, that they will hold and maintain the good usages and customs of the kingdom.

This principle of the loyal observance of the law is well expressed in another place where Jean d'Ibelin says that the kings and nobles of Jerusalem should be wise, loyal, and good administrators of justice : they must be loyal, for they must loyally keep and govern themselves and their people, and must not do or suffer to be done disloyalty or falsehood; they must be good administrators of justice, for they must uphold the rights of every man in their several courts and lordships.

The same principle is again tersely expressed in one of the Norman law books. When the Duke of Normandy is received as Duke he must swear to serve the Church of God, and to keep good peace and justice according to law; and again, in the most important of the feudal law books of Germany, the 'Sachsenspiegel', when the king is elected he is to swear to uphold the law of the kingdom, according to his power.

We have already dealt with the important passage in which Bracton sets out the same principle in relation to the coronation oath of the King of England, and Bracton is only commenting on the immemorial customs attendant on English coronations, customs which had not been in any way interrupted by the Norman Conquest.

CHAPTER III.
THE SOURCE OF LAW.

The law is then to the feudal jurist the expression of the principle of justice, and it is supreme in the state, the king himself is the servant of the law.

What is then the source of law, what is the authority which it represents? It is here perhaps that it is most difficult for the modern to understand the Middle Ages, while it is to the failure to do this that we may attribute most of the mistakes which have been made with regard to the nature of the mediaeval State and the conception of government in the Middle Ages.

Above all things we must, if we are to make our way at all, discard the common conception of sovereignty, the conception that a law represents the mere command of a lawgiver, or even of a community. This conception, whose value in regard to modern times we cannot here discuss, is wholly foreign to the Middle Ages. To them the law was not primarily something made or created at all, but something which existed as a part of the national or local life. The law was primarily custom, legislative acts were not expressions of will, but records or promulgations of that which was recognised as already binding upon men. The conception of legislation had perhaps already appeared in the ninth century, but if so it had in the main died out again in the tenth and eleventh.

Bracton, indeed, in a well-known passage based on Glanvill, claims that while other countries use “leges” and “jus scriptum”, England alone uses unwritten law and custom. His phrase probably is related to the fact that there were people in some parts of Europe who lived under Roman law, and possibly to the great development of the influence of the Roman jurisprudence since the rise of the law school of Bologna in the twelfth century. While, however, we can in part explain Bracton’s saying, and while it was no doubt correct about England, it is a curiously inaccurate view of the nature of law in the other European countries.

If we turn from Bracton to his great contemporary, Beaumanoir, in France, we find that he asserts boldly that all pleas are determined according to custom, and that the great feudatories like the Count of Clermont, and even the King of France himself, are bound to keep them, and cause them to be kept; and Beaumanoir states the two tests by which it can be determined whether a custom is legally binding. The first is that the custom is general, and has been observed without dispute as far as man’s memory goes, the second is that there has been a dispute about the matter and that there has been a judgment of the Court about it.

Perhaps, however, the most illuminating view of the place of custom in mediaeval law may be found in the account of the origin of the Assizes of Jerusalem which is given by Jean d’Ibelin and Philip of Novara. The story is historically very improbable, but it is none the less important for us, for it represents in a very vivid fashion the conceptions of these jurists. Jean d’Ibelin tells us that when Godfrey of Bouillon had been elected as head of the newly conquered state of Jerusalem, he, with the advice of the Patriarch and princes and barons, and the wisest men whom he could find, appointed a certain number of wise men to inquire of those who were in Jerusalem what were the customs of their various countries, and to put these into writing. When this had been done the collection was brought before Godfrey and the Patriarch and notables, and he then with their counsel and consent selected such of the customs as seemed good to him, and made Assizes and usages, by which he and all the people of the kingdom were to be governed. He relates further how the Kings of Jerusalem with the same advice and consent added from time to time other Assizes and altered the old ones, after inquiring from those who came to the Holy Land about their customs and usages, and how several times the Kings of Jerusalem sent to other countries to inquire directly about their customs.

We have here a very suggestive account of what these jurists looked upon as a great legislative action. The circumstances indeed were unparalleled in medieval history, for the Kingdom of Jerusalem represented the establishment of a Western and Christian state in an alien and infidel country, while the Crusaders were not a homogeneous body, but were drawn from many different Western countries. They were therefore, as the authors of the Assizes thought, compelled to create a system of law for themselves, to proceed to a large and comprehensive effort of legislation. It is the more significant that in doing this they, according to the tradition, endeavoured scrupulously to ascertain the customary laws of the various national societies from which the Crusaders came, and formed their own laws by a process of selection and conflation from them.

The whole story illustrates very vividly the fact that the medieval conception of law was dominated by custom, for even when the jurists thought that the Crusaders had to legislate for a new political society, they conceive of them as doing this by the process of collecting existing customs, only selecting and modifying as far as was necessary to bring them into some sort of harmony with each other. The Assizes of Jerusalem were, in their estimation, primarily written customs. And it is of interest to observe that when, as they thought, the great compilation was lost, when Saladin conquered Jerusalem, and when therefore they could no longer consult the text of the written customs, they at once fell back upon the unwritten customs and the decisions of the courts.

We have so far been dealing with the Assizes of the High Court of Jerusalem, but there has also come down to us a collection of the Assizes of the Court of Burgesses. It is noticeable that these are influenced in a high degree by the *Corpus Juris Civilis*: no doubt this seems to indicate that the population of the towns was drawn in large measure from those countries like the south of France, and some parts of Italy, in which there were many who lived under Roman law. Our text of these Assizes dates from a much earlier time than the works of Jean d'Ibelin and Philip of Novara, it is indeed generally thought to belong to sometime between 1173 and 1180. It is not quite clear whether the statement of Jean d'Ibelin with regard to the origin of the Assizes of the High Court refers to them also, but there seems no substantial reason to doubt it. It is also deserving of notice that there was established in Jerusalem a court for the native Syrian population, and that this administered a justice based upon their own customs.

The first element in the conception of feudal law is that it is custom, that it is something not made by the king or even by the community, but something which is a part of its life. We can, however, see that at least as early as the thirteenth century there began to reappear the conception of laws as being made, not that the idea of custom as law disappears, but that there gradually grew up alongside of this the conception that laws could be made under certain conditions and by suitable authority. It is difficult to say how far the development of this was due to the pressure of circumstances compelling men deliberately to make new laws, or to modify old ones, how far it may have been facilitated by the revived and extended study of the Roman jurisprudence, and by the systematic development of the Canon law, which in this matter represents the same principles as the Roman law, and was indeed no doubt greatly influenced by it. Whatever may have been the circumstances which produced this great change, it is of the first importance in the history of political theory to observe the fact of the change.

We have here arrived at the beginnings of the modern conception of sovereignty, that is, of the conception that there is in every independent society the power of making and unmaking laws, some final authority which knows no legal limits, and from which there is no legal appeal. We cannot here consider how far, and in what sense, this conception was present to the political thinkers of the ancient world. Still less can we here consider what is the real character of the modem theory, how far indeed it has been thought out completely and adequately, how far it still represents a somewhat crude and inorganic conception of society, a somewhat crude and partial apprehension of certain elements in the nature of the state.

It is at any rate quite certain that the modern conception as a whole was not only unknown to the Middle Ages, but that it would have been to them almost unintelligible. For to them the law of any particular state represented, in the first place, the customs of the community, which had not been made, but were part of the life of the community; and, in the second place, so far as they reflected upon the principles which lay behind these customs, they conceived of them as related to and determined by the rule of justice; and, if and so far as they went further, they conceived of the law of the state as subservient to the natural law and the law of God.

It remains true that at least in the thirteenth century the conception of definite legislative action begins to appear, and we must therefore now consider the terms or forms of this legislative action as it is presented to us by the feudal jurists.

We begin with a phrase of Glanvill which bears upon its face the influence of the revival of Roman law, and which is yet also clearly medieval in its principle. The laws of England, he says, though unwritten, may properly be called "laws", for the law says that whatever the Prince pleases has the force of law; that is, we may properly call these "laws" which have been promulgated on doubtful matters with the counsel of the chief men and the authority of the prince. We may put beside this some sentences from the Norman 'Summa de legibus' of the middle of the thirteenth century. "Consuetudines" are customs observed from ancient times, approved by the prince, and maintained by the people, which determine to whom any thing belongs. Laws (leges) are institutions made by the prince and maintained by the people of the province, by which every dispute is decided. And again, laws and institutions were made by the Norman princes with great industry, by the counsel and consent of the prelates, counts, barons, and other prudent men, for the wellbeing of the human race.

In these passages the conception of the authority of law is related first to custom, but the writers are aware that there are forms of law which have an immediate origin of a different kind, which have been made after due deliberation. The force of these laws is derived from the authority of the prince, the counsel and consent of the great men, and the observation, or reception, or maintenance of them by the people: it is difficult to find an exact rendering for the phrase "a populo conservati."

This conception of law is characteristic of the whole mediaeval tradition. It is for the prince or king to issue or promulgate laws, and without his authority this cannot be done; but to make his action legitimate he must consult the great and wise men of the nation; and the people or whole community has its place, for they have to receive or observe the law. This is the conception which we find in the political writers and in the legislative documents of the ninth century, and it is evident that it continued to be the conception of the feudal lawyers of the twelfth and thirteenth centuries. It may have some relation to the definition of law by Papinian. It is possible that the terms of the phrases which describe the part of the people in legislation may be related to the principle laid down by Gratian, that no law is valid, by whomsoever promulgated, unless it is accepted by the custom of those concerned. A similar doctrine was held by some at least of the civilians of the twelfth and thirteenth centuries.

The same principles, again, are stated by Bracton in the passage of which we have already cited the first words. While in almost all other countries men follow the laws (leges) and a written "jus", England alone uses not written law but custom; it is not, however, absurd to call the English laws "leges", for that has the force of law (legis) which has been justly determined and approved, with the counsel and consent of the great men, the approval (sponsione) of the whole commonwealth and the authority of the king. And again, in another place, he says, that such English laws and customs, by the king's authority, sometimes command, sometimes forbid, and sometimes punish transgressors, and inasmuch as they have been approved by the consent of those who are concerned with them (utentium), and confirmed by the oath of the king, they cannot be changed or abolished

without the common consent of all those by whose counsel or consent they were promulgated, although they may be improved (in melius converti) even without this consent, for to improve is not to destroy.

There is one great feudal lawyer whose position requires some special examination, and that is Beaumanoir. For his phrases are, at least at first sight, a little ambiguous. In some passages he would seem to say simply that the king is the legislator, and if this stood alone, we might conclude that to him the authority of law was derived simply from the king's will. It is indeed possible that Beaumanoir represents some tendency which was peculiar to the French monarchy, and it is more than probable that his conceptions of the nature of the power of monarchy were strongly influenced by the revived study of the Civil law, and its conception of the legislative authority of the Emperor, and we might therefore incline to the conclusion that his position was different from that of the feudal lawyers whose principles we have so far examined. In order then that we may rightly estimate his position we must examine briefly his conception of the origin of kingship.

In an important passage, which we shall have to consider again later, Beaumanoir says that in the beginning all men were free, and of the same freedom, for we all are descended from one common parent, but as the number of men increased strife arose, and those who desired to live in peace recognised that this was impossible while every man thought himself as good as others. They therefore elected a king, and made him head over them, and gave him power to judge their misdeeds, and to make commandments and "establissemens" over them. The phrases of the passage suggest very strongly the influence of the Roman jurisprudence; the conception of the original equality of men, the appearance of war and its consequent confusions and crimes, the conception of the people creating a king and giving him authority to make laws, these may have come directly to Beaumanoir by many channels, but it is at least very probable that they represent the traditions of the Institutes and Digest. The phrases are remarkable both for their democratic conception of human nature, and of the source of authority, and for their sharply marked conception of the legislative power of the king, and if they stood alone we might have to conclude that Beaumanoir's theory of the nature of law was different from that which we have so far seen to be characteristic of the feudal jurists. But the phrases do not stand alone, and in order to form a complete judgment upon his theory we must examine some other passages in his work. The first is one in which Beaumanoir is careful to point out that while every baron is "souverain" in his own barony, the king is "souverain" in all the kingdom, and has thus the general care of the whole kingdom, and therefore he can make such "establissemens" as he thinks well for the common good. The words represent an important development of the conception of the national monarchy, and they attribute the supreme legislative power to the king; but it should be noticed that he holds the power because he is responsible for the care of the whole kingdom, and exercises it not for his own ends, but for the common good. The last phrase is important, and is constantly repeated, the legislative power must be used for the common good.

In other passages we find, however, phrases which add another principle to these. The king may make "establissemens" only for his own domain, and in this case they do not concern his barons, who must continue to administer their lands according to the ancient customs. When, however, the "establissemens" are general, they are in force throughout the kingdom. But such "establissemens" are made "par tres grant conseil", and for the common good. Again, in another place; the king may indeed make new "establissemens", but he must take great care that he makes them for reasonable cause, for the common good, and "par grant conseil."

Beaumanoir does not anywhere explain what precisely he means by the words "par grant conseil"; but it would seem most natural to understand them as referring to the need of consultation with some body of persons qualified to advise the king. We must then at least correct our first impression of Beaumanoir's theory of legislation. He would seem to place the royal authority in a

more isolated position than is general in the feudal jurists, he may be more influenced than they are in general by the newly recovered conception of the legislative power of the emperor in the Roman law, and may possibly, though on this we can express no opinion, represent some conception of monarchy which was developing specially in France at that time. But, on the other hand, in his insistence upon the need of reasonable cause, on the "grant conseil", and on the principle that legislation must be for the common good, he comes very near to the general principles of the other feudalists.

We are therefore justified in the conclusion that the feudal conception of law is first that of custom; and secondly, that so far as men began to recognise the necessity of actual legislative action, they conceived of the law as deriving its authority not from the will or command of the ruler alone, but also from the counsel and consent of the great or wise men, and the assent of the whole community.

CHAPTER IV.
THE MAINTENANCE OF LAW.

The feudal jurists held clearly and maintained emphatically that the relations of men to each other are determined by the principles of justice, that the law is the form and expression of justice, and that it is in the strict observance of the law that men find the security for the maintenance of justice. The principle is clear, but it may be said that this was little more than formal, that the king might indeed swear to administer justice and to maintain the law, but there was no method by which this obligation could be enforced. How far this was from being true we shall see as we examine more closely the principles of the structure of feudal society.

We shall do well to remind ourselves of a very noticeable phrase in that passage in the Assizes of the Court of Burgesses of Jerusalem which we have already quoted. If the lord should break his oath and refuse to minister law and justice to his people, they are not to permit this. This is a blunt expression of the principle which underlies the structure of feudal society, and the relations of lord and vassal. But feudal law did more than recognise the principle, it provided a carefully constructed machinery for carrying it out.

We must turn from the principle of the supremacy of law to the method of its determination and enforcement. That is, we must examine the nature of the feudal court, and the relation of lord and vassal to this, and we begin by examining these questions as they are presented in the Assizes of Jerusalem. Jean d'Ibelin draws out with great care the nature of the mutual obligations of lord and vassal. He expresses in the highest terms the fidelity which the vassal owes to his lord, the service and help which he must render to him, the secrecy which he must maintain about his counsels, and the respect which he owes to his wife and daughter, and he enumerates those distinctive obligations which the vassal owes to his lord, which we have already mentioned, but at the same time he insists that the lord is bound to his vassal by the same faith which the vassal owes to him, and that he may not touch his vassal's body or his fief except by the judgment of the court.

These are the principles of the relation between lord and vassal, but they are not mere abstract principles, they are legally enforceable. If the vassal fails to discharge his obligations, and the lord can establish this by the judgment of the court, the vassal will lose his fief, and the lord can treat him as a traitor, and as one who has broken his faith. On the other hand, if the lord breaks his faith to the vassal, the vassal can bring the matter before the court, and if the court decides in his favour, it will declare him to be free from his obligations, and he will hold his fief without service for his lifetime. Neither lord nor vassal can take the matter into his own hands, but must submit his complaint to the court, and abide by its judgment. It is the court which is the judge in all cases of dispute about the relative rights or duties of lord and vassal.

It is thus important to ask what was the composition of the feudal court. It was the court of the lord, and one might naturally enough think that it was the lord who decided the matters brought before it. But this was not the case; the court was composed in principle of all the vassals, and the judgment of the court was the judgment of its members. It was even by some disputed whether the lord was properly speaking a member of the court at all. Jean d'Ibelin's work contains a very interesting and significant discussion of this subject. He is dealing with the question how a man is to claim a fief which he, or his ancestors, have held, and says that the man is to appear before the lord and say by his advocate that he, or his ancestors, have held the fief, and that if the lord doubts this he is prepared to prove it "par le recort de partie des homes de vostre court". The lord may reply that proof must be "par privilege ou par recort de court", and that proof "par la recort de partie des homes de la court" is not valid, for there could be no court unless the lord himself or his representative were present. To this the vassal replies that on the contrary the lord may not sit in the court, "as esgars ne

as conoissance ne à recors que il font"; the vassals are to sit without the lord, and when they have arrived at their decision, it is to be reported to the lord as the judgment of the court. Jean d'Ibelin does not formally pronounce a judgment upon the whole question, but he is clear that the presence of the lord is not necessary to constitute a proper court, at least in cases concerning claims to the tenure of a fief. In another passage he describes the proper procedure of the court when the king or his representative is not present. The court, then, whose duty it is to enforce upon lord and vassal alike the due observance of these obligations, is indeed the court of the lord, but its judgment is the common judgment of all those concerned.

It may, however, be urged that this is very well in principle, but what sanction could there be for such a comprehensive control over lord and vassal, what power was there which could enforce the observation of the decisions of the court. This question may seem to us, from our modern standpoint, one of great difficulty, but the compilers of the Assizes of Jerusalem had what seemed to them a perfectly simple and clear answer.

The matter is dealt with both by Jean d'Ibelin and by Philip of Novara, but the treatment of the latter is the more complete. He has set out, in a passage to which we shall have to return later, the relation of the overlord to the sub-vassals, as declared in an Assize of King Amauri, and then explains the position of the mesne vassals in case of dispute between them and the overlord. The king, he says, recognised, when the Assize was established, that all his liegemen, whether they held of him immediately, or of his vassals, were bound in faith to each other, and could demand aid each of all the others, and he draws out the significance of this in detail. If a vassal makes some claim upon his lord and demands that the matter should be brought before the lord's court and the lord refuses, the vassal may call upon all his peers to go to the lord and demand that he should allow the matter to be brought before the court. If the lord refuse to listen to them, they must declare to the lord that they will discharge none of their obligation to him till he has done this. And thus also if the case has been brought before the court and the lord refuses to carry out its judgment, the vassals are to renounce their service to him until this has been done. And again, if the lord or his representative should deprive a man of his fief without judgment of the court, the vassal's peers are to help him and give him force to recover his fief. And Philip adds that he remembered that when the representative of the Emperor (Frederick II) deprived the lord of Beyrouth and his nephews of their fiefs, this assize was cited in the court, and the court recognised it as valid.

Jean d'Ibelin maintains the same principles, and it is worthwhile to notice the emphatic phrases he uses with respect to the case of a lord putting his vassal in prison without the judgment of the court. In such a case his friends and relations may summon all his peers to accompany them to the lord, and to demand his release or the judgment of the court. If the lord refuses, they are to rescue their peer by force, unless the lord resists in person; in that case, as they cannot bear arms against him, they are each and all to renounce all service to him till he has set their peer at liberty, or has submitted the case to the judgment of the court.

The principle of the authority of the court in enforcing their mutual obligations upon lord or vassal is to the compilers of the Assizes of Jerusalem perfectly clear and obvious, and the whole body of the vassals is bound to maintain this authority even against the lord. This is perhaps even more clearly brought out by Jean d'Ibelin in another passage, in which he maintains that if the court has given a judgment against the lord in the case of a man who is not a vassal, and the lord refuses to carry this out, such a man may lay the matter before the vassals and adjure them to compel the lord to carry out the judgment. The vassals are then to go to their lord and request him to do this, and if he refuses they are to declare to him that they are bound to maintain the honour of the court and the Assizes of the Kingdom of Jerusalem, and that they will renounce all service to him until he has carried out the judgment of the court.

This was then the method by which the authority of the laws and customs of Jerusalem was to be declared and enforced. The court was the supreme judge, and the lord, that is, the King of Jerusalem, had to submit to it; if he refused to do this the ordinary relations between him and his vassals were for the time suspended, and they were to renounce all their service to him until he submitted to the court and its judgments. The compilers of the Assizes justify their opinion by citing two cases in which, as they say, the vassals of the kingdom of Jerusalem had taken such action.

It may perhaps be urged that the Assizes of Jerusalem represent an extreme and even fantastic development of the principle of the obligation of the king or lord to govern according to law, and that their principle of the supremacy of the court over the king or lord was eccentric and unparalleled. It is indeed true that in their detail they represent a particular and local attempt to create a method of control over the ruler, a method which, however good it may seem in theory, was not likely to produce an effective system of government; and we cannot look upon this method as being more than one of the many experiments in government which were being made in the twelfth and thirteenth centuries. But we are in this work concerned rather with the principle which lay behind such experiments than with the experiments themselves. If we are content to consider them from this standpoint we shall find these experiments immensely interesting, and shall also find that these principles are reflected more or less clearly and completely in many at least of the feudal law books.

In those compilations of the feudal law of Lombardy which are known to us as the 'Consuetudines Feudorum', and which belong substantially to the twelfth century, the principles of the relation of lord and vassal are set out with great clearness. The obligations of the vassal must be discharged by him, and if he refuses or fails to carry them out, he will lose his fief. On the other hand, it is laid down with great emphasis that no vassal can be deprived of his benefice except for a definite and proved offence. And it is very clearly maintained that in all cases of dispute about the fief and its tenure between the lord and vassal there is always a proper tribunal to decide, and this tribunal is either the court which is composed of the peers of the vassal or the court of the Emperor. It is noteworthy that the lord has only the same remedy against his vassal as the vassal against him, that is, the appeal to the court, and that the court is, if need be, to compel the lord to make restitution to his vassal or to submit himself to the judgment of the court. If the lord should refuse to do this the vassal can carry the case to the higher authority, that is, clearly to the overlord or Emperor.

The 'Sachsenspiegel', the most important German handbook of feudal law, which was written before 1232, does not describe in detail like the Assizes of Jerusalem the organisation of the feudal court and the method of securing its authority in enforcing the mutual obligations of lord and vassal, but it contains two very significant passages which are related to the position of the vassal and the control of the king.

In the first of these it says that a man may without violation of his fidelity wound or even slay his lord, or the lord the man, if this is done in self-defence. In the second it lays down the principle that the man who feels himself injured by the "richtere" can appeal to the Schultheiss, and that also the Count Palatine is judge over the Emperor.

The work entitled 'Le Conseil de Pierre de Fontaines' belongs probably to about the year 1253, when its author was Bailli of the Vermandois. Its intention, according to the author, was to record the customs of the Vermandois, and other lay courts, but it consists very largely of citations from the Code and Digest of Justinian, and it has been suggested that it is really a fragment of a French "Summa" of the Code. The author assumes that a vassal has the right to implead his lord in the lord's court, that is, that the court has authority to judge between the lord and the vassal, but he limits the right to questions concerning the fief and injuries inflicted upon the vassal concerning this.

In the compilation known as the 'Etablissements de St Louis', we have a more complete treatment of the relations of lord and vassal, which with some important modifications represents the same principles as those of the Assizes of Jerusalem. In the first place, it is very clearly laid down

that the obligations of lord and vassal are mutual and must be observed with equal care by both. The vassal who transgresses against this, and is guilty of various offences against his lord, will justly lose his fief; but then, with equal clearness, it is laid down that if the lord refuses his vassal the judgment of his court, or if he seduces his wife or daughter, then the vassal will be free from his obligation to him and will hold his fief from the overlord.

Again we find in the Etablissements the same principle as that of the Assizes of Jerusalem, that in cases in the king's court on any matter concerning a vassal's inheritance, the decision belongs not to the king personally, but to the court including the vassal's peers. The Etablissements do not indeed contain the same elaborate machinery for the enforcement of the judgments of the court as do the Assizes, but the compiler did not scruple to maintain that in the last resort the vassal, if the King of France refuses to do him justice in his court, has the right to make war upon him, and is entitled to summon his sub-vassals to follow him. Before they obey the summons they must indeed first go to the king and ask whether it was true that he had refused their lord the judgment of the court; if the king denied this and said that he was willing to discharge his lawful obligations, they can refuse to follow their lord, but if his complaint proved to be true, they must then follow him to war, even against the king.

If we now turn to the greatest of the French feudal lawyers, that is to Beaumanoir, we find that his conceptions of the relation of lord and vassal, while they differ in detail, are substantially the same as those which we have hitherto considered. In the first place, he sets out very clearly the principle that the obligations of lord and vassal are mutual, as the vassal owes faith and loyalty to his lord, so also the lord owes these to the vassal, and the penalty for a violation of these obligations is the same, in extreme cases the lord will forfeit the homage of his vassal, just as the vassal will lose his fief.

In the next place, Beaumanoir lays down as clearly as the other feudal lawyers that these reciprocal obligations are protected by a suitable judicial machinery. In cases of dispute between the whole body of the vassals and their lord, Beaumanoir holds that the court of vassals cannot be judge, as they are all parties to the dispute, but they should demand justice of the lord and his council, and if the lord refuses this they should go to the king, as overlord. In the case, however, of a dispute between a single vassal and the lord, the case is decided by the court of the vassal's peers. There is always a court which is competent to decide upon disputes as to feudal duties and rights, and this court is in the first place the court of the lord, but the judgment in the court belongs to the vassals. Until the vassal has demanded justice in the court he cannot appeal to the overlord, and Beaumanoir mentions a famous case of his time in which the men of Ghent had tried to bring a case against their lord, the Count of Flanders, before the King of France; their suit was refused on the ground that they had not first taken the case to the court of the Count of Flanders.

The important matter is that the feudal court is not one in which the judgment is dependent upon the caprice or self-interest of the lord, but one in which, as it administers the custom and law of the district or country, so also the decisions are given by all those who are concerned to maintain them. The true character of the court is well brought out when Beaumanoir says in another place that when a lord brings a case in his court against one of his vassals he can take no part in considering what should be the judgment of the court, it is the vassals who determine this; if the lord is dissatisfied with the judgment he can appeal against it, and the appeal goes to the court of the overlord. Beaumanoir seems to maintain that in the Beauvosis the lord was in no case a judge in his own court, but only the vassals. We have dealt with the discussion of the place of the lord in his court in the Assizes of Jerusalem, it is very important to compare with this the opinion of a jurist of the caution and sagacity of Beaumanoir. Finally, it should be observed that Beaumanoir holds that in the last resort a vassal who feels himself wronged by his lord can renounce his homage and his fief and

challenge his lord, and in the same way the lord can renounce his right to homage and can then challenge his vassal.

The great English jurist Bracton, as we have already seen, lays down the general principles of the relation of authority to justice, and to law as the embodiment of justice, in broader terms than any of the other lawyers whose work we have been considering. His work also illustrates very specially a movement of mediaeval society which we have not yet had the opportunity to consider, that is, the gradual supersession of the feudal system of government by that of the national monarchy.

We have already noticed his statement of the reciprocal nature of feudal obligations. Disputes about these are decided in the court of the lord, and if that does not do justice the case is to be taken to the county court, and finally, if the king consents, can be taken to the "great court". We have here the same principles as those which we have already considered, with the important modification that the case is to be taken from the court of the lord to the county court, not to a feudal court.

It is, however, in his treatment of the relation of the king to the law that Bracton is most interesting. We have already cited some of the most important passages in which he sets out what he considered the most essential principles of kingship, and the relation of the king to justice and law. We must now consider some aspects of these in detail.

There is no king, Bracton says, where there is no law, and the phrase has an immense constitutional and philosophical breadth, and warns us how short-sighted is the judgment of those who imagine that the Middle Ages had no philosophical conception of the State. For here we have no mere isolated phrase, but the summary expression of a principle which is illustrated in the whole constitutional structure of mediaeval society, and not least in its feudal aspect. Where there is no law there is no king, and the king is under God and the law, for it is the law which makes the king. The phrase may possibly be influenced by a reminiscence of the words of Theodosius and Valentinian in the 'Code', "our authority depends upon the authority of law", but the phrase is not the less remarkable, for Bracton, who is constantly influenced by the Roman jurisprudence, must have been aware that the Roman law books also contained the doctrine that the emperor was "legibus solutus", and he selects from the Roman tradition that which suits his purpose.

The king is under the law, and is to obey the law himself. The king is indeed the minister and vicar of God, but this is only a further reason why he should obey the law, for being God's minister his authority is only that of law (right), not of wrong (*iniuriae*), for this only is the authority which comes from God, the authority of wrong (*iniuriae*) is of the devil, and the king is the servant of him whose works he does—the vicar of God when he does justice, the minister of the devil when he does wrong. Just so far as the king is to be the vicar of God he must follow the example of Jesus Christ and the blessed Virgin, who submitted themselves to the law. It is very significant that Bracton—while maintaining in its highest form the conception of the divine authority of the ruler, as we have just seen, he calls him the vicar of God—should use this not as an argument for an unlimited and uncontrolled authority, but rather as an additional reason for maintaining that the king is under the law, and must govern according to law. Bracton does not hesitate to call the law "fraenum potentiae", the bridle of power.

And now lest we should imagine that this means little, because the king is himself the source and author of law, Bracton is careful to warn us against a perversion of the doctrine of the Roman jurisprudence. He was familiar with Ulpian's phrase that the will of the prince has the force of law and evidently felt that this might mislead men, and he therefore lays it down that not everything which it may be thought that the king wills has the force of law, but only that which is promulgated by the king's authority, with the counsel of his great men, and after due deliberation. Again, in other passages which we have already quoted, in which he sets out the great importance of unwritten and customary law in England, he says that it is reasonable to call the English laws, though unwritten,

"laws", for that has the force of law which is set out and approved with the counsel and consent of the great men, and the general approval of the commonwealth, by the authority of the king.

And again, when these laws have been approved by the custom of those concerned, and by the oath of the king, they cannot be abrogated or changed without the consent of all those by whose counsel and consent they were made. The law is not something which the king makes or unmakes at his pleasure, but rather represents an authority which even the king cannot override.

The king is indeed the supreme administrator of law, and Bracton uses strong phrases to describe the need of submission to his authority, but here we come upon a somewhat difficult question of interpretation. We have, in the first place, several passages which seem to state very emphatically that the king has no superior, and that no one can judge his actions. In the first of these Bracton, after enumerating the various classes or orders of men in the State, says that all are under the king, and he is under no man, but only under God; he has no equal in his kingdom, much less a superior; the king must be under no man, but only under God and the law, for it is the law which makes him king. In another passage it is said that no one can dispute the king's charters, nor his actions, not even the "justiciarii", nor can any one interpret them except himself, and this corresponds with another passage in which it is said that a complaint against the king can only be made by way of supplication to him, for no writ runs against the king, and if he will not correct or amend what is complained of, he must be left to the judgment of God.

So far we have apparently clear statements of the position of Bracton, but the matter is not as clear as it looks. The last passage cited begins with the words, "non debet esse maior eo in regno suo in exhibitione iuris, minimus autem esse debet, vel quasi, in iudicio suscipiendo, si petat", and the same principle is set out in a passage in a later Book, "licet in iustitia recipienda minimo de regno suo comparetur". We have just cited the words which immediately precede this. The king should have no equal, much less a superior, especially in administering justice, but in receiving justice he is like the humblest in his kingdom.

In another passage Bracton, in discussing the question against whom the Assize of Novel Disseisin may be demanded, says that this cannot be claimed against the king or prince or other person who has no superior but God; in such a case there is place only for supplication that he should amend his action, and if he will not do this he must be left to the judgment of God, who says "Vengeance is mine, and I will repay". But then, with a sudden turn of thought, Bracton adds that some may say that in such a case the "universitas regni" and the "baronagium" may and should correct and amend the king's action in the king's court (Curia).

And this brings us to a passage which seems, at first sight at least, wholly inconsistent with the conception of the position of the king presented in those passages which we first cited. We have just considered the first part of this passage, in which it is laid down that no one may dispute the king's charters or acts, but it continues in a different strain. The king has a superior, that is God, and the law by which he is made king; and also he has his court, namely counts and barons, for counts are so called as being the king's associates, and he who has an associate has a master; if therefore the king should be without a bridle, that is without law, they should impose a bridle upon him.

It is certainly difficult to reconcile this statement with those in other passages which we have already considered, in which it is said very emphatically that the king is under no man, that he has no equal or superior, except God and the law. It seems most probable that the passage has been interpolated into the text of Bracton's work; but while it is difficult to think that Bracton would himself have used these terms, it is not clear whether he would have repudiated the substance of them. It is true that in the passages which we have just cited he says that if the king refuses to do justice, he must be left to the judgment of God, but against this must be set the phrase "minimus autem esse debet, vel quasi, in iudicio suscipiendo, si petat", the more general but very emphatic statement that the king is under the law, and the reference to the possibility that the "Universitas

Regni" and the "Baronagium" may correct the king's unjust action. It should also be observed that in a passage which also we have already cited, Bracton describes the king as the vicar of God if he does justice, but the minister of the devil if he turns to injustice, and he uses phrases, derived in part from St Isidore of Seville, that the title of king is derived from good ruling, not from mere reigning, for he is a king while he rules well, but a tyrant when he oppresses the people which is entrusted to him. It is indeed impossible to say with absolute confidence what Bracton may have implied in using the designation "tyrant" of the unjust king, but it must be borne in mind that in the common usage of mediaeval writers this is generally employed to describe a ruler who either never had, or had ceased to have, any claim on the obedience of his subjects.

We are, however, not so much concerned with the question whether the words represent the opinion of Bracton, or of some other contemporary writer. There seems to be no reason to think that the words, although interpolated, belong to a later time. They are important to us on account of their correspondence with the principles of other feudal jurists. The principle which they represent is the principle of some of the most important of these. The Assizes of Jerusalem set out very clearly that the king is subject to the law, and that the court is the tribunal to which anyone who feels himself aggrieved by the king or lord can appeal, that it is responsible for the maintenance of the law, if necessary even against the king, and they cite cases in which this principle had been carried out in action. The 'Sachsenspiegel' seems definitely to lay down the doctrine that even the king is answerable to one who can judge him. The 'Etablissements of St Louis' are clear that even in the case of the King of France the vassal can demand justice of him in his Court, and that if the king refuses to give this he can make war upon the king, and can require his sub-vassals to follow him. And though Beaumanoir does not commit himself to any definite statement about the coercion of the king, he does emphatically set out the general principle of the supremacy of the court as determining the mutual obligation of lord and vassal.

It is, we think, clear that the feudal system was in its essence a system of contractual relations, and that the contract was binding upon both parties, on the lord as much as on the vassal. Whatever else may be said about it, one thing is clear, and that is that feudalism represents the antithesis to the conception of an autocratic or absolute government.

CHAPTER V.
FEUDALISM AND THE NATION.

It may be urged that the tendency of feudalism was really anarchical and disintegrating, that it tended to arrest or retard the development of the conception of the national society or state, that the principle of the loyalty which the vassal owed to his immediate lord was really inconsistent with the conception of the authority of the whole community and its head. There is a great amount of truth in such a contention, and we must therefore consider the matter in some detail, but briefly.

In an earlier chapter attention has been drawn to the contrast, which finds expression in some of the epic poetry, between the personal loyalty and devotion which the vassal owes to his immediate lord and the indifference and even contempt for the overlord or king. There is no doubt that we have here a forcible expression of an anti-national and disintegrating character in feudalism. The truth is that the feudal system, whatever may have been its remoter origins, took shape during those years when the dissolution of the Carolingian empire and the invasions of the Northmen and Magyars reduced Europe to an extreme confusion, and that its characteristics are related to the absence of such a well-organised government as might give the private man adequate protection. In the absence of strong central or national authorities, men had to turn for protection to the nearest power which seemed to be capable of rendering this. At the same time all those jurisdictions, which had once represented the delegated authority of the Carolingian emperors and kings, tended to become hereditary. When Europe began to recover from the anarchical confusions of the late ninth century and the early tenth century, the new conditions were firmly established, and the great national organisations which gradually formed themselves out of the ruins of the Carolingian empire were at first rather groups of semi-independent territories or states than compacted administrative unities. It would be outside of our province to examine the varieties of these conditions as they present themselves to us in Germany or Italy, in France or England. We must bear in mind that the conditions varied greatly in detail; it is enough for our purpose to recognise that in spite of these variations the conditions were substantially similar.

It was the characteristic of feudal society that the local and personal attachments were strong, while the relations to the central authorities were comparatively weak and fluctuating. This is the fact which lies behind the weakness of the overlord or king and the power of the immediate lord. The great feudatories no doubt owed allegiance to the king or emperor, but the vassals of the great feudatories had at first probably no very clearly defined relations to the overlord. We have now to recognise that while this was true, and while in Germany the process of national consolidation was overpowered by the territorial principle, in England and France, and ultimately in the other European states, the national unity triumphed over these disintegrating forces. The truth is that while feudalism was based primarily upon the relations between a man and his immediate lord, the principle of the national state was, though undeveloped, older, and soon began to reassert itself, so that at least as early as the eleventh and twelfth centuries the principle of a direct relation between all free men and the king began to be firmly established. Students of English constitutional history will remember the significance of the action of William the Conqueror in requiring all landowners to take the oath of fidelity to himself, whosesoever men they were. We have now to observe that this principle is embodied in the feudal law books of the twelfth and thirteenth centuries.

Jean d'Ibelin makes it clear that in the kingdom of Jerusalem it was established as law after the war between Amauri I and Girard of Seeste (Sidon) that the sub-vassals as well as the tenants-in-chief had to take the oath of allegiance (ligece) to the chief lord, the king, and that he could require the inhabitants of cities and castles held by his vassals to swear fealty to himself. In another passage he lays it down that when any man does homage in the kingdom of Jerusalem to any one else than

the chief lord he must not do "ligece", for no one can do "ligece" to more than one man, and all the vassals of the vassals are bound to do "ligece" to the chief lord of the kingdom. In another place again he describes the mode in which the sub-vassal makes allegiance to the chief lord of the kingdom; he is to kneel and, placing his hands between those of the chief lord, is to say, "Sire, I make you allegiance (ligece) according to the Assize for such and such a fief, which I hold of such and such a person, and promise to guard and protect you against any who may live or die, as I am bound to do by the allegiance (ligece) made according to the Assize". The chief lord kisses him and replies, "And I receive you in the faith of God and in my own, as I ought to do in accordance with the allegiance (ligece) made according to the Assize". When they have thus made allegiance the sub-vassals are bound to defend and support the chief lord against every one, and even against their immediate lord under certain conditions. If the chief lord has a dispute or war with any one of their lords, the sub-vassals are to remind their lord that they are the liegemen of the chief lord, and to request him to demand that the dispute should be submitted to the judgment of the court. If the chief lord refuses to do justice in his court, they will follow their lord, but if he refuses to take these steps within forty days, or if within that time he takes action against the chief lord, they will forsake him and support the chief lord. Again, Jean d'Ibelin says that if any lord is doing wrong to the chief lord, without his knowledge, the sub-vassals must remonstrate with their lord, and if necessary must join the chief lord against him. Again, the close relation between the chief lord and the sub-vassal is illustrated by the principle that the chief lord is bound to protect him against his immediate lord, if he acts unjustly and without the authority of his court, and to replace him in his fief if he has been unjustly deprived of it. These principles are stated in much the same terms also by Philip of Novara.

It is clear therefore that even in a typical feudal constitution such as that of the kingdom of Jerusalem in the twelfth century, the principle of the supremacy of the central or national organisation over the relations between the vassal and his immediate lord was already fully recognised. It is perhaps scarcely necessary to point out that this principle is clearly set out in Glanvill with regard to England in the twelfth century, but it is worthwhile to notice that he makes a distinction between the homage which a man may make to different lords for different fiefs, and the liege obligation (ligancia) which he can only make to that lord from whom he holds his "capitale tenementum". The distinction is not the same as that in the Assizes of Jerusalem, but it is parallel to it. Glanvill makes it clear that in doing homage to any lord, there must always be reserved the faith which he owes to the king, and that the sub-vassal must follow the king even against his lord.

If we turn to France we find the principle of the reservation of fidelity to the king is clearly stated in the thirteenth century by the author of the 'Jostice et Plet'. The king, he says, must hold of no one: dukes, counts, &c., may hold of each other, and become each other's men, but always, saving the dignity of the king, against whom no homage is of any authority. "Chastelain", "vavasor", citizens and villains are under others, but all are under the king. Again, Beaumanoir sets out very distinctly the principle that the obligation of the vassal to follow his lord in battle does not extend to the case when the vassal is called upon to follow against the overlord or the king.

The only writer in whom we have found some suggestion of ambiguity about the matter is one of the Lombard civilians of the thirteenth century, who also wrote on feudal law, James of Ardizone. He seems indeed to agree himself with the jurists already cited that the sub-vassal is not bound to follow his feudal superior against the overlord, and that he is rather to be rewarded if he refuses to follow his lord against the "prince" and the "patria", for every man is bound to defend the "patria", and the "prince" is to be preferred to every other creature; but he mentions, apparently as a view which was maintained by some, that a vassal is bound to help his lord against another superior, and is not to be punished for this. The phrase is indeed ambiguous, but it leaves upon one's mind the impression that the "alter superior" is his lord's superior. It is easy to recognise that the question here raised was a difficult one, and that it would arise specially under Italian conditions; but it is

important to observe that even in Italy the principle of the reservation of fidelity to the overlord, or to the prince, was very definitely maintained. We must, however, allow for the great influence which the Roman jurisprudence would exercise upon the judgment of James of Ardizone.

There is indeed no doubt that in the judgment of the feudal jurists of the thirteenth century the king has a full jurisdiction over all persons within his kingdom.

The author of the 'Sachsenspiegel' lays down this doctrine with great clearness and emphasis. The king, he says, is the common (ordinary) judge over all men. Every man has his right (law) before the king, all authority is delegated by him. Whenever and wherever the king is himself present all other jurisdictions are superseded, and all prisoners must be brought before him, any person refusing to do this will be put under the ban, and any man who is aggrieved by a judgment can appeal to the king. These phrases are very comprehensive in their nature, and, while this is not the place to discuss their actual constitutional significance in the administration and judicial organisation of the empire, they are yet of great importance as indicating how far at least in theory the national conception had imposed itself upon the feudal.

The same principle is set out in the 'Summa de legibus', one of the Norman law books of the thirteenth century. The prince alone has "plena iurisdictio" over all disputes brought to him, and again in another place, the jurisdiction of the feudal lord is severely limited to certain cases, for all "iusticiatio personarum" belongs in Normandy to the Duke, in virtue of the fealty which all men owe to him; and again, jurisdiction over the bodies of all men, small or great, belongs in Normandy to the Duke, inasmuch as they are bound by fidelity and allegiance to him alone.

The author of the 'Jostice et Plet', and Beanmanoir, maintain the same doctrine in France. The author of 'Jostice et Plet' is indeed so much influenced by the Roman law that it may be held that he is to be considered rather as a civilian than a feudalist, but his treatment of the subject corresponds in principle with that of the feudal jurists. His phrases are noteworthy. The king has jurisdiction everywhere and always, he has plenary authority in everything, while others have it only in part. Again, the count or duke has "jostice" in his lands, but under the king who is over him, the king must not indeed deprive him of this, so long as he does right, but the king can interfere to secure justice. The king holds of no one; dukes, counts, viscounts, and barons can hold of each other, and become each other's men, but always, saving the dignity of the king, against whom homage is of no avail, for all are under the hand of the king.

Beaumanoir asserts very emphatically that the king is supreme over all jurisdictions and over all persons. In one passage of great importance which we have already discussed he explains the sense in which he uses the word "souverain", and says that while every baron is "souverain" in his own barony, the king is "souverain" over all, and has the charge of the whole kingdom, and therefore can make "establissements" which are binding everywhere. Ho one is so great that he cannot be called before the king's court, "pour defaute de droit ou pour faus jugement."

The whole conception is summed up by Bracton in an emphatic passage in which he lays down the principle that the king has the "ordinary" jurisdiction and authority over all men who are in the kingdom, for all laws which belong to the crown and the lay authority and the temporal sword are in his hand; it is he who holds justice and judgment, that is jurisdiction, so that it is by his jurisdiction, as being the minister and vicar of God, that he gives to every man that which is to be his.

When we now endeavour to sum up the conclusions which arise from the study of the political theory of the feudal law books, it is evident that they represent very different principles from those which have been sometimes thought of as related to feudalism. The conception of personal devotion and loyalty, of an almost unquestioning obedience and fidelity of the vassal towards his lord, was no doubt of great importance, and the conception has left deeply marked traces in the structure and the sentiments of European political society. But it is also clear that the principle of loyalty did not, in the minds of the feudal lawyers, or, as we shall see further in the second part of the volume, in the

judgment of mediaeval society in general, override other considerations of an ideal and rational kind. The feudal jurists recognised very clearly that all human relations, and not least the relations of lord and vassal, must be controlled by the principles of equity and justice, and that these principles found their embodiment in the law—the law which is the superior of kings and princes, which is the expression not of their will merely, but of justice, and of the custom and consent of the community. It is clear that the feudal jurists conceived of the relations of vassal and lord as being limited and determined by the law, that lord and vassal were equally obliged to obey and to maintain the law, which prescribed the nature and extent of their mutual obligations. The relation of lord and vassal was a contractual relation, the terms of the contract were prescribed by law, and the obligation of the contract was determined by law.

Again, we have seen that while feudalism, in its great development in the tenth century, was the result of the operation of forces which were anarchical, or which at least tended to disintegrate the larger political organisations of Western Europe, these tendencies were rapidly checked by the growth of the principle that the feudal jurisdictions were subject to the control of the rising national systems, and that beyond the obligations of the vassal to his immediate lord every individual free man owed allegiance to the national sovereign. We have considered the history of this movement as it is reflected in the feudal law books themselves, and have seen that at least as early as the twelfth and thirteenth centuries it was recognised that the royal or national authority was paramount over all other authorities.

It is no doubt true that feudalism left for many centuries deep traces in the structure of Western society, and even on the theory of political relations, but it is also true that, when we consider the subject in the broadest way, feudalism did not counteract the normal development of the political ideas of Western civilisation, but rather that in the end its main influence went to further the growth of the principle that the community is governed by law, and that the ruler as much as the subject is bound to obey the law.

PART II.
GENERAL POLITICAL THEORY IN THE ELEVENTH AND TWELFTH CENTURIES.

CHAPTER I.
NATURAL LAW AND EQUALITY.

We now turn to the history of the general development of political ideas from the beginning of the tenth century to the end of the twelfth, that is, we can resume the history of these conceptions at the point where we left them in our first volume. We shall in doing this have occasion from time to time to take account of the influence of the three systems of law which we have considered, the feudal, the civil, and the canon law, but our main task is to trace this development in the general literature of those times, and in the principles expressed or implicit in the constitutional development of Europe. For the time being we shall not discuss directly the questions concerned with the relations of the temporal and spiritual powers. These became during this period so important that we propose to devote a separate volume to them.

In considering the theories of the civilians and canonists we have seen how important was the conception of natural law in the Middle Ages, but we must not look for any detailed discussion of this in the literature which we have now to examine, for these writers were for the most part engaged in considering the principles of political society as they emerged in the actual controversies and conflicts of this time. On the other hand, there is enough to show us that so far as they reflected upon the matter they all thought under the terms of the contrast between the natural and conventional condition.

This is especially clear in regard to the conception of human nature and its "natural" characteristics. We are apt to think of medieval society as governed by the idea of distinctions of blood and birth, and these conceptions were not wholly unimportant. It is, however, clear that, so far as men reflected upon the matter, they accepted the tradition of the later philosophical system of the ancient world, and of Christianity as handed down by the Christian Fathers and by the civil law, that there are no "natural" distinctions in human nature, and that all differences of rank and condition are conventional or "positive."

We have dealt with the subject as it is illustrated in the writings of the civilians and canonists in the second volume, and we only therefore add one citation from an ecclesiastical writer. It is, however, specially significant to observe how emphatically the conception of the natural freedom of men is stated by some of the feudal lawyers.

In the tenth century, in a work of that strange and eccentric prelate, Ratherius, Bishop of Verona, we find a passage in which he urges upon Christian men that they should remember that God made all men equal in nature, and that it is quite possible that the subject may be a better man than his lord. The man who boasts of his noble blood should remember that we are all of one origin and are made of the same substance. In Christ we are all one, redeemed with the same price, reborn in the same baptism, and those who rend asunder the unity of the brotherhood by setting themselves over others are really denying the common fatherhood and redemption of men. In the sight of God we are only distinguished from each other so far as our actions are better; the man who humbly serves is better than the man who arrogantly despises his fellowmen, he is nobler who observes the law of nature and does not repudiate his true origin, than he who violates that friendship between men which is so great and natural a good.

The passage is no doubt based mainly upon recollections of earlier writers, of the Fathers, and, probably through them, of Stoic writers like Seneca, but it is representative of the normal judgment of mediaeval thinkers.

We may take as our first illustration from the feudal lawyers a very notable passage in the 'Sachsenspiegel'. God, says the author, made all men in His own likeness, and redeemed man by His passion, the poor as well as the rich; there were no slaves when the forefathers of the Germans first settled in the land; slavery, or serfdom, began by violence and capture and unrighteous force; the law of Moses required all slaves to be set free in the seventh year; and the author holds that it is not in accordance with the truth or the will of God that one man should belong to another.

We may put beside these phrases a passage from Beaumanoir in which he sets out the same principles, but in different terms. All men, he says, were at the beginning free, and of the same freedom, for all men are descended from one father and mother; slavery (or serfdom) arose in many ways, such as that men were taken prisoners in war, or sold themselves into slavery on account of their poverty, or because they could not defend themselves against the unjust violence of lords; however men may have become slaves it is a great act of charity that a lord should set his slaves (or serfs) free, for it is a great evil that Christian men should be in the servile condition.

It is clear that even the feudal lawyers were profoundly affected by the earlier traditions, and that to them just as much as to the Christian fathers the subjection of man to man as slave or villein was a thing conventional, not natural.

CHAPTER II.
THE DIVINE ORIGIN AND NATURE OF POLITICAL AUTHORITY.

In the first volume of this work we have examined the characteristic elements of the theory of the origin and nature of political authority as it is set out in the literature of the ninth century, and we think that enough has been said to make it clear that as soon as we find any literary treatment of political conditions and ideas, we find that there were very clearly fixed in the minds of the men of the new mediaeval civilisation some highly important conceptions of political origins and obligations. We have in the last volume endeavoured to examine the relation of the revived Roman law, and of the new system of Ecclesiastical law, to these conceptions, and in the first part of this volume we have considered the bearing upon them of Feudalism. We must now inquire how far these conceptions can be said to have been continuously present to men's minds in the centuries from the tenth to the twelfth, and how far they were modified or developed.

We are entering upon the study of an age in which the structure of society was very rapidly growing and changing, and we have to inquire how far and in what manner men's conceptions of the principles of the political order changed with it. If our interpretation of the political theory of the ninth century is at all correct, the main features of that theory are to be found in three principles—first, that all authority, whether Temporal or Spiritual, is ultimately derived from God; second, that the supreme authority in political society is that of the law, the law which represents the principle of justice; and third, that the immediate source of all political authority is the community, for law is primarily the custom of the community, and there can be no legitimate authority without the election or recognition of the community. We have to inquire how far these principles continued to control the conception of political society, and in what manner they were modified or developed.

During the tenth century and the earlier part of the eleventh we should infer, from the fragments of the literature which have survived, that there was not very much active political speculation; we can indeed gather from occasional phrases the general nature of the conceptions which were current, but it may be doubted whether men did generally do much more than repeat the commonplaces of the ninth century tradition. These commonplaces were not, however, unimportant, and in some respects they seem to represent real and intimate convictions.

It was the great constitutional and ecclesiastical conflicts of the latter part of the eleventh century, continued in the twelfth, which compelled men to consider these traditional presuppositions more closely, and from the middle of the eleventh century we have an abundant and important body of literature in which we can discern with great clearness the main features of an energetic and determined political speculation.

We must begin by considering the question how far in the period with which we are now dealing it was doubted or denied that the secular authority was derived from God, and this will lead us on to the closely related question whether the State was or was not conceived of as having a moral function and purpose.

As we have seen, the principles of the divine source of political authority, and of the moral function of government, were most emphatically laid down by the Fathers, and maintained by the writers of the ninth century. It has been suggested that these conceptions were really undermined by the influence of St Augustine, especially as expressed in the 'De Civitate Dei', and that the effects of St Augustine's mode of thought are clearly traceable in the Middle Ages. We cannot here discuss the real and complete meaning of St Augustine, the subject has been handled with great care and restraint by Reuter. The question with which we have to deal is whether there was among the political theorists of the eleventh or twelfth centuries any important tendency to think of the secular power as lacking the divine authority, and as representing a principle of evil rather than of good.

The discussion centres round some phrases of Pope Gregory VII (Hildebrand), their meaning and their influence. Some writers have attached a very great importance to these, and have considered them to be representative of a clear and dogmatic theory, which as they have thought was of great importance in the Middle Ages. And no doubt Hildebrand's phrases are emphatic and startling. The best known of them is to be found in his famous letter to Hermann, the Bishop of Metz (1081) : "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". Beside these words we may put those of an earlier letter written to the same Bishop (1076) : "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". These are indeed strong phrases, and might well, to the unwary, seem to imply a definite doctrine of the secular power, as representing not the authority of God, but of evil.

In order, however, to arrive at the meaning of Hildebrand's phrases, we must begin by observing that in other places he speaks of the secular power in very different terms. In a letter written to Rudolph, Duke of Swabia, in 1073, he speaks of his hope that the "sacerdotium" and the "imperium" may be united in concord, that, as the human body is ruled by its two eyes, so the body of the Church may be ruled and enlightened when the two authorities agree in the true religion. In a letter of 1074 to Henry IV, he bids him to know that he rightly holds the royal power, if he obeys Christ the King of Kings and defends and restores the Church. In a letter to Sweyn, King of Denmark, in 1075, he prays him to administer the authority entrusted to him, according to God, to adorn the dignity of the royal title with the appropriate virtues, and to make it manifest that that justice, in virtue of which he reigned over his subjects, also ruled in his heart. Again, in writing to Harold, King of Denmark, in 1077, he admonishes him to keep the honour of the kingdom committed to him by God with all diligence, and to make his life worthy of it, in wisdom, justice, and mercy, that God may be able to say of him, "By me this King reigneth". And again, in writing to Olaf, Kang of Norway, in 1078, he describes the true function of his royal authority as being to help the oppressed, to defend the widow, and to love and defend justice with all his might.

Perhaps the most notable passage is contained in a letter in which Hildebrand urged upon William the Conqueror, in 1080, the duty of obedience to the papal authority, inasmuch as the Pope would have to give account to God for him in the day of judgment; he prefaced this exhortation to obedience by a very explicit statement that God had appointed two authorities greater than all others to rule the world, the apostolical and the royal.

It is clear that if we are to arrive at a complete and just view of the conception of kingship and secular authority held by Hildebrand, we must not isolate the phrases of the two letters to Hermann of Metz, but must consider them along with the sentiments he expresses at other times. If, then, we examine the circumstances under which the two letters to Hermann were written, we find that the purpose of both was to refute the arguments of those who maintained that it was not lawful or proper for the Pope or any one else to excommunicate the king or emperor. Hildebrand was primarily concerned to demonstrate the absurdity of this view, and he justifies his action by three considerations—first, the general authority of binding and loosing given by Christ to Peter, from which no one is exempt; second, the precedents which he cites of such excommunications of kings in the past; and third, by a comparison of the dignity and authority of the temporal and spiritual powers. It is in this last connection that he discusses the origin of secular authority, and urges that this had its origin in the sinful ambition and love of power of men who desired to make themselves the masters of their equals. That is, Hildebrand in these phrases maintains that the origin of secular authority is related to the vicious or sinful character in human nature.

We have then here one aspect of Hildebrand's conception of the nature of secular authority, stated sharply and without qualification, but in a context which is highly controversial. In the other passages which have been cited we have a very different view. In these he describes secular authority as being derived from God, and as finding its true character in the defence and maintenance of justice, and he hopes that there may be a true concord and agreement between the "sacerdotium" and the "imperium", the two authorities which God has appointed to rule over the world.

These two conceptions may seem at first sight, especially to those who are unfamiliar with the Stoic and Patristic tradition, inconsistent and irreconcilable, but this is merely a confusion. For, in this tradition, government, like the other great institutions of society, such as property and slavery, is the result of sin, and represents sinful greed and ambition, and yet is also the necessary, and, in the Christian conception, the divine, remedy for sin. Men in a state of innocence would neither need coercive government, nor would they claim to rule over their fellow-men; while in the state of sin and ambition, men desire lordship over each other, but also, in this condition, men need control and restraint if any measure of justice and peace is to be attained and preserved. And thus the institution of government, which is the result of men's sinful passions, is also appointed by God to restrain sin.

No doubt the phrases of Hildebrand in the two letters to the Bishop of Metz express one side of the traditional theory in a very harsh and crude fashion, and we have evidence that they were resented even among those who were not prepared to defend the investiture of bishops with ring and staff by the secular authorities. For instance, Hugh of Fleury, in a treatise addressed to Henry I of England in the early years of the twelfth century, protests indignantly against the phrases which had been used by Hildebrand in these letters about the origin and character of the royal authority, and maintains that such opinions are absurd, and contrary to the apostolic doctrine that all authority is from God, and that there is a divine hierarchy of authority and obedience not only on earth, but also in heaven.

The phrases of Hildebrand were resented, and, considering their highly controversial context, this is not surprising. Is there now any reason to think that the conception which is expressed in these phrases was maintained by other writers of this period as representing a complete and exclusive theory of the origin and nature of temporal authority? There are a very few passages in the contemporary literature which deserve our attention.

In a fragmentary treatise written in the middle of the eleventh century by a French churchman attacking the action of the Emperor Henry III with regard to the Papacy, especially no doubt in view of the deposition of the Popes at the Council of Sutri, the author severely condemns the emperor as having claimed jurisdiction over the Pope, and urges that the emperor does not occupy the place of Christ, but that it might rather be said that he holds that of the devil, when he uses the sword and sheds blood.

Again, in a treatise written by a certain Bernald, apparently in the last years of the eleventh century, he urges that if the Popes have authority to depose Patriarchs, they have the same authority over secular princes whose dignity seems to have been created rather by men than by the divine institution. Cardinal Deusdedit, in one of his treatises, speaks of the royal authority as arising from human institution, with the permission indeed of God, but not by His will, and he refers to the demand of the Israelites for a king, as related in 1 Samuel.

The first of these passages is very drastic, and if we had any reason to think that it represented a generally current view, would have considerable significance; but as we shall see presently, some of the strongest papalists take the very opposite view of the use of the temporal sword. The phrases of Bernald and of Deusdedit do not represent anything more than the conception that the temporal power is not derived immediately from God, but is directly the creation of human will and authority.

What was, then, the normal view of these centuries as to the source and nature of secular authority? There can really be no doubt whatever about this to those who are at the pains to make

themselves familiar with the literature of those times. The writers of these centuries are practically unanimous in maintaining that the authority of the king or emperor is derived from God. The principle is clearly expressed by those who wrote before the development of the great conflict between the Papacy and the Empire in the latter part of the eleventh century, but we also find it maintained with equal clearness during the great conflict both by imperialists and papalists.

In a commentary by Bishop Atto of Vercelli, which belongs to the second half of the tenth century, we find a very interesting and very emphatic statement of the divine authority of the secular ruler, whether he was Christian or pagan. Again, in a report of the sermon of the Archbishop of Mayence at the coronation of Conrad the Salic, which Wippo gives in his life of Conrad, the Archbishop is represented as referring to the same phrases of St Paul, and as speaking of God as the source of all human dignity, who had appointed Conrad to be king over his people; the king is the vicar of Christ. The same conception is maintained by Peter Damian, one of the most illustrious of the reforming Italian churchmen of the middle of the eleventh century. In a letter to Archbishop Anno of Cologne, he speaks of the "regnum" and "sacerdotium" as being both derived from God, and of the need which each has of the other. In another place he draws out in some detail the complementary relation between the spiritual and the temporal authorities. The duties of the different members of the Church, for they are both within the Church, are not the same. The duty of the priest is to nourish and cherish all in mercy, the duty of the judge is to punish the guilty, to deliver the innocent from the power of the wicked, to be diligent in carrying out the law, and in maintaining equity ; he should always remember the words of the apostle, "Wouldest thou have no fear of the power? do that which is good, and thou shalt have praise of him, for he is God's minister to thee for good. But if thou doest evil, be afraid; for he beareth not the sword in vain" (Rom. XIII, 3, 4). Peter Damian is clear that the authority of the secular power in administering justice and punishing crime is derived from God.

The writers whom we have just cited belong to the period before the great conflict had broken out, but the same principle is maintained by writers of all shades of opinion during the great struggle. It is needless to cite the declarations of the extreme imperialist writers, for this principle is one of the main foundations of their argument against the papalists, and we shall presently have to consider some of their phrases in detail, when we discuss the conclusions which some of them wished to draw from this principle.

It is, however, very important to observe that this principle was held with equal firmness by writers who did not belong to the imperialist party, and even by the extremest papalists. Gerhoh of Reichersberg, one of the most important writers of the middle of the twelfth century, was certainly no partisan of the secular party, rather, vehemently maintained the liberty and authority of the Church, but he was also very clear in asserting the divine origin and authority of the secular power. In one of his treatises he condemns in the strongest terms any attempt of the ecclesiastic to draw to himself the secular authority, on the ground that this would be to destroy the authority which had been set up by God Himself. Again, no writer of the Middle Ages is clearer than John of Salisbury as to the limits and conditions of the royal authority, and the right of resistance to the tyrant, but he is equally clear that the authority of the prince comes from God, and has the divine sanction.

We shall presently have occasion to examine in detail the political theory of Manegold of Lautenbach, the most incisive writer of the investiture controversy, and the most unsparing critic in the Middle Ages of what he conceived to be the illegitimate pretensions of the imperialists. While, however, he emphatically repudiates what he held to be the false interpretation of the apostolic doctrine of the divine nature of secular authority, he traces this error to a confusion between the office of the king, which he evidently conceives to be sacred, and the position of an individual king who may have justly forfeited his authority, and cannot then claim obedience in the name of the apostolic authority. And again in another passage he quotes with approbation a sentence from a letter

of Pope Innocent I, which asserted that the exercise of criminal justice by the secular power was founded upon the authority of God Himself.

And again the same principle is maintained by Honorius Augustodunensis. In his treatise entitled 'Summa Gloria', which is in the main a vindication of the greater dignity of the spiritual as compared with the temporal authority, he held indeed that the authority of man over man was not primitive, but established to restrain men's sinful passions, but he is also clear that it was established by God. And in another chapter of the same work he sets this out with great emphasis. The royal authority is indeed inferior in dignity to the priestly, but the royal authority must, in those matters which belong to it, be obeyed, not only by the laity, but by the clergy; and he quotes St Peter and St Paul as teaching plainly that it was instituted by God for the punishment of the wicked and the reward of the good.

There can really be no doubt whatever as to the normal conceptions of the political theorists of the eleventh and twelfth centuries as to the origin and nature of the temporal power. The phrases of Gregory VII in his letter to Hermann of Metz are no doubt at first sight startling, and it is not surprising that they have led to some misunderstanding, but it is clear that they only represent one aspect of his own conception of the state, and that an examination of his correspondence makes it clear that he had no intention to deny that political authority was derived from God. And we hope that it is now evident that the political theorists of all schools of thought recognised that, if man in a state of innocence would have needed no coercive authority, man under the actual conditions of human nature requires such an authority both for the suppression of wrong and injustice and for the maintenance of righteousness.

CHAPTER III.
THE MORAL FUNCTION OF POLITICAL AUTHORITY.

The normal conception of the Middle Ages was then that the temporal as well as the spiritual power derives its authority from God. We must now observe that this principle found its rationale in the moral purpose or end of temporal authority. Such occasional and controversial phrases as those of Hildebrand might leave the impression that secular authority had no other purpose than to minister to the ambitions and to satisfy the desires of the ruler. But this was very far from being the real principle of the Middle Ages; to these the authority of the king or emperor was divine, because it was his function to secure the establishment and maintenance of justice.

It is true that St Augustine had entangled himself in a position which in some places at least led him to deny that the state must find its essential and distinguishing quality in justice. There is no trace of this conception in the writers of the tenth, eleventh, and twelfth centuries; the passages in St Augustine's writings which support it are not, as far as we have seen, ever quoted. On the contrary, the constant principle set out by the mediaeval writers is that the maintenance of justice is the essential function of the ruler.

We can find this represented first in some references to the beginnings of organised society. Such references are scanty and contain nothing new or important, but, such as they are, they all represent the beginning of the authority of man over man as due to the need of order and of some method of restraint upon men's evil tendencies. Gerbert (Silvester II), for instance, says that it is certain that when our first parents abused their free will by their transgression, man was set over his fellow-man in order to restrain his unlawful desires, and that thus men are held in check by civil and ecclesiastical laws. Again, Othloh of St Emmeran points out that it is impossible that men should live together in peace unless there is some system by which some are subjected to others. Again, the history of the Bishops of Cambrai, a work which belongs to the eleventh century, commences with a brief account of the beginnings of city life—men, as it was said, at first wandered about like the wild animals, without any government of custom and reason, pursuing blindly the satisfaction of their desires ; it was only when they began to come together into cities that they learned to keep faith and to maintain justice, and to live in obedience to each other. These phrases obviously represent formal literary traditions, and are not in themselves of much importance, but they may serve as an introduction to our consideration of the theory of the function or purpose of the state.

We begin by observing that the principle of the just end of the state, which was, as we have seen, very firmly maintained by the political writers of the ninth century, continued to be held in the tenth and eleventh. In the 'Collectio Canonum' of Abbo, the Abbot of Fleury, which is inscribed to Hugh and Robert, Kings of the French (*i.e*., before 997), he quotes as from a Council of Paris a passage from that treatise 'De Duodecim Abusivis Saeculi', which was much used in the ninth century; the justice of the king is to oppress no man by force, to judge without favour of persons, to be the defender of strangers and children and widows, to put down vice and crime, to maintain the poor with alms, to set just men over the affairs of the kingdom, to defend his country against its enemies, and to hold the Catholic faith.

Ratherius of Verona gives a terse statement of the qualities which make a true king, and without which he may have the name but cannot have the reality of kingship; these are prudence, justice, courage, and temperance, the man who possesses these qualities, though he be but a peasant, may not improperly be said to be a king, while the man who lacks them though he held the universal monarchy of the world could not rightly be called a king, for the man who governs wrongfully loses his authority.

Wippo, in that life of Conrad the Salic to which we have already referred, represents the Archbishop of Mainz, in crowning him, as urging him to remember that he was the vicar of Christ, and that no one but he who imitated Christ was a true ruler, God required of him above all that he should do justice and seek peace for his country, that he should be the defender of churches and clergy, the guardian of widows and orphans.

These examples will suffice to show that the principles of the political theorists of the ninth century continued to be held until the time of the great conflict between the papacy and the empire. They were not changed by that conflict. Neither the imperialists nor the papalists had any doubt whatever that the true function of the king was to maintain and set forward justice. The papalists might use the principle to justify opposition and resistance to what they conceived to be an unjust authority, and the imperialists to repel attacks upon what they conceived to be the legitimate claims and authority of the temporal ruler, but they were at one in maintaining that this was the true purpose of all authority.

There is an excellent example of the principles of the imperialist writers in the work called 'De unitate ecclesiae conservenda', which was written against the Hildebrandine tradition, in the last years of the eleventh century, possibly by Waltram, Bishop of Naumburg. The author's treatment of the questions concerning the relations of Temporal and Spiritual power is important, and we shall have occasion to deal with the treatise again in this connection, but for the moment it is enough to observe that in discussing the nature of the State he cites those passages from the 'De Civitate Dei', in which St Augustine has preserved Cicero's description of law as being the embodiment of justice, and of the state as that which exists to maintain law and justice.

The same conception that the essential character of kingship is to maintain justice is maintained in that treatise of Hugh of Fleury to which we have already referred. He has a very high conception of the nature of the royal authority, he cites both the Pauline doctrine that all authority is from God, and the Gelasian principle that there are two powers by which the world is ruled, the royal and the priestly, while Christ Himself was both King and Priest, and he reproduces the phrases of Ambrosiaster and Cathulfus, that the king has the image of God the Father, while the bishop has that of Christ, and maintains that the king has authority over all bishops in his kingdom. At the same time he maintains very emphatically that the function of the legitimate king is to govern his people in justice and equity, to protect the widows and the poor; his chief virtues are sobriety, justice, prudence, and temperance.

These illustrations will be sufficient to make it clear that those who belonged to the imperialist party were quite clear that the function or end of the temporal authority was to maintain justice. It is more important to observe that the same principle was firmly maintained by the papalists and anti-imperialists. We have already seen that Manegold of Lautenbach maintained the ultimate divine origin of the temporal power, while, as we shall see presently, he held that it was derived immediately from the community. He was perhaps the most vigorous assailant of Henry IV and the most radical theorist of the nature of government in the eleventh century, he had as little respect for the arbitrary king as any political writer of the seventeenth century or of the French Revolution. But he founds his opinions, not on the theory that secular authority was a thing illegitimate or improper, but on the principle that as the royal authority excelled all other earthly power in dignity, so it should also excel them all in justice and piety. He who was to have the care of all, to rule over all, should possess greater virtue than all, in order that he might administer his power with the highest equity. The people had not set him over them that he should act as a tyrant, but that he should defend them from tyranny. Again in another passage Manegold urges that the chief distinction between human nature and that of other living creatures is that it is possessed of reason, and that therefore men consider not only what they should do, but why they do it. No man can make himself king or

emperor; when therefore the people set one man over them, they do it in order that he should give to every man his due, that he should protect the good, destroy the wicked, and administer justice to all.

Berthold of Constance in his Annals expresses the same principle, but in terms derived ultimately from St Isidore of Seville. The true king is he who does right, while the king who does wrong will lose his kingship; or rather, he is no king, but only a tyrant. Lambert of Hersfeld, in his account of the demands put forward by the Saxons and Thuringians, in the rising of 1073 against Henry IV, represents them as acknowledging that they were indeed bound by their oath of allegiance to Henry, but only if he used his authority for the building up, and not the destruction of the Church of God, if he governed justly and lawfully according to ancestral custom, if he maintained for every man his rank and dignity and law.

Again, in the twelfth century John of Salisbury asserts with great emphasis that the Prince is entrusted with his great authority, is even said to be "legis nexibus absolutus", not because he may do unjust things, but because it is his essential character to do justice and equity not out of fear but from love of justice. Who would speak of the mere will of the prince in regard to public matters, when he may not will anything but that which law and equity and the public interest requires? The prince is the minister of the public utility and the servant of equity, and is the representative of the commonwealth, because he punishes all injuries and crimes with equity.

We have been compelled to give some space to the consideration of the questions discussed in these two chapters only because there has been some uncertainty as to the position of the political theorists of the eleventh and twelfth centuries, and this uncertainty has arisen owing to the supposed influence of some aspects of St Augustine's theories of Church and State. We shall have to consider the nature of this influence more closely when, in our next volume, we deal with the theory of the relations of the spiritual and temporal powers, and we hope that we shall then be able to see more precisely what influence St Augustine may have exercised. In the meanwhile it is, we hope, quite evident that the conception that, the political theorists of the eleventh and twelfth centuries doubted or denied either the divine origin of the State, or the principle that its end and purpose was an ethical one, namely, the maintenance of justice, is a complete mistake. No such doubt was seriously entertained, and the theorists were all convinced that as temporal authority came from God, so also its purpose or function was to maintain the divine justice in the world.

CHAPTER IV.
THE THEORY OF THE "DIVINE RIGHT".

It is we hope now sufficiently clear that substantially there was no doubt in the great formative period of the Middle Ages which we are now considering—that is, in the eleventh and twelfth centuries—that the State was a divine institution, that political as well as ecclesiastical authority was derived from God, and had an ethical or moral, as well as a material function. We hope to consider the systematic theories of the thirteenth century in a later volume, and cannot here anticipate our discussion of them.

This conception, which, as we have shown, was fully admitted even by the most determined papalists, found its most emphatic expression when the king was called the Vicar of God. The title was not so far as we have seen used by any of the more strictly papalist writers during this period, though it had been frequently used by the Churchmen of the ninth century, but if the phrase was not actually used by them, the conception which it expressed, that the authority of the king is derived from God, was unreservedly admitted.

We have now to consider how far this principle may have been interpreted, in the period which we are now considering, as implying that the authority of the king or ruler was in such a sense divine that resistance to him was under any and all circumstances unlawful. We have endeavoured to set out the origin of this conception in our first volume; as far as we can judge, it seems to us clear that the conception was substantially an oriental one, which came into the West in the main through certain of the Fathers, and that it was derived by them, immediately, from a one-sided study of certain passages in the historical books of the Old Testament. It was St Gregory the Great who formulated it, and as we shall presently see, it is to his influence that we can generally trace the appearance of the conception in the Middle Ages. We have also showed that while St Gregory the Great drew out the conception with great clearness, and while certain other Fathers may have inclined towards it, yet others, and especially St Ambrose and St Isidore, set out a fundamentally different principle, and that St Isidore especially drew a very sharp distinction between the king and the tyrant.

The writers of the ninth century inherited both traditions, and they cited the phrases which belong to both, but it is clear that while they might use the phrases of St Gregory, they were governed rather by the tradition of St Ambrose and St Isidore, and that while they looked upon the secular authority as a divine institution, it was to them divine only so far as it represented the principles of justice and the authority of law.

These two principles were inherited by the men of the Middle Ages. What did they make of them? How did they relate them to each other? We have seen that both parties, in the great conflict of the temporal and spiritual powers, maintained that all authority, whether ecclesiastical or secular, came from God, and that they were at one in maintaining that the function of authority was to uphold justice and righteousness. But there were some who maintained that while this was true, yet the king was answerable only to God, that there was no authority which could judge him, and that the subject must therefore submit even to injustice and oppression, looking only to the just judgment of God to punish the oppressor and to defend the innocent. As we shall presently see, there are traces of this view even before the outbreak of the great conflict between the Papacy and the Empire, but, not unnaturally, in the great conflict, some imperialists, in their anxiety to lay hold of every instrument of defence against the Popes, tended to assert this view with much greater emphasis.

In the tenth century Atto of Vercelli, in one of his letters, maintains very dogmatically that it is an impious thing to resist the king, even though he is unjust and wicked. As St Gregory the Great had done, he cites the example of David, his veneration for the Lord's anointed, and his refusal to lift his hand against him, and he alleges the example of the submissive tone of St Gregory in writing to the

Emperor Maurice. He also quotes a passage, which he thinks comes from the writings of St Chrysostom, in which it is said that while it is true that the people elect the king, when he is once elected they cannot depose him, and some canons of a Council of Toledo which condemn revolt against the king, under penalty of excommunication. And, in a passage from another treatise of which we have already cited some words, he explains away a passage of Hosea which seems to imply that there might be kings who had not derived their authority from God, and maintains that even in matters of religion a good man must not resist the king, but must submit patiently to persecution however unjust.

In a commentary on the Psalms by St Bruno, who was Bishop of Wurzburg from 1034 to 1048, the words, "Against Thee only have I sinned" (Ps. LI. 4), are interpreted as meaning that while a private person who commits an offence transgresses against God and the king, the king transgresses only against God, for there is no man who can judge his actions.

The excommunication and deposition of Henry IV by Gregory VII raised in its most acute form the question which had already arisen with the great Saxon revolt of 1073, the question how far revolt against the royal authority was a thing legitimate, and more especially the question how far such a revolt was consistent with the Christian conception of the divine nature of secular authority. We do not yet discuss the question of the relation of the spiritual authority to the temporal, though it must be remembered that this was always present to men's minds.

The imperialist party did not necessarily or always take up the position that the temporal power was in such a sense sacred, that it could never under any circumstances be justifiable to revolt against it, but it was natural enough that some of them should have recourse to that tradition of the Church. In Henry IV's reply to the bull of deposition of 1076, he denounces Gregory VII's arrogance and audacity in venturing to raise his hand against him who had been anointed to the kingdom, while the tradition of the holy Fathers taught that he could be judged by God alone, and could be deposed for no crime, except for that of departing from the faith; the Fathers indeed had not judged or deposed even the apostate Julian, but had left him to the judgment of God. Berthold of Constance, in his Annals for the year 1077, relates how some of the clergy were continually proclaiming that neither the Pope nor any other authority could judge kings, whatever might be the crimes of which they were guilty, even if they were heretics. Berthold himself holds this conception to be absurd, but his evidence is only the more important.

The source of this opinion is obviously in the main the tradition of some of the Christian Fathers, and especially of St Gregory the Great. There is a very good example of this in a treatise written about 1080 by Wenrieh, the head of the educational school at Trier, afterwards Bishop of Vercelli, in the name of Theodoric, the Bishop of Verdun, who was at that time one of the supporters of Henry IV. It is a protest against Gregory VII's action in deposing Henry IV and encouraging the German princes to revolt against him. He maintains that such conduct was contrary to the law of God, and urges the example of the humility and courtesy of Gregory the Great, who even when he reproved the authorities of the State was careful to address them in terms befitting their dignity, and protested that he recognised that he owed obedience to kings, and acted in this spirit even in regard to actions of which he disapproved. When the emperor required him to promulgate a law forbidding the reception of soldiers into monasteries, he protested against it as contrary to the law of God, but he carried out the imperial order for its promulgation.

Another example will be found in the treatise 'De imitate ecclesiae conservanda'. The author was a determined partisan of the cause of Henry IV against the Hildebrandine party, and contrasts Hildebrand's conduct with that of Gregory the Great. Hildebrand claimed to have authority over kings and kingdoms, while Gregory the Great, with true humility, called himself the servant of servants, and in his book on "Pastoral Care" he set out the conduct of David as an example to all good subjects who have bad rulers. David would not take advantage of the opportunity to slay his

persecutor, but repented that he had even cut off the skirt of his cloak; and the author cites the words of Gregory the Great, in which he condemns even criticism of the conduct of the ruler, lest men should transgress against God who gave them their authority. He looks upon the successive deaths of Rudolph of Swabia and of Hermann of Luxemburg, who had been set up against Henry IV, as examples of the judgment of God upon those who revolted against their lawful king, who had received his authority from God, for neither the princes nor the people of that party could destroy that authority.

The same principles were maintained by others of the imperialist party. In the work known as the 'Liber Canonum contra Henricum quartum', which, as it is thought, was compiled in the year 1085, the supporters of Henry IV are represented as bringing forward the authority of St Augustine and St John Chrysostom to prove the impropriety of the action of Hildebrand in excommunicating Henry IV. The passage cited from St Augustine affirms the divine origin of the temporal authority, and the duty of obedience by Christian men even to an unbelieving emperor such as Julian. The passage attributed to St John Chrysostom is the same as that quoted by Atto of Vercelli, and sets out the principle that, while no man can make himself king but only the people, when the king has once been elected and confirmed the people cannot depose him. These words are again substantially reproduced in the collection of Epistles, &c., of the Cardinals who were in opposition to Hildebrand and Urban II.

Again, Sigebert of Gembloux, in a letter written in the name of the clergy of Liège about the year 1103 against Pope Paschal II, urges that even if the emperor were such as the papal party represented him to be, his subjects must submit, for it is their sins which merited such a ruler.

The most complete statement, perhaps, of the doctrine of non-resistance, and of the conception that the king is responsible only to God for his conduct, which is to be found in the literature of this period, is contained in the treatise written by Gregory of Catino in the name of the monks of Farfa, probably in the year 1111. He maintains very emphatically that the royal or imperial authority could not be condemned or overthrown by any man. The authority of the saints both of the Old and New Testaments showed that rulers must be endured rather than condemned; no one of the saints and prophets and other orthodox Christians had ever ventured to condemn or depose a king or emperor, even though he had been unjust or impious or heretical. That wisdom which is Christ said, "By Me kings reign", and by Him therefore alone can they be condemned. Saul and David sinned, but neither Samuel nor Nathan ventured to condemn them. Many kings and emperors both before and after the coming of Christ were wicked and heretical, but none of the prophets, or apostles, or saints condemned them or attempted to take from them the obedience and dignity which was their due, but left this to God, and endured their persecutions for Christ's sake; even Christ Himself, while He lived in the flesh, condemned no man. Gregory then relates a number of examples of the conduct of the Christian Fathers, as illustrating this principle, and it is noteworthy that he points out quite correctly that Pope Gregory II restrained the Italians when they wished to revolt against Leo the Iconoclast and to set up another emperor. Finally, summing up the whole matter, he urges that it is God only, the Almighty creator of kingdoms and empires, who can grant them or take them away, and that he who resists the powers that have been ordained by God resists the ordinance of God.

CHAPTER V.
JUSTICE AND LAW.

We have so far endeavoured to make it clear that the political theory of the eleventh and twelfth centuries held firmly to the principle of the divine origin and authority of government, and the conviction that its function was to maintain righteousness and justice. In the last chapter we have seen that with some writers, and especially among those who were engaged in defending the imperial position in the great conflict with the papacy, the principle of the divine nature of government sometimes passes into the conception that the authority of the ruler was in such a sense divine that it could never he resisted, whether it was used justly and wisely, or foolishly and unrighteously, and that the king was responsible for his actions to God only.

This conception was not unimportant, and indeed in later times, and especially in the seventeenth century, assumed a considerable significance. But it was not the normal theory of the Middle Ages, and we must now consider aspects of the political ideas and principles of those times which were both more completely developed in theory, and also much more closely related to the actual political and constitutional movements of these centuries.

As we have already seen, there were two traditions which had come down from the Fathers—the one, with which we have just dealt, that the authority of the king was always sacred, whether it was used justly or unjustly, the other, that as the function of kingship lay in maintaining justice and righteousness, he was no true king who did not behave justly, who did not govern himself and his people under the terms of righteousness and equity. In the first volume of this work it has been pointed out how fully this conception was developed, and how firmly it was held in the ninth century, and as we shall presently see it was equally firmly maintained in the eleventh and twelfth centuries.

There was a related principle which had governed men's minds and controlled their actions in the earlier Middle Ages, which has also been fully dealt with in the first volume, and that is the principle that the just order of the State is embodied in its law, that to govern justly is to govern according to the law. We have in the first part of this volume considered the high development of this conception in the feudal organisation of society, and in the principles of the feudal lawyers; we have now to consider its place in the political circumstances and in the general political theory of this period.

And finally, we have in the first volume considered the early stages of the conception of the authority of the ruler as representing the authority of the community, and as being dependent upon the faithful discharge of the obligations which he had undertaken, we must now consider the rapid development and the great importance of this principle in the Middle Ages.

We have already pointed out that the writers of the period with which we are dealing are united in maintaining that the purpose and function of all authority is to maintain righteousness and justice, that the ambiguities of St Augustine had no effect upon them. We must now observe that this principle was constantly drawn out to the very important conclusion that where there was no justice there was no King, but only a Tyrant. This distinction between the King and the Tyrant was indeed one of the most important of the political conceptions of the Middle Ages. The distinction is the same in principle as that of Aristotle, but it was not from him that it was drawn, at least directly. Directly it came to them from St Isidore of Seville and the writers of the ninth century, and it is probable that it is Cicero from whom St Isidore derived it.

The most complete statement of the conception is to be found in the 'Policraticus' of John of Salisbury. We shall have to discuss his political theory in detail presently, but we may begin by noticing some words in which he expresses this principle. This, he says, is the only or the supreme

difference between the tyrant and the prince, that the prince governs the people according to law and obeys the law himself, the tyrant is one who oppresses the people by violence, and is never satisfied unless he makes the law void and reduces the people to slavery. The essence of kingship is respect for law and the just rights and liberties of the people, without them a man may have the name, but not the reality of authority. We can trace the significance of this conception through the whole political literature of the Middle Ages.

We have seen its great importance in the ninth century, and even in the scanty literature of political theory in the tenth and early eleventh centuries we find the essential principle firmly maintained. We have already referred to a passage in the 'Praeloquiorum' of Ratherius of Verona which has this meaning, but it is worthwhile to look at it again. There are certain qualities without which a man may indeed have the name but not the reality of kingship; the king must be prudent, just, brave, and self-restrained; the man who possesses these qualities, though he were a peasant, may not improperly be called a king—without them, even if a man held the dominion of the whole world, he could not justly be called a king, for when a man governs ill he loses his authority. We may put beside this a phrase from the "Proverbs" attributed to that Wippo, from whose life of Conrad the Salic we have already quoted. The king, he says, must learn and hearken to the law, for to keep the law is to reign.

We have begun by citing these phrases, not because they are in themselves specially important, but only in order that we may be clear that these principles were not merely thrown out in the great conflicts of the eleventh and twelfth centuries, but that they represent the normal convictions of medieval society, which were continuous with those of the ninth century. It is true that these great conflicts forced men to consider over again their principles, and to determine what practical action they were prepared to take in order to enforce them; the political development of European civilisation from the middle of the tenth century to the end of the thirteenth was indeed almost incredibly rapid, and it would be absurd to imagine that the ideas or principles embodied in these constitutional developments were not themselves greatly modified, or enlarged, in the process; but at least, as we understand it, the movement of ideas was continuous and organic.

The principle that unless the king is just and rules according to law he is no true king is the first principle of the mediaeval theory of government, and was firmly held even before the great political agitations of the eleventh and twelfth centuries compelled men to think out the real nature of their political convictions. While, however, this is true, it is also true that these great disturbances had in a very high degree the effect of stimulating political reflection, and it is no doubt to this that we owe it that, after the comparative silence of the tenth century, we suddenly find ourselves, in the latter part of the eleventh century, and in the twelfth, in face of a great production of political pamphlets and treatises.

It is not our part here to trace the political and constitutional movements of the several European countries, but the history of political ideas would be unintelligible if we were not to bear in mind something of the general nature of these movements. We must not make the mistake of imagining that the interests and energies of the European people were concentrated upon the struggle between the Papacy and the Empire, or the related conflicts of Church and State in the various European countries. No doubt these were not only of high importance in themselves, but they had a great influence in stimulating political thought. And yet it may be doubted whether they had, taken by themselves, any serious effect on the constitutional development of European civilisation. We hope in the next volume to examine the questions related to these conflicts in detail, and to consider the nature of the oppositions or difficulties which lay behind them. But the political or constitutional development of Europe was not caused by them, or dependent upon them. All this is familiar to the students of the constitutional history of the European countries, but it is sometimes forgotten by those who are not well acquainted with this.

The history of the political theory of the Middle Ages was organically and continually related to the development of the political civilisation of Europe; no doubt, as we have constantly endeavoured to show, it derives its terms, and much of its substantial tradition from the past, but it was shaped and moulded in the actual movement of these times.

It was with the political agitations and revolts of Germany in the latter part of the eleventh century that active political speculation and controversy began. We cannot here deal with the real nature of the circumstances which lay behind the great revolt of the Saxons and Thuringians against Henry IV. It is enough for our purpose to observe that it raised at once the fundamental questions as to the nature and conditions of political authority. We have cited the words of Ratherius and Wippo as illustrating the commonplaces of literature before the great movements of the eleventh century; with the outbreak of the Saxon revolt against Henry IV in 1073 these commonplaces assumed another aspect, and became the foundations of a rapidly developing political theory.

We have already referred to the terms of the demands which Lambert of Hersfeld attributes to the Saxons and Thuringians in the revolt of 1073, but we must now consider these a little more closely. They demand that he should do justice to the Saxon princes whose properties he had confiscated without legal process, and that he should do this in accordance with the judgment of the princes, that he should put away from his court the lowborn persons by whose counsels he had administered the state, and should entrust the care of the great affairs of the kingdom to the princes to whom this belonged, that he should dismiss his concubines and restore the queen to her proper position, and that he should do justice to those who asked for it. If he would do these things they would with ready minds obey him, under those terms which became free men born in a free empire, but if he would not amend his ways, they as Christian men would not associate with one who was guilty of the worst crimes. They had indeed sworn obedience to him, but only as to a king who would uphold the Church of God, and would rule justly and lawfully according to ancestral custom, and would maintain the rank and dignity, and hold inviolate the laws proper to every man. If he violated these things they would not hold themselves bound by their oath, but would wage a just war against him as a barbarian enemy, and an oppressor of the Christian name, and would fight till their last breath for the Church of God, for the Christian faith, and for their own liberty.

As we have just said, we are not here concerned with the real nature of the revolt of the Saxons and its ultimate causes and character, it is not difficult to recognise even in this passage something of the complexity of the situation, and we cannot feel any confidence that these particular principles were urged by the leaders of the revolt against Henry IV in these terms. We must indeed take them rather as representing the ideas and theories and, probably, the literary reminiscences of Lambert. But they are not the less significant on that account. The passage contains some constitutional conceptions with which we shall deal later, but in the meanwhile we can fix our attention on the sharp and definite character of the distinction between the king to whom men swear allegiance, and the unjust ruler who sets at naught the law and rights of his subjects, and to whom therefore men are under no obligations. It is the history of this conception which we must trace farther.

We may put alongside of this passage from Lambert the terms of a speech which Bruno, the author of the ‘De Bello Saxonico’, puts into the mouth of Otto, who had been Duke of Bavaria. It is represented as addressed to the Saxons at “Normeslovo” in 1073. He exhorts them to rise against Henry, and urges upon them that the castles which Henry was building were intended to destroy their liberty, and in fiery terms he asks whether, when even slaves would not endure the injustice of their masters, they who were born in liberty were prepared to endure slavery. Perhaps, he says, as Christian men they feared to violate their oath of allegiance to the king; yes! but they were made to one who was indeed a king. While Henry was a king, and did those things which were proper to a king, lie had kept the faith which he had sworn to him whole and undefiled, but when he ceased to be a king he was no longer such that he should keep faith to him. He had taken up arms, and adjured

them to take up arms, not against the king, hut against the unjust assailant of his liberty, not against his country, but for his country, and for that liberty which no good man would consent to lose except with his life.

Lambert of Hersfeld sets out the same principle, but in more technical terms. He represents Otto as urging at another time that herein lay the difference between the king and the tyrant, that the tyrant compels the obedience of unwilling subjects by violence and cruelty, while the king governs his subjects by laws and ancestral custom.

Berthold of Constance in his Annals for the year 1077 relates, as we have already mentioned, how on Henry's return to Germany after his absolution by Hildebrand at Canossa, many of the clergy maintained that no one could judge or condemn a king however wicked and criminal. Berthold himself holds that this opinion is absurd, and cites, though without mentioning his source, St Isidore of Seville's phrases, that the king holds his title while he does right, if he acts wrongfully he loses it; and maintains that those who do wickedly and unjustly are really tyrants, and are only improperly called kings. The same phrases are again quoted by Hugh, Abbot of Flavigny, in defending the deposition of Henry IV.

Herrand, Bishop of Halberstadt, writing in the name of Louis the Count of Thuringia about 1094 or 1095, expresses the same conceptions, but in a more developed form, in his answer to a letter of Waltram the Bishop of Naumburg. Waltram had urged the authority of the words of St Paul: "Let every soul be subject to the higher powers, for there is no power but of God". Herrand replies that Waltram was misinterpreting St Paul, for if every authority was from God how could the prophet (Hosea VIII. 4) have spoken of princes who reigned, but not as of God. They were willing to obey an ordered power, but how could such a government as that of Henry IV be called an order at all; it is not order to confound right and wrong. Again, in a later passage, answering Waltram's contention that concord was useful to the kingdom, Herrand replies that it was absurd to speak thus of a society which could not be called a kingdom, for a kingdom is something rightful; could that be called a kingdom where innocence was oppressed, where there was no place for reason, for judgment, or for counsel, where every desire was reckoned to be lawful? Such a kingdom should rather be called a congregation of the wicked, a council of vanity, the dregs of iniquity; in such a kingdom concord is unprofitable. Among good men indeed concord is praiseworthy, but among evil men it is blameworthy; what man in his right mind would speak with approval of a concord of robbers, of thieves, of unclean persons?

The distinction between the true king and the tyrant, between just and legal authority, which was the characteristic of the true commonwealth, and mere violence and unjust power, was indeed firmly fixed in the minds of all medieval thinkers, and we find it clearly set out even in the writings of those who were the strongest upholders of the imperial or royal authority. We have already had occasion to discuss the opinions of Hugh of Fleury as represented in his treatise on the royal and sacerdotal powers, addressed to Henry I of England. We have seen how stoutly he maintains, against the apparent meaning of certain phrases of Hildebrand, that the authority of the king is from God, and that he even repeats those phrases, which had been used by Ambrosiaster and Cathulfus, in which the king is described as bearing the image of God, while the bishop bears that of Christ. And while, as we have seen, he holds very clearly that the function of the king is to maintain justice and equity, he also urges that the honour due to those in authority must not be measured by their personal qualities, but by the place which they hold, and that therefore even heathen rulers must receive the honour due to their position.

And yet he also warns kings and princes and tyrants that those who refuse to keep the commandments of God are wont to lose their power and authority, and that it frequently happens that the people revolt against such a king.

The author of the controversial pamphlets which have been published as the 'Tractatus Eboracenses' sets the temporal power higher perhaps than any other writer of the Middle Ages, and in a strange phrase which has some resemblance to that of Hugh of Fleury he speaks of the priest as representing the human nature of Christ, while the king represents the divine nature. But even he recognises that there have been kings who were no true kings but only tyrants. He does not indeed say that they are to be resisted, but he is aware of the distinction between the true and false king. In another passage he makes the distinction very clear between the authority which is always good, and the person of the ruler who may be evil. Our Lord had bidden men give to Caesar that which was Caesar's. He did not say, render to Tiberius that which is Tiberius'; render to the authority, not to the person, the person may be evil, the authority is just, Tiberius may be wicked, but Caesar is good. Render, therefore, not to the evil person, to the wicked Tiberius, but to the just authority, to the good Caesar, that which is his.

If these are the judgments, even of those who defended the temporal authority against what they conceived to be the unreasonable claims of the spiritual power, we need not be surprised that the supporters of the political or ecclesiastical opposition pressed them still more emphatically. We shall have occasion presently to deal with the position of Manegold in detail, but in the meanwhile we may observe how sharply he draws the distinction between kingship and tyranny, and how emphatically he states the conclusion that the ruler who governs tyrannically has no claim whatever upon the obedience of his people. The people, he says, did not exalt the ruler over themselves in order that he should have freedom to tyrannise over them, but in order that he should defend them from the tyranny of others. It is therefore clear that when he who was elected to restrain the wicked and to defend the good, actually becomes evil, oppresses the good, and is guilty of that tyranny which it was his duty to repel, he justly falls from the dignity which was granted to him, and that the people are free from their subjection to him, inasmuch as he has violated that agreement in virtue of which he was appointed.

As we have already said, the conception of the fundamental difference between the king and the tyrant is developed more clearly and completely by John of Salisbury than by any other writer of these centuries. We have from time to time cited various passages from his 'Policraticus', but his position in the history of political theory is so important and so representative that we must consider it briefly as a whole.

We have already cited some of the phrases in which he draws out the distinction between the king and the tyrant; wo must look at these more closely. This, he says, is the only or the greatest difference between the prince and the tyrant, that the prince obeys the law, and governs the people, whose servant he reckons himself to be, according to the law; he claims, in the name of the law, the first place in carrying out the public offices, and in submitting to the burdens of the commonwealth; he is superior to other men in this, that while others have their particular obligations, he is bound to bear all the burdens of the State. The prince is endued with the authority of all, in order that he may the better minister to the needs of all. The will of the prince is never contrary to justice. The prince is the public authority, and an image on earth of the divine majesty, and his authority is derived from God. The passage concludes with those famous phrases of the Code in which it is said that the authority of the prince depends upon the law, and that it is a thing greater than empire to submit the princely authority to the laws.

For the definition of the tyrant we must turn to a later passage, where we find it said that the philosophers have described him as one who oppresses the people by violent domination, while the prince is one who rules by the laws. The prince strives for the maintenance of the law and the liberty of the people; the tyrant is never satisfied until he has made void the laws and has reduced the people to slavery. The prince is the image of God, and is to be loved and cherished; while the tyrant is the image of wickedness, and often it is meet that he should be slain. The origin of tyranny is iniquity,

and it is this poison of unrighteousness and injustice which is the source of all the troubles and conflicts of the world.

It is specially important to observe that to John of Salisbury the essence of the distinction between the tyrant and the prince lies in his relation to law. In other places he enforces the principle in very interesting phrases. There are some, he says, who whisper or even publicly proclaim that the prince is not subject to the law, and that whatever pleases him has the force of law; that is, not merely that which he, as legislator, has established as law in accordance with equity, but whatever he may chance to will. The truth is, that when they thus withdraw the king from the bonds of the law they make him an outlaw. John does not indeed desire to destroy the dispensing power of the ruler, hut he refuses to submit the permanent commands or prohibitions of the law to his caprice. We may compare with these words those of another passage in which he urges that all men are bound by the law; the prince is said to be free from the law, not because he may do unjust things, but because his character should he such that he follows equity and serves the commonwealth, not from fear of punishment, hut for love of justice, and that he always prefers the convenience of others to his own personal desires. It is indeed meaningless to speak of the prince's desires in respect to public matters, for he may not desire anything hut what law and equity and the common good require; his will has indeed in these matters the force of law, hut only because it in no way departs from equity. The prince is the servant of the public good and the slave of equity, and hears the public person, because he punishes all injuries and crimes with equity.

It is important to observe, in considering these passages, how much John of Salisbury is affected by the revived study of the Roman law; his reference to Vacarius, and the progress of the influence of the Roman jurisprudence in England, in spite of the attempts to restrain it, is well known; and the effects of his own study are very clearly illustrated in the passages we have just discussed. He is evidently gravely concerned to find a just meaning for such phrases, as that the prince is "legibus solutus", or "quod principi placuit legis habet vigorem", for evidently they had, by some, been used to defend the conception that the prince was not subject to the law, and that even his capricious desires might override the law. Such conceptions seem to him monstrous and impossible. The will of the prince which is to have the force of law can only be that which is in accordance with equity and law. He is only free in relation to law in the sense that his true character is that of a man who freely obeys the law of equity. It is specially interesting to notice his phrase about the result of withdrawing the prince from the authority of the law, that the true result of this is to make him an outlaw—that is, a person to whom all legal obligations cease.

To appreciate the significance of these principles of John of Salisbury completely, we must bear in mind not only the traditions which we have considered in this chapter, but also the whole tradition of the feudal lawyers, culminating in the dogmatic affirmation of Bracton that the king is under the law. It is evident that John approaches the discussion of these questions formally through the medium of the Roman law and other literary traditions, but that his actual judgment corresponds with and expresses the effects of the political traditions and the practical circumstances and necessities of his own time.

The legitimate prince or ruler is thus distinguished, in John of Salisbury's mind, by this, that he governs according to law. What is then the law to which he is subject, and which it is his function to administer? It does not represent the arbitrary will of the ruler, nor oven of the community. John finds expression for his principles in terms derived partly from the contemporary Civilians and partly from the Digest. The prince, he says, must remember that his justice is subordinate to that of God, whose justice is eternal and whose law is equity. Ho defines equity in terms used by a number of the Civilians, as "rerum convenientia ... quae cuneta coaequiparat ratione et imparibus (in paribus) rebus paria iura desiderat", and as that which gives to every man his own. Law is the interpreter of this equity, and he cites the words of Chrysippus as quoted in the Digest, that it is law which orders all

things divine and human, and those of Papinian and Demosthenes, that law is formed and given by God, is taught by wise men, and established by the commonwealth. All, therefore, he concludes, are bound to obey the law, unless perchance some one claims to have licence to commit iniquity.

In another place John of Salisbury takes from the work which ho knew as the 'Institutio Traiani', and attributed to Plutarch, a definition of the commonwealth which represents the conception that all political authority embodies the principles of equity and reason. The commonwealth, he represents the work as saying, is a body which is animated by the benefit of the divine gift, and is conducted at the bidding of the highest equity, and controlled by the rule of reason.

The authority of the law and the State is the authority of justice and reason, and it is impossible therefore for John to conceive of any ruler as being legitimate, or as having any real claim to authority, unless he is obedient to the law, which is the embodiment of justice and reason.

What are then the conclusions which John of Salisbury draws from these principles, in regard to the practical questions of the relations of subjects and rulers? It is true that he is a little hampered by the recollection of the Augustinian and Gregorian tradition; that he remembers that in the patristic tradition the evil ruler may be the instrument of God's punishment upon an evil people. And in one passage he seems at least doubtful whether it is lawful for a man to seek the death of him to whom he is bound by fidelity and oath, and he mentions with approbation the conduct of David who would not use violence against Saul, and of those who in oppression pray to God for deliverance.

When, however, we have allowed for certain qualifications, it remains true that John of Salisbury maintains very emphatically that the tyrant has no rights against the people, and may justly and rightfully be slain. He deals with the matter first at the end of the third book, and says that it is not only lawful to kill the tyrant, but equitable and just, for it is right that he who takes the sword should perish by the sword. That is, he who usurps the sword, not he who receives it from the Lord. He who receives his authority from God, serves the law, and the law, and is the minister of justice and the law, while he who usurps authority subjects the law to his will. It is therefore right that the laws should take arms against him who disarms them. There are many forms of treason, but there is none graver than that which attacks the whole system of justice. If in the case of treason any one may act as a prosecutor, how much more in the case of that crime which attacks the laws which should control even the emperor. Assuredly no one will avenge the public enemy, and he who does not attack him is guilty of a crime against himself and the whole body of the Commonwealth.

These principles are constantly maintained by him. We have already seen how, in that passage in which he describes the character of the tyrant, he says that while the prince, who bears the divine image, is to be loved and venerated, the tyrant, who has the image of wickedness, often ought to be slain. Again, in the same chapter, where he has urged that there may be ecclesiastical as well as secular tyrants, he says that if the secular tyrant may properly, according to divine and human law, be slain, we cannot think that the tyrant who bears the priesthood is to be loved and cherished. And again, in a later chapter, he says that it is clear from history that it is just to slay public tyrants, and to set free the people for the service of God; the priests of the Lord reckon their slaughter to be an act of piety.

His judgment is admirably summed up in the chapters in which he illustrates the just end of the tyrant from Roman and from Jewish history. He sets out in eloquent words the greatness and excellence of Julius Caesar, "Homo perpaucorum et cui nullum expresse similem adhuc edidit natura mortalium", and yet, because he took command of the commonwealth by force of arms, he was deemed to be a tyrant, and, with the consent of a great part of the senate, was slain in the Capitol. Augustus forbad men to call him lord, and living as a citizen avoided both the name and the reality of tyranny. Tiberius was slain by poison, and though poisoning is a detestable thing, yet the world judged the poison by which he was destroyed to be life-giving. Caligula, the third tyrant, was slain by his servants, and with the death of Nero, the most monstrous and wicked of men, the family of the

Caesars came to an end. Lest it should be thought that such deeds against tyranny were permitted by the laws against that family only, John recalls the murder of Vitellius and Domitian. With the cruel tyranny and bloody end of those tyrants he contrasts the justice and felicity of the emperors from Nerva to Marcus Aurelius. Passing then to Jewish history, he describes the end of many tyrants, from Eglon, King of Moab, to Holofernes, "Finis enim tirannorum confusio est; ad interitum quidem, si in malitia perseverant; si revocantur, ad veniam."

John of Salisbury sums up, no doubt in extreme and somewhat harsh terms, the normal doctrine of these centuries, that there can be no legitimate government which does not represent the principle of justice, and that this justice is embodied in the law. The ruler who is unjust, and who violates the laws and customs of his country, has ceased to have any claim to the obedience of his subjects, and may justly be resisted, and if necessary deposed and killed. It is probable that the somewhat harsh terms of his doctrine of tyrannicide are due to the influence of his study of classical literature and history, and it is interesting to observe the first effects of the direct study of the ancient world. But though the form of his principle of the right of resistance to unjust and illegal authority is probably literary in its origin, and might not have met with general approbation, yet the essential principle which he maintains is the normal view of the Middle Ages.

CHAPTER VI.
CONSTITUTIONAL THEORY AND CONTRACT.

We have so far endeavoured to trace the development of the conception that political authority is controlled and limited by the principle of justice, and by the law as the embodiment of this. There is no doubt that in this conception we have one of the most important apprehensions of political theory in the Middle Ages. In modern times it may seem that the principle does not take us very far, for we always tend to ask what is justice, and whether the law is just, and this is the natural tendency of a time when men are conscious of movement and change. In the Middle Ages the conditions of civilisation were actually changing probably as rapidly as they are today, but men were hardly conscious of change, and the appeal to precedent, to tradition, was probably almost wholly sincere.

While, however, the belief in the supremacy of law and justice is of the first importance, yet it is also true that a society which is civilised and moving towards greater civilisation must not only be possessed of some ideal or ethical principles, but must also develop some method or form for securing the effective authority of its principles. In the Middle Ages this was represented by the development of the conception that the ruler received his authority, sometimes by the principle of hereditary succession in some one family, but never without the election or recognition of the great men, or the community as a whole—and these two cannot be separated in the medieval apprehension. And the authority which the medieval ruler thus held by the authority of the community, he exercised and could only exercise normally with the counsel of the great men of the community.

We have considered the earlier stages in the development of these principles in our first volume, and they were too firmly rooted in the structure of mediaeval society to die out even in the chaos of the tenth century; but it is no doubt true that in this respect, as with regard to the other principles of political authority, it was the great civil and religious conflicts of the eleventh and twelfth centuries which made men clearly conscious of ideas and convictions which had always been implicit, but had only occasionally been expressed. It is, however, important to observe that, even before these violent conflicts compelled men to make real to themselves their political principles, we can find occasional but very clear expressions of what we may call the constitutional conception of authority.

Here is, for instance, a very characteristic expression of the principle that the king governs only with the counsel of his faithful men. This is contained in a letter written by Gerbert (afterwards Pope Sylvester II) in the name of Hugh, King of France, to the Archbishop of Sens. The king was evidently somewhat doubtful of the loyalty of the archbishop, who had probably not been present at his consecration in Rheims in July 987, and admonishes him with some asperity to make his allegiance before November, and, evidently in order to reassure him, declares that he has no intention of abusing the royal power, but intends to administer the affairs of the state with the advice and judgment of his faithful men, among whom he reckons the archbishop as one of the most honourable.

We find the same principle expressed in a contemporary work of Abbo, the Abbot of Fleury. How can the king, he says, deal with the affairs of the kingdom and drive out injustice except with the advice of the bishops and chief men of the kingdom? how can he discharge his functions if they do not by their help and counsel show him that honour and reverence which is due?—the king alone is not equal to all that the needs of the kingdom require. And he appeals to the obligations which they had taken upon themselves in electing him to the kingdom, for it were better not to have assented to his election than to condemn him whom they had elected. There are three important elections, he says—that of the king or emperor, which is made by the agreement of the whole kingdom; that of the

bishop, which represents the unanimous agreement of the clergy and people; and that of the abbot, which is made by the wiser judgment of the community.

This conception corresponds precisely with the contemporary forms of legislative or quasi-legislative action. The *Capilula* issued by the Emperor Otto I at Verona in 967 are said to be established by the emperor and his son Otto the king, with the chief princes—that is, the bishop, abbots, and judges, along with the whole people. And again, the Emperor Henry II issued in 1022 the Constitution confirming and approving certain synodical legislation of Pope Benedict VIII, along with the senators, the officers of the palace, and the friends of the commonwealth.

It is not within the scope of our work to deal with the development of the constitutions of the European states, but it is impossible to separate the history of political theory from the history of the growth of institutions. This is always true, but especially in the earlier Middle Ages, when there was very little merely abstract political speculation. In the thirteenth and fourteenth centuries this was somewhat different, but we hope to deal with this later. In the eleventh and twelfth centuries it is obvious that political theory arises very largely out of the conflicts of the time, and reflects in the main the constitutional principles of the European societies, as men conceived them. While therefore we must keep clear of any attempt to give an account of the constitutional organisation of Western Europe, we must endeavour by means of a few illustrations to indicate what seem to us to be some of its most important principles.

There is no doubt that in the Middle Ages the authority of the ruler was conceived of as normally depending upon the election, or at least the recognition, of the community. The conception of a strictly hereditary right to monarchy is not a mediaeval conception. In France and England no doubt the principle of succession within one family established itself early. But students of English history do not need to be reminded that some form of election or recognition was always a regular part of the constitutional process of succession to the throne. And in France it was not really otherwise, though the strictly hereditary principle may be thought of as having established itself there more rapidly. In the Empire the succession was elective, and if at any time during the eleventh century it might have tended to become hereditary, this tendency was abruptly checked in the great civil wars of Henry IV's reign, and in the troubles of the thirteenth century.

It is worthwhile to notice some of the phrases in which this is expressed. Hermann of Reichenau relates how the Emperor Henry III procured the election of his infant son as king at Tribur in 1053, but mentions that the election was made subject to the condition that he should prove a just ruler. Bruno relates how at the council of Forchheim, in 1077, it was determined by the common consent, and approved by the authority of the Roman pontiff, that no one should receive the royal authority by hereditary succession as had been the custom, but that the son of the king, even though he were wholly worthy, should succeed to the kingdom by free election rather than by hereditary right; while if he were not worthy, or if the people did not desire him, they should have it in their power to make him king whom they would.

This principle is again expressed, and something more of its significance indicated, in the circular letter issued by the Archbishops of Cologne and Mayence (Mainz) and other bishops and princes on the occasion of the death of Henry V in 1125. They announce the Emperor's death, and say that they have celebrated his funeral, and that they now propose to hold an assembly to consider the condition of the kingdom and to arrange for a successor. They disclaim all intention of prejudicing the decision of those to whom they write, but they express the hope that they will be mindful of the oppression of the Church and kingdom, and will invoke the help of God that He would so guide the election of a successor that the Church and kingdom might be free from the slavery in which they had been held, and might live under their own laws, and that the princes and the people might have peace. The writers of the letter not only claim the right of determining the

succession, but also clearly consider that this right should be used to provide security for good government and the due observance of the laws.

We can find another illustration of the recognition of the elective principle, and of the conception that it involved definite obligations on the part of the chosen ruler, in the letter sent to Pope Eugenius III in the name of Frederick I (Barbarossa) on his election to the kingdom in 1152. He speaks of himself as having been clothed with the royal dignity, partly by the homage of the lay princes, partly by the benediction of the bishops, and as having put on the royal mind, and that therefore he purposes, according to the terms of that promise which he made when he was enthroned and consecrated, to give all honour and love to the Pope and the Roman Church, to all ecclesiastical persons the ready justice and defence which was their due, and to widows and orphans and the whole people entrusted to him law and peace.

We have already dealt with the treatment of this question in the feudal law books, but it is worthwhile to notice again the emphatic terms in which the principle of election is set out in the 'Sachsenspiegel'. The Germans, according to the law, are to elect the king, when the king is elected he is to swear that he will maintain the law, and put down all that is against it. And in another place the author lays down the principle of election in the broadest terms when he says that all authority is founded upon election. What the exact significance of the latter phrase may be is difficult to say, but at least it seems to illustrate the breadth and importance of the elective principle.

The fact that in mediaeval theory the authority of the king is founded upon the election or at least the recognition of the community does not in truth require any serious demonstration. It is very important, however, to notice that it is not only in the election or succession of the ruler that the authority of the community was recognised, but that in some sense or another the legislative action of the ruler was limited and conditioned by the counsel and assent of the great men of the community. This is clear in the first place from the formulae which are used in all legislative or quasi-legislative actions. We may take a few examples from the twelfth century.

The great settlement of Worms in 1122 was embodied in the 'Privilegium Imperatoris', in which Henry V agreed to resign the imperial claim to the right of investiture of bishops with the ring and staff. This is expressly said to be done with the counsel and consent of the princes whose names are subscribed.

Lothar III's Constitution, 'De Feudorum Distractione', of 1136, was made on the exhortation and counsel of the archbishops, bishops, dukes, and other nobles and judges. Frederick I issued the feudal constitutions of Roncaglia after taking counsel with the bishops, dukes, marquesses, counts, judges of the palace, and other chief persons.

It is not, however, only in the formal preambles of legislation that we find this principle recognised. It was expressly asserted as a principle of government by so great and masterful an emperor as Frederick Barbarossa. In replying to certain demands of Pope Hadrian IV in relation to the papal and imperial position in the city of Rome, and to certain claims of the imperial authority on ecclesiastical persons in Italy, Frederick, while giving a provisional answer, says that he cannot give a complete answer until he has consulted the princes.

There is really no doubt whatever that in the normal tradition of the Middle Ages the position of the ruler was conceived of as that of one who ruled with the advice and consent of the chief persons of the community. The relation of this to the feudal conceptions, as we have endeavoured to set them out, is obvious, but the tradition was older than the feudal system. The authority of the mediaeval ruler rested upon the election or consent of the community, and was exercised normally and constitutionally with the advice of persons who were not merely his dependents or creatures, but were in some sense, however vague and undetermined, the representatives of the community.

It was the great civil conflicts of the eleventh century which compelled men in the Empire to consider how far the conditions and assumptions of constitutional order gave the community or its

chief men the right to take such action as might secure the purposes for which the ruler had been elected or recognised. It is from this standpoint that we must again consider the principles of government which are presented by the historians of the great revolt against Henry IV. We have already dealt with some passages from their writings in considering the theory of the relation of authority to justice, but we must look again at some of these, and consider them from the standpoint of their constitutional theory.

According to the account of Lambert of Hersfeld, the demands of the Saxons and Thuringians in 1073 were, first, that Henry IV should do justice to the Saxon princes, whose possessions, as they said, he had seized without judicial process, in accordance with the judgment of the princes of the kingdom; secondly, that he should dismiss from his court the low-born persons by whose advice he had been governing, and should entrust the administration of the affairs of the kingdom to the princes of the kingdom, to whom the charge properly belonged; and thirdly, that he should put away his concubines and abandon the vicious habits which had disgraced the royal dignity. If he would do these things they were prepared to serve him, but only as became free men in a free empire.

As we have already said, we are not discussing the question of the real nature of the causes which lay behind the revolt of the Saxons, and we think that the sentiments or motives attributed by Lambert and the other historians to the revolters must often be taken rather as those of the writers than of those into whose mouths they are put. We are concerned with the theory which the great conflicts brought out rather than with the conflicts themselves, and the passage just cited represents two constitutional principles of great importance. First, that the king has no arbitrary power, but that there is a legal authority in the State to which he and all others must submit; and secondly, that the great affairs of the State are not to be administered by him at his capricious pleasure, but only through those who have a constitutional right to be consulted.

The principles which are thus expressed in relation to the beginning of the great revolt are constantly repeated during the conflicts which followed. Lambert represents even those who belonged in a measure to the royal party as admitting their validity. In the speech which he attributes to Berthold, formerly Duke of Carinthia, Berthold admits the justice of the complaints of the revolters, but begs them to consider the reverence which is due to the royal majesty, and urges that they should lay aside their arms and agree upon a meeting to which the king should summon the princes of the whole kingdom, at which he might clear himself, before the common judgment, of the charges made against him, and might set right whatever should need correction.

It was indeed this constitutional conception, that the king was in the end responsible to the judgment of the princes of the kingdom, which was maintained throughout the long struggle between Henry IV and those who revolted against his authority. They maintained steadily that it was for the council of the princes of the kingdom to decide upon the justice or injustice of the charges brought against Henry, and that it was in their power, for sufficient reasons, to declare the throne vacant. Lambert represents Rudolf of Swabia as refusing in 1073, at the meeting between the Saxon princes and those of the royal party at Gerstengen, to be made king, until the matter had been considered by a council of all the princes, and it had been decided that this could be done without involving them in the guilt of perjury.

It is true that when once the great dispute between Henry IV and Gregory VII had developed, and when in 1076 Gregory had formally excommunicated Henry, the revolters, as reported by Lambert, eagerly seized upon this new circumstance, and proposed to refer the charges against Henry to the Pope, who was to be invited to attend a council of all the princes at Augsburg, and, when all parties had been heard, to pronounce judgment upon them. They also decided that if Henry was not released from his excommunication within a year, they would no longer recognise him as king.

In our next volume we shall have to examine the whole question of the principles of the papal intervention, here we need only observe that it greatly strengthened the hands of those who were

already in revolt against Henry. The revolters would evidently have been glad to put the whole responsibility of Henry's deposition upon the Pope, and indeed at the council of Forchheim in 1077, as Berthold of Constance reports it, they at first assumed that the Pope had finally deposed him, but the Pope's legates seem to have made it clear that this was not so— presumably on account of Henry's absolution at Canossa early in the same year—and intimated that it was for the council to judge and to determine upon their action. It was the princes therefore who declared him to be deposed, and elected Rudolf of Swabia. It soon, however, became clear that there was still a strong party which supported Henry, and Berthold represents the chief men of both parties as agreeing later in the same year that the principal men of the kingdom should meet, and along with the legates of the Pope should consider what should be done, and as determining that they would by common consent repudiate whichever of the kings should refuse to accept their judgment, and would acknowledge and obey the other.

We find another very significant assertion of this principle, that there was in the community an authority which could sit in judgment even upon the supreme ruler and upon his actions, in the last stages of Henry IV's tragic reign. In his despair, when he had been overwhelmed by the union of his son Henry V with his opponents, he wrote, as is reported by Ekkehard, to the bishops and princes of Germany appealing to them against his son's conduct towards him. They replied inviting him to lay his case before the princes and the people, that he might receive and render justice, and that by the due consideration and just settlement of all the causes of discord, the Church and the kingdom might be restored to security.

The claim was indeed far-reaching, and if it stood alone might hardly deserve serious consideration, but as a matter of fact it is only a clear statement of the theory which was represented throughout the reign of Henry IV. And it did not disappear with his death. We find a close parallel to it some years later in a document which belongs to the last stages of the investiture controversy, to the year before the settlement of Worms. This is a statement of the conclusions arrived at in a council of the princes held at Wurzburg in 1121. The emperor is to render obedience to the apostolic see, and to make peace with the Pope by the advice and help of the princes, under such conditions that the emperor shall have that which belongs to him, and the churches also shall possess their own in peace and quiet. The princes propose to devise a settlement of the dispute concerning investitures. If the emperor under any advice or influence should take hostile measures against any one on account of this, the princes, acting under his own authority and consent, determine that they will act together and admonish him not to do this, and, if he should neglect their advice, the princes will abide by the faith which they have pledged to each other.

It is no doubt difficult to measure precisely the reality and value of principles which are put forward in periods of violent controversy and civil war. But in this case we can recognise with confidence that the principle that the ruler is not an arbitrary or irresponsible master of the State, but must govern in accordance with the counsel and judgment of others whose duty it is to see that justice is done to the whole community, was firmly held apart from the mere passion of revolt, and that the stress and pressure of civil conflict only brought out into clearer view conceptions which had always been present and powerful.

It is then from this standpoint that we can profitably examine the political theory of Manegold of Lautenbach, by whom the conception of the limitations and conditions of the royal authority was most clearly and sharply set out. In order to deal adequately with his position we must not consider only a few isolated phrases, but must endeavour to make clear to ourselves the local structure of his theory.

It would be to fall into a complete and deplorable confusion if ,we were to think that Manegold denied or doubted the sanctity and the divine authority of secular government. On the contrary, as we have already pointed out, if he attacks its abuse, it is in the name of the greatness and the august

nature of the office of the king. The royal office, he says, excels all other earthly authorities, and therefore the man who is to administer it should excel all other men in wisdom, justice, and piety, for lie who is to have the care of all, to govern all, should be adorned with greater virtue than others, that he may be able to exercise the powers entrusted to him with the highest equity. Again, in defending the right of the opponents of Henry IV to use violence in resisting him, he urges with great force that the authority of the State in punishing transgressors is a part of the divine order. He does not doubt the truth of the words of St Peter, "Be subject to the king as supreme", and "Fear God, and honour the king", but only argues that they have been misapplied, for the title of king is a description not of a personal quality, but of an office, and obedience is due to the office, not to a man who has been deposed from it. Wenrich of Trier had urged against Hildebrand that Ebbo the Archbishop of Rheims had been deprived of his see for taking part in the deposition of Louis the Pious, in the ninth century, and Manegold admits that this was just, because it was done without due process and for unjust reasons.

Manegold, that is, recognises fully and explicitly the august and sacred nature of political authority and its function in maintaining justice and equity. But, on the other hand, he refuses to admit that this means that the authority of the ruler is absolute, or that he is irresponsible and irremovable, and with characteristic boldness he attacks the tradition of the absolute divine right of the ruler in its most august source. Wenrich of Trier had, as we have already seen, urged the words and the example of Gregory the Great as showing that even the popes, and even in matters which concerned religion, had felt themselves bound to obey the commands of the emperor even when they thought them wrong. Manegold meets this first by suggesting that the words of Gregory are susceptible of another interpretation; but he does not hesitate to maintain that if indeed Gregory meant what was thought, and acted as he was understood to have done, his words and actions were wrong and must be repudiated. Manegold was clearly prepared to refuse to accept any authority however august which would impose the yoke of an unlimited obedience upon the subject.

It is with the same courage that he deals with the question of the binding nature of the oath of allegiance. Wenrich had made a vigorous attack upon the action of Hildebrand in absolving the subjects of Henry IV from their oath of allegiance. Manegold answers him not so much by urging the papal authority in this matter as by examining the nature of such an oath and the conditions of its obligation. This, he says, is the superiority of human nature to that of the animal, that in virtue of the power of reason it examines the causes of things, and considers not merely what should be done, but why it should be done. No man can make himself king or emperor, and the people elect a man to this position in order that he may protect the good and destroy the wicked, and administer justice to every man. If he violates the agreement under which he was elected, and disturbs and confounds that which he was to set in order, the people is justly and reasonably absolved from its obedience, since he has broken that faith which bound him and them together. The people never binds itself by an oath to obey a ruler who is possessed by fury and madness.

There are, Manegold points out, two cases which have to be considered, that of the man who takes a just and reasonable oath to the king, and that of him who takes an unjust and unreasonable oath, and he examines the two cases separately. He who takes a just and reasonable oath to the king swears that he will be his companion and helper in maintaining the government of the kingdom, in preserving justice and establishing peace, and this oath is binding so long as the king demands his help in doing those things which he has sworn to do. But if the king ceases to govern the kingdom, and begins to act as a tyrant, to destroy justice, to overthrow peace, and to break his faith, the man who has taken the oath is free from it, and the people is entitled to depose the king and to set up another, inasmuch as he has broken the principle upon which their mutual obligation depended. This, Manegold maintains, is what the German princes had done; they had perhaps sworn allegiance rashly when Henry IV was too young to understand the nature of an oath, but they had striven to keep their

oath, until he threw aside his obedience to the apostolic see, and forced them to apostatise from the Christian religion. When for this crime the Synod of Borne had deposed him, and deprived him of the royal dignity, the Christian people no longer owed him any reverence. It was the proper function of the apostolic see to reassure the people, which was concerned and anxious about the obligation of the oath it had taken, and it is therefore clear that it justly loosed the oath which was certainly and manifestly null and void, and publicly annulled that which was inherently invalid.

The discussion of the second case, that of the man who has sworn to do something in itself evil and unjust, does not demand any detailed consideration. Manegold urges, and supports his contention with a number of patristic quotations, that such oaths are obviously from the outset null and void.

It should be observed that Manegold's treatment of the real nature of the authority which was exercised, when a man was absolved from the obligation of an oath, was not in any way peculiar or eccentric, but represents what was probably the normal conception of the canonists. We are not here dealing with the claim of the ecclesiastical or papal authority to have the power of deposing kings; with that we propose to deal in the next volume, and we shall then have to consider the treatment of this subject by Manegold. In the meanwhile we must observe that his contention that the oath of allegiance is not binding to the king who abuses his authority is really independent of this. In his opinion the Pope merely declares that obligation annulled which is already null and void.

We can now approach the consideration of that well-known passage in which Manegold sets out his theory of the nature of political authority and obligation in the sharpest and clearest terms. We have already indeed cited the first words of the passage, the words in which he expresses his judgment of the greatness and dignity of the royal office, and of its high moral function in maintaining justice. The royal dignity excels all earthly authority, and he who is to hold it, who is to have the care and government of all, should be superior to all in virtue, that he may exercise this power with the highest equity. So far we have already followed Manegold's argument, but suddenly he turns to the other side of the principle. The people does not exalt him in order that he should act as a tyrant towards them, but in order that he should defend them from the wickedness and tyranny of others. If he, who has been elected to put down the wicked and to defend the good, turns to wickedness, oppresses the good, and plays the part of a tyrant over his subjects, it is clear that he justly falls from the office which was conferred upon him, and that the people are free from his dominion and from their subjection, inasmuch as he has violated that agreement (*pactum*) in virtue of which he was appointed. The people cannot in such a case be accused of a breach of faith, for it is he who has first broken faith.

And then Manegold, with characteristic audacity, reinforces this principle by a comparison from humble life. If a man has given his swine for a suitable wage into the charge of a swineherd, who, in place of keeping them safe, steals, slays, or loses them, he will refuse to pay the wage, and will dismiss him from his service. If this is just in such humble matters, how much more is it clear and just that the man to whom the rule of men has been committed, and who uses his power not for the true government of men, but to lead them into error, should be deprived of all power and dignity. This principle is surely right in Christian times, for even the Romans drove out Tarquin for the outrage which his son had committed against Lucretia. It is one thing to reign, it is another to act like a tyrant, and, while men should render faith and reverence to kings and emperors in order to maintain the true government of the kingdom, yet, if they play the tyrant, then they deserve neither faith nor reverence.

We have in this passage not only the summary of the political conceptions of Manegold himself, but the crystallization of a movement of political thought and principle into a great phrase. For when Manegold represents the relation between the king and the people as embodied in an agreement or "pactum", a contract binding equally upon each party, he is not only giving the first definite expression to the conception which came in later times to be known as the theory of the

"social contract", but he is summing up in one phrase the main principle of medieval political society. This conception is the same as that which finds its classical expression in the phrase of the "Declaration of Eights" that James II had broken the original contract between the king and the people, and it is also the expression of the medieval principle of the relation of the king to the law and the administration of justice. It is, indeed, of the first importance to observe that Manegold's conception is not constructed upon some quasi-historical conception of the beginnings of political society, but rather represents in concrete form the constitutional principle of the mediaeval state as embodied in the traditional methods of election or recognition, and of the reciprocal oaths of the coronation ceremonies. The people have indeed sworn obedience, but their oath is related to and conditioned by the oath which the king has at the same time taken to administer justice and to maintain the law. It is in virtue of this that he has been elected or recognised, and it is these reciprocal oaths which constitute the contract. The oath of the people is indeed "ipso facto" null and void if the king does not on his part faithfully observe the obligations which he has taken. Men do not undertake so great an obedience except for reasonable causes, and it is not reason to think that they are bound to obey one who refuses to recognise the principles and conditions in virtue of which they promised obedience.

It is no doubt true that the phrases of Manegold are related to a period of great confusion and civil war, and if they stood alone they would represent at the best an interesting and important anticipation of later developments of political principle or theory. But they do not stand alone, there is indeed no other writer of the eleventh or twelfth centuries who expresses the principle in exactly the same phrases, but the principle expressed by his phrases is the normal principle of the political theory of these centuries.

CHAPTER VII.
THE CONCEPTION OF A UNIVERSAL EMPIRE.

We have endeavoured to set out the main aspects of the theory of political authority in the eleventh and twelfth centuries, and we have so far made no distinction between the theory as it may have been related to the empire and the other Western states. We do not indeed find any reason to think there was any substantial distinction; on the contrary, the principles of political organisation appear to us to have been substantially the same in all the European communities.

There is, however, one conception which has been thought to have been important in the theory of the structure of medieval society with which we have not dealt, and this is the conception of the political unity of the world. It has been sometimes thought that as the Middle Ages present us with a unified ecclesiastical system under the headship of the Pope, so, at least in principle, they represent a unified political system under the headship of the emperor. There is, indeed, no doubt that at least in the fourteenth century, when abstract political theory was very highly developed, many writers, of whom Dante was the most illustrious, were much occupied with this conception, and it might well he supposed that this represents the natural survival of the impression of the great attempt of Charlemagne to gather together into one the divided members of the ancient Roman empire.

It is indeed clear that the conception of the one empire embracing and including all lesser states, and claiming some indeterminate superiority over them, was from the first frequently held among the people of the empire which the Ottos built up in the tenth century, and that they conceived of the position of the Homan emperor as being something different from that of a German king. The expeditions to Italy represented the claim not merely to political authority in Italy, but to the succession of Charles the Great and of the ancient empire.

This is the conception which is represented in the Annals of Quedlinburg. They speak of the consecration and coronation of Otto III in 996 as being done with the acclamation not only of the Roman people, but of the people of almost all Europe. And they enlarge these phrases, and make them even more emphatic in describing the position of Conrad II (the Salic). They speak of the chief men of all Europe and the envoys of many peoples as hastening to his court, and of the emperor as one to whom all parts of the world bow the neck.

The author of the life of St Adalbert, writing probably about the end of the tenth century, uses a phrase which serves well to illustrate the conception of the emperor as supreme lord of the world. He speaks of Rome as the head of the world, and says that Rome alone can transform kings into emperors. It is Rome that keeps the body of the Prince of saints, and it is right therefore that the lord of the world should be appointed by Rome. Berno, the Abbot of Reichenau, in a letter to the Emperor Henry II, addresses him as his lord, the propagator of the Christian religion, Emperor and Augustus, the lord both of lands and sea, and gives thanks to God, who has made his magnificence excel that of all kingdoms. And Wippo, in his panegyric on Henry III, says : “Thou art the head of the world, while thy head is the ruler of Olympus, whose members thou dost rule with the just order of the law”. Such are some of the phrases used by the earlier writers as expressive of the conception that in some sense the emperor was lord not merely of the German and Italian kingdoms, but of Europe and of the world. And the tradition was not lost, but continued throughout the Middle Ages. Thus St Peter Damian, in the second half of the eleventh century, in his treatise on the disputed election of Alexander II and Cadalous of Parma, adjures the royal counsellors and the ministers of the Apostolic See to labour together that the “summum sacerdotium” and the Roman empire may be united in alliance with each other, and that the race of men which is ruled by these two may not be divided. And in a letter addressed by him to Henry III he speaks of all the kingdoms of the world as being

subject to his empire. Again, we may notice how, in a treatise ascribed to Cardinal Beno, in the last years of the eleventh century, Hildebrand is vehemently censured for applying certain words of St Gregory the Great to the emperor, as though there were no difference between him and any "provincial" king.

It is thus that when the empire reached its highest point under Frederick I (Barbarossa), we find a frequent recurrence of phrases indicating the notion that the Empire was superior to all other States, and even in some sense supreme over them. Thus Frederick uses of himself a phrase which might seem to be a claim to universal authority. In the introduction to a document of 1157 he styles himself "Frederick, by the grace of God emperor and always Augustus", and says that he holds by the Divine providence "Urbis et Orbis gubernacula". Again, in a document relating to the enfeoffment of the Count of Provence, he speaks of the dignity of the Roman empire as having a more excellent glory and greatness than all other kingdoms, authorities, or dignities, as it is adorned by the greater number and merit of its illustrious princes and wise men.

It is, however, in one of the documents relating to the Council of Pavia (1159-1160) that the imperial claims are most forcibly expressed. On the death of Hadrian IV there had been a double election to the papacy, and both Alexander III and Victor claimed to have been duly elected. Frederick maintained that in such a circumstance the emperor had the responsibility of taking the proper steps to prevent a schism, and he therefore called together a council at Pavia to inquire into the matter and to decide which of the two claimants had a just title. It is in the letter of invitation to the German bishops that he uses the strongest phrases about the position and dignity of the empire. When Christ, he says, was content with the two swords, this pointed to the Roman Church and the Roman Empire, for it is by these two that the whole world is ordered in sacred and human things. For as there is one God, one pope, one emperor, there must be one Church. And thus it is the Roman emperor who must take measures to provide a remedy for this great mischief. He has therefore called together an assembly of the bishops of the empire, and of the other kingdoms, France, England, Spain, and Hungary, in order that they should in his presence decide which of the claimants should lawfully rule over the universal Church.

We are not here concerned with the question of the relation between the secular and the ecclesiastical authorities which was raised by this attempt to deal with the disputed succession to the papacy, we deal with Frederick's letter here only as illustrating his assertion of a special and unique position of the empire. If we were to take the encyclical letter to the German bishops alone, we might well think that Frederick definitely claimed that the empire stood above all other political authorities. When, however, we take account of the other documents relating to the Council of Pavia, we observe that his tone is somewhat different. His letter to Henry II of England has been preserved, and it is noticeable that in this the more pretentious phrases about the position of the empire are omitted, and that he confines himself to the invitation to send as many of his bishops and abbots as possible to the meeting at Pavia, that they may assist in restoring the peace of the Church. And in another of these documents, a letter addressed to the Archbishop of Salzburg asking him to postpone his recognition of either of the claimants to the papacy, he tells him that he has entered into communication with the Kings of France and England, and asked them also not to accept either of the claimants unless he had been recognised by them all.

There is, however, a passage in a letter of Henry II to Frederick I cited by Rahewin, which seems to recognise the superior authority of the emperor in a very large sense; he speaks of the emperor as having the right to command, and assures him that he will not fail in obedience. And Roger of Hoveden relates that Richard I of England being a prisoner in Germany, and in order to procure his release from captivity, handed over his kingdom of England to the Emperor Henry VI, "as to the Lord of all", and that the emperor then invested him with it on the terms of the payment of an annual tribute. He adds that the emperor released him from this on his deathbed, but he also

mentions that Richard was summoned in virtue of his oath and faith to be present at Cologne in 1197, as being a chief member of the empire, to take part in the election of Henry VI's successor, and that he sent envoys to represent him.

It is difficult to say what credit is to be attached to this story; if it is true, it has to be observed that Richard was acting under compulsion. But it is possible that there may be some confusion about it, as Richard was at the same time invested, according to Hoveden, with the nominal kingdom of Arles by Henry VI. There may be some confusion, and it is possible that it was in this connection that he was summoned to the election.

Such are some of the most important illustrations of the survival in the eleventh and twelfth centuries of the conception of the emperor not only as holding a position and authority different from that of all other rulers, but as in some sense the supreme lord of a united world, as representing the conception of a political unity of the civilised world. It must be observed that with the exception of the last passages, all of these phrases represent the opinion or feelings of those who were emperors, or members of the empire. When we turn to the consideration of the question how far the sentiments of men in other western countries corresponded with them, we find ourselves in a somewhat different atmosphere.

There has survived a very significant letter written in 988 by Gerbert (afterwards Pope Sylvester II), in the name of Hugh, King of France, to the Emperor of Byzantium, which indicates very clearly the attitude of the newly established kingdom of the Western Franks. It is possible, indeed, as M. Havet has suggested, that the letter was never actually sent, but it is hardly the less significant. It expresses the desire for close and friendly relations, and, in order that these may be secured, proposes a marriage between Robert, the son of the French king, and the daughter of one of the emperors, and assures them that the French king will resist any attempt on the part either of the "Gauls" or the "Germans" to attack the Roman Empire. It is no doubt very probable that the project of a matrimonial alliance with Byzantium was suggested by the marriage of Otto II with Theophano, and that the letter may represent nothing more than a project of Gerbert's for the glory of the French kingdom. But the recognition of the Easterns as rulers of the Roman Empire, and the undertaking to defend it against a possible attack on the part of the "Germans", are very significant of the attitude of the French kingdom.

In a curious poem by Adalbero, Bishop of Laon, there are some lines which seem to assert the dignity of the French kingdom and its independence. In a letter of William, the Abbot of St Benignus, at Dijon, addressed as has been thought to Pope John XIX (1024-1033), he asserts that the Roman Empire, which once ruled over the whole world, is now broken up, and is ruled by many kings, and that the power of binding and loosing in heaven and earth belongs to the jurisdiction of St Peter. We are not now concerned with the ecclesiastical question, but the emphatic assertion of the contrast between the unity of the ecclesiastical authority and the fragmentary and divided nature of political authority is very noteworthy. And again, while as we have seen St Peter Damian in some places speak as though the world was united under the rule of the one emperor and the one Pope, in another work he expresses himself very differently, and contrasts the one Pope who rules over the world with the many kings whose authority is limited to their particular territories, and explains that this is the reason why the death of the Pope is notified throughout the world, while there is no reason why the death of a king should be thus announced.

There is then some evidence that the idea of the unity of the world continued to influence men's thoughts and expressions, that the tradition of the universal empire of Rome, and the great unity of the Carolingian empire was never wholly lost, and that from time to time it was asserted by emperors, or those who were under the imperial rule. On the other hand, we find occasional statements which seem to repudiate the conception of a unity of political control, and we can find no examples of any attempt seriously and practically to assert this. This does not mean that there was no

conception of a unity of the Christian and civilised world. We shall have to consider this more carefully when in our next volume we endeavour to deal with the question of the relation of the spiritual and temporal powers.

It is important to observe that, although there has been preserved a great mass of political writing of the eleventh and twelfth centuries, it is only in a few incidental phrases that we find any trace of the conception of a political unity of the world. It is not till the latter part of the thirteenth century, or rather till the fourteenth century, that the conception of a universal empire takes an important and conspicuous place in political theory—that is, not until it had ceased to have any relation to the actual political circumstances of Europe. What may have been the conditions under which the idea of political unity became important, just when the actual development of the modern nationalities was rendering it practically impossible, we cannot at present consider, though we hope that we may be able to deal with this later.

The truth is that, if we are to be in a position to consider this whole question seriously, we must begin by taking account of the actual trend and movement of European civilisation during the Middle Ages. As soon as we make the attempt to do this we shall recognise that the most important aspect of the living growth of the centuries, from the tenth to the sixteenth, was the development of the great nationalities of Europe out of the chaotic welter of incoherent tribes. For a moment these had been united by Charles the Great under the Frankish lordship, but the unity was merely artificial and apparent. Once his great mind and strong hand was removed Europe fell back into confusion, and it was only slowly out of the complex of oppositions and sympathies that there arose the various European nationalities. The movement was thus bot h towards unity and towards division, unity within certain areas, and the political separation of these great areas from each other.

No doubt the position of the emperors and their relation to Rome gave them a place which was formally different from that of other European rulers, and it is probably true to say that few men would have doubted that this gave them a certain priority or precedence. But the position of the new monarchies was in the main that of independent states, recognising no authority over them but that of God. We are therefore driven to the conclusion that while the tradition of a universal empire was not dead in these centuries, and while in those parts of Europe which were closely connected with the Empire the conception was always more or less present to men’s minds, it is yet impossible to recognise that during the eleventh and twelfth centuries the conception had any living part in determining either men’s ideals, or the principles and theory of the structure of society.

CHAPTER VIII.
SUMMARY.

There are three great conceptions expressed in the political literature of the Middle Ages, so far as we have yet examined it. The first is the principle that the purpose or function of the political organization of society is ethical or moral, that is, the maintenance of justice and righteousness. We have seen in an earlier volume that this was continually and emphatically maintained in the political literature of the ninth century, and our examination of the general literature of the eleventh and twelfth centuries, and of the feudal law books to the thirteenth, has been sufficient to show that no one ever seriously questioned it. If there has been any doubt among modem scholars it has arisen from a misunderstanding as to the influence of St Augustine on the medieval theory of the state, and from a hasty interpretation of some phrases of Hildebrand.

No doubt there lay behind St Augustine's treatment of the state a real difficulty which had its origin in the fact that, as we can see in the later philosophical systems of the ancient world and in the Christian theory of life, men had become more clearly aware of the existence of characteristics of human nature and personality which cannot be adequately expressed in the terms of the political organisation of society. It is this new apprehension of the nature of human life which is struggling for expression in St Augustine's 'De Civitate Dei'. His apprehension is often profound, but the expression of it is sometimes crude and ill-considered. As wo have seen in the first volume, St Augustine at times seems to deny to the State as such the character of justice, though at other times he speaks in different terms. But the difficulty is not to be measured by these hasty phrases of St Augustine. The difficulty lay in the fact that men had begun to apprehend that there are aspects of the moral and spiritual life which the coercive machinery of the state cannot adequately represent. This is no doubt the principle which lay behind the development of the conception of the independence of the spiritual power. It was conceived of as the embodiment of moral and spiritual ideals which could not be adequately represented by the temporal power. When the distinction was crudely conceived, the former was spoken of as being concerned with "divine" things and the latter with "secular". We cannot here discuss these questions adequately, we shall have to return to them when in our next volume we deal with the relations of the ecclesiastical and political powers in the Middle Ages. We can, however, recognise at once that behind the formal aspects of this question there lay great and profound difficulties, difficulties for which we have not yet found any complete solution.

It is necessary to recognise the existence of real perplexities for the mediaeval political thinkers. But, having done this, we must also recognise that the broad common-sense of these men refused to allow itself to be entangled in these perplexities to such an extent as to admit any doubt whether the State had a moral character and purpose. It is clear that no mediaeval thinker seriously doubted the moral function of the State, and that this moral function was the securing and maintaining of justice. Even when Hildebrand urged that the State had its origin in sin, he did not mean that the State was sinful. It may have been sin which made it necessary, but also it was the remedy for sin, the divinely appointed remedy for the confusion which sin produced, the means of curbing and restraining the sinful passions and actions of men.

This is the real meaning of the doctrine of the New Testament, and the Fathers, and of the Middle Ages, that the authority of the king is a divine authority. He is God's minister for the punishment of the wicked and the reward of the good. It is true that here again a certain confusion had crept in, owing mainly to some rash phrases of St Gregory the Great, and, as we have seen, there were some even in the Middle Ages who were carried away by this tradition into the impossible theory that the authority of the king was in such a sense divine, that he was responsible only to God, and that it was always unlawful to resist him even when his conduct was unjust and illegal. But again

the robust good sense of the mediaeval political thinkers and the force of circumstances counteracted this influence. They believed firmly in the divine nature of the state, they looked upon the ruler as God's representative and servant, but only so far as he really and in fact carried out the divine purpose of righteousness and justice.

This, then, was the first principle of the political theory which we have been considering. And the second is closely related to the first, for it is the principle of the supremacy of law as the concrete embodiment of justice. Mediaeval thinkers upon politics were not disturbed by some of our modern perplexities, they were satisfied to regard the law of any society as the expression of the principle of justice for that society. It is very difficult for us to put ourselves back into the mood and temper of these times; we look upon all legal regulations as being at the best reasonable applications of general principles which make for the wellbeing of human life, we look upon laws as the expression of the judgment of the legislative authority, representing more or less adequately the judgment of the community, and normally we recognise the laws as reasonable, though not necessarily the best possible; we take them to be rules laid down by men yesterday or today, and perhaps to be changed tomorrow. Our difficulty is to make it clear that there ought to be, and to face certain that there is, a real moral sanction behind them, and that they justly interpret the actual needs of society. To the men of the Middle Ages the law was a part of the local or national life; it had not been made, but had grown with the life of the community, and when men began to reflect or theorise on the nature of law, they assumed that these customary regulations represented the principles of justice.

To the mediaeval political theorist then the supremacy of justice meant the supremacy of law, and though the expression of this conception by John of Salisbury is stronger and more systematic than that of most writers of the period which we have been considering, yet it does not really go beyond their principles. To them the conception of an arbitrary authority was simply unthinkable, the distinction between the king who governs according to law and the tyrant who violates it, was not a rhetorical phrase, but the natural and normal expression of their whole mode of thought.

And if we now compare the conceptions which are embodied in the general political literature with those of the feudal lawyers, we find that they are substantially identical. Indeed Bracton and the authors of the Assizes of the Court of Burgesses of Jerusalem speak as sharply and definitely as John of Salisbury. "There is no king where will rules and not law", "The king is under God and the law", "La dame ne le sire n'en est seignor se non dou dreit," these phrases are as unequivocal as those of John of Salisbury, and their doctrine is the doctrine of all feudal lawyers.

The third great principle of mediaeval political theory is again related to the others, and it is the principle that the relation between the king and the people is founded and depends upon the mutual obligation and agreement to maintain justice and law. We have considered the clear and somewhat harsh terms in which this is expressed by Manegold of Lautenbach. It may be urged that he represents an extreme position which was not generally approved, but we must not allow ourselves to be misled into the judgment that the principles which he expressed were strange or unfamiliar. On the contrary, it is clear that he was only putting into definite if hard form a principle which was generally assumed as that which determined the relations between subject and ruler. This is, we think, the conclusion which must be drawn from the literature which we have just been examining, and our judgment is only confirmed when we turn to the strictly feudal literature. The feudal obligation may have once been conceived of as one of unconditional personal loyalty, but, as we find it in the feudal law books of the twelfth and thirteenth centuries, it is clear that this loyalty was limited and conditioned by the principle of the necessary fidelity of lord as well as of vassal to the mutual and legal obligations which each had undertaken.

Manegold may express the principle in one way, John of Salisbury in another, and the authors of the Assizes of Jerusalem in a third, but their meaning is the same. Manegold speaks of deposing the ruler who has broken his contract, John of Salisbury of the lawfulness of slaying the tyrant, the

authors of the Assizes of refusing to discharge any of their feudal obligations to the lord who refuses to do justice to his vassal according to the law and the judgment of the court; the forms of expression are different but the principle is the same. The mediaeval conception of contract is not a speculation of a pseudo-historical kind, related to some original agreement upon which political society was founded, but rather a natural and legitimate conclusion from the principle of the election or recognition of the ruler by the community, and the mutual oaths of the ceremony of coronation ; it is an agreement to observe the law and to administer and maintain justice.

BOOK IV.
THE THEORIES OF THE RELATION OF THE EMPIRE AND THE PAPACY FROM THE TENTH CENTURY TO THE TWELFTH

PREFACE TO BOOK IV

In this volume I have endeavoured to put together some detailed account of the theories of the relations of the Papacy and the Empire from the beginning of the tenth century to the latter part of the twelfth. I have not endeavoured to deal with the more general subject of the relations or oppositions of the ecclesiastical order and the secular. Some aspects of these have been already discussed in the first and second volumes of this work, and we shall probably return to them in the next volume; but I should like to remind our readers that the subject of this work is not the history, either civil or ecclesiastical, of the Middle Ages, but the political theories, and we deal with the relations of the Temporal and Spiritual powers only so far as they seem to us to have tended to influence the development of these theories.

I do not indeed think that these relations had as much effect upon political theory in general as has been sometimes suggested. The great political conceptions of the Middle Ages, the supremacy of law, the authority of the community, the contractual relation between ruler and subject, were only incidentally affected by the question of the relations of the two Powers. And yet I think that we are justified in devoting a whole volume to the conflicts of the Empire and the Papacy in the eleventh and twelfth centuries for two reasons. First, because the principle that human society was controlled by two authorities, a spiritual as well as a temporal, represents the development of what is one of the most characteristic differences between the ancient and the modem world. Second, because it has been sometimes thought that the principle of the independence of the spiritual life tended in the Middle Ages to become the principle of the supremacy of the Spiritual Power. I do not indeed pretend in this volume to deal with the whole of this subject; in the next volume we hope to deal with this in its development in the thirteenth century. I have endeavoured in this volume to consider how far the question arose in the great conflicts of the eleventh and twelfth centuries, and to arrive at some conclusions as to the nature and extent of the development of such a theory of supremacy during this period.

I wish to express my very great obligations to Mr Z. Brook of Caius College, Cambridge, who has read the proofs, and to whose corrections and suggestions I am most deeply indebted, though he is not in any way responsible for the final form of the treatment of the subject, or for the judgments which are expressed. I may be allowed to express the hope that it may not be long before his detailed studies of Gregory VII. may be made accessible to us all.

I wish to express my constant obligations to the masterly work of Professor Otto von Gierke, and especially to that part of it translated by the late Professor Maitland. Only those who have endeavoured to work through the mass of mediaeval literature can appreciate fully its monumental erudition, and the accuracy of even his most incidental references. I should also wish to express my admiration for Professor Mirbt's excellent and detailed study of the controversial literature of the eleventh and twelfth centuries, 'Die Publizistik im Zeitalter Gregors VII'. And I must remember with gratitude my obligations to the work of one of the most learned of our ecclesiastical historians of the Middle Ages, Professor Hauck of Leipzig, who has unhappily passed away in these troubled but heroic years.

A. J. CARLYLE.
Oxford, December 1921.

PART I
RELATIONS OF THE SPIRITUAL AND TEMPORAL POWERS FROM 900 A.D. TO 1076 A.D.

CHAPTER I.
THE OVERLAPPING OF THE SPIRITUAL AND TEMPORAL POWERS.

In the first volume of this work, we endeavoured to consider the main principles and characteristics of the relations of the spiritual and temporal authorities in the ninth century, and we came to the conclusion that, while it was clearly apprehended that the principle which governed these relations was that each authority should be supreme and independent of the other within its own sphere, the relations were in fact very complex, and often appeared to be inconsistent with this principle. The Temporal power actually and continually possessed a great influence in the ecclesiastical sphere, while the Spiritual constantly exercised a great amount of control in temporal affairs. The principle was clear enough, but it was obviously very difficult to act in strict accordance with the principle. The emperor or king frequently found himself in the position of one whose duty it was to see that the ecclesiastical officers of the Church carried out their functions rightly, and therefore actually exercised a large if undefined authority in ecclesiastical matters; while, on the other hand, the spiritual authorities were frequently involved in the direction and ordering of secular matters.

The principles which men held were clear and apparently simple, hut the actual relations of the two great authorities were very complex. It is, however, true on the whole to say that in spite of this complexity there was no serious collision or conflict between the two authorities.

In this volume we have to consider how it came about that these comparatively tranquil conditions were changed, and that for some two hundred and fifty years, from the accession of Pope Gregory VII in 1073 till the death of Pope Boniface VIII in 1303, Western Europe was almost stunned with the noise of the great conflict between the Empire and the Papacy, while in other Western countries the conflicts of the Temporal and Spiritual powers were, if not so sensational in their form, not less serious in their character. In this volume we do not propose to deal with the subject beyond the date of the accession of Innocent III (1198), for which his pontificate these relations assumed a new form which must be considered in immediate connection with the conditions and theories of the thirteenth century.

We have to consider, first, how the great conflict came about; second, the actual nature of the questions and principles at stake in the conflict; and third, the nature of the solutions, partial or permanent, at which men arrived in the course of the twelfth century. And first we must consider how the great conflict came about, for certainly here, if anywhere in history, it is only through the consideration of the antecedents or causes of the situation that we can hope to reach any real interpretation of the situation itself. In order that we may do this we must therefore begin by considering the actual nature of the relations of the two great authorities, the spiritual and the temporal, in the tenth century and in the eleventh, until the accession of Pope Gregory VII to the Papal See.

When we begin to examine dispassionately the history of this period we are impressed before all with the fact that, while there is no reason to think that any one doubted that the spiritual and temporal authorities were distinct and had each their own proper sphere, in actual fact the temporal

ruler and the laity in general did constantly take a large part in administering ecclesiastical affairs, while the Pope and bishops exercised a large amount of authority in political matters.

Throughout the tenth and eleventh centuries we find constant reference to the presence of secular princes and other laymen at Church councils as taking part in their deliberations, and giving their authority to their determinations. A good example of this is to be found in the proceedings of a council held at Augsburg in the year 952. The council was summoned by Otto I, with the advice of the bishops, for the consideration of spiritual affairs and the condition of the Christian Empire; and the bishops specially invited his presence at the discussion of sacred matters. Otto is not actually represented as taking part in declaring the laws of the Church, but he was present while they were deliberated on, and it was to his support that the clergy looked for their maintenance.

We can find numerous parallels to this in the tenth and eleventh centuries, not only in Germany but also in Italy. In the reports of various councils held during the pontificate of John XIII, it is said that the Emperor Otto I was present and consenting; and again in the account of a council held at Rome by Pope Gregory V, in the year 998, the Emperor Otto III is represented as having taken an active part in the discussion of the question of a contested election to the bishopric of Auxonne. Again, Otto III is spoken of as presiding along with Pope Gregory V at the council held in Rome, at which the see of Merseburg was refounded and restored to its original dignity. The Emperor Conrad II is said to have presided with Pope John XIX at a council held in Rome in 1027 to determine the relation of Grado to the Patriarch of Aquileia, and the decision is described as being that of the Pope and the Emperor; the Emperor Conrad is also said to have presided at a council of bishops at Frankfort, at which a large number of the inferior clergy and laity were present.

Again, Henry III is said to have been present at a synod held at Pavia in 1046, and the decision of the synod with regard to the precedence of the Bishop of Verona is described as being in accordance with his "præceptum". In the decrees of the Council held at Mayence in 1049 by Pope Leo IX, the Pope speaks of the Emperor Henry III as sitting with him in the Council, and as giving his approval to the judgment of the Council with regard to a disputed claim to the archbishopric of Besançon. The inferior clergy and the laity are also mentioned as being present and signifying their approval.

These passages will serve as illustrations of the fact that the kings or emperors of the tenth and eleventh centuries frequently took an important part in the proceedings of ecclesiastical assemblies. It is not less important to observe that the presence of other laymen is mentioned in the accounts of the Synods of Frankfort and Mayence, to which we have just referred, and it is worth while to notice some further illustrations of this. Pope Leo IX in one of his letters refers to the decisions of the Council which he held at Rheims in 1049 as having been made by himself, with the advice of the bishops, and the assent and approval of the clergy and people. A few years later, in a letter addressed by Pope Nicholas II to the bishops of Gaul, Aquitaine, and Gascony, he describes the Council which he had held in Rome in 1059—the Council at which the famous new order for papal elections was made—as having been attended by bishops, abbots, clergy, and laity. A few years later again, in 1067, we find a letter of Pope Alexander II addressed to the clergy and laity of the Church of Cremona, inviting them to send representatives to a council which he proposed to hold after Easter. There is therefore nothing to surprise us when we find it stated in the life of Lanfranc, that the council for the revival of the canonical system and order of the Church in England was summoned by him with the authority of Pope Alexander and King William, and that it is described as being composed of the bishops and princes, the clergy, and the people. The Synod or Council of Rome, held in the year 1076 by Gregory VII, at which the Emperor Henry IV was excommunicated and declared to be deposed, is said to have been attended not only by the bishops and abbots and clergy, but also by the laity. At the end of the eleventh century we find another example of the same thing in two letters of Pope Urban II. dealing with the question of the metropolitan authority of the

Archbishop of Tours in Britanny; he announces his decisions as having been made in a council attended not only by bishops and other clergy, but also by the Roman judges and "consulars", and by their advice.

It might seem that these and similar phrases are not in themselves of much importance, and no doubt in many cases they are little more than formal; but this does not really affect their significance, for what they imply is this, that however clearly men might maintain the principle of the separation of the two powers, and of the two orders of clergy and laity, in fact the layman was not conceived of as completely excluded from the organised ecclesiastical authority.

If it is important to observe the fact that the temporal ruler and the laity in general were recognised in the tenth and eleventh centuries as having some place in the administration of ecclesiastical affairs; it is not less important to take note of some passages in the writings of these times in which the Pope or other ecclesiastical persons are spoken of as having their place in the regulation of temporal matters. We shall have to consider later very carefully the exact nature of the claims made with respect to this when the great conflict had broken out, in the meanwhile we only desire to take note of some incidental references to the matter before that time.

We have pointed out in the first volume of the work that it was frequently recognised in the ninth century that the Popes and the bishops of the Church had a considerable authority in the appointment of emperors and kings. As we have said, it is difficult to determine the exact principles upon which this was founded. In the case of the relation of the Pope to the appointment of an emperor, there were the special circumstances attending the recognition of the Frank rulers as Roman Emperors; in the case of the bishops in general it is difficult to say how much was due to the respect for their spiritual office and authority, how much to the fact that the bishops were among the great men of the community to whom the selection and proposal of the ruler was normally entrusted. It is, indeed, very doubtful whether in the ninth century the various elements upon which the intervention of ecclesiastical persons in secular matters depended were clearly distinguished from each other, and it would seem that there is the same ambiguity about the matter in the period that followed.

In the last year of the ninth century we find some important phrases in a letter attributed to Hatto, the Archbishop of Mayence (Mainz), and written to Pope John IX, with reference to the election of Louis, "the Child", as King in Germany. Hatto excuses the neglect to consult the Pope about the election, on the ground that the roads between Germany and Rome were blocked by the " pagans", and asks the Pope that, now that it was possible to communicate with him, he would confirm their action. The letter implies clearly that the Pope was in such a sense recognised as having a place in the matter, that it was important to conciliate him, and to secure his approval and support. In the tenth century, and at the time of the deepest degradation of the Papacy, Pope John XII speaks of Otto I as having come to Rome that he might seek the imperial crown from St Peter by his hands, and proclaims that he had anointed him as Emperor for the defence of the Church, and with the benediction of St Peter. Rodolphus Glaber, writing in the first half of the eleventh century, states very emphatically the principle that no one might be called, or could be, Emperor except he whom the Pope should choose as fit for such an office, and upon whom the Pope had conferred the Empire. The Continuator of the 'Annals of Hildesheim' speaks of Henry III as having made his infant son king by the election of the Roman Pontiff and the other bishops and princes.

Enough has been said for the moment to illustrate the extent to which in the tenth and eleventh centuries the two great authorities, the temporal and the spiritual, continued to overlap each other, and to show how often the temporal authority intervened in ecclesiastical matters, and the spiritual in secular. We must now consider in more detail some of those questions in relation to which there finally arose the great conflict of the eleventh and the twelfth centuries.

CHAPTER II.
ELECTIONS TO THE PAPACY IN THE TENTH AND ELEVENTH CENTURIES.

If we are to attempt seriously to understand the nature of the later controversies, we must begin by considering the part taken by the German Emperors, from Otto I to Henry III, in the appointment and deposition of the Popes. We do not indeed pretend here to give an exhaustive or detailed account of all the circumstances of the papal elections during this period, and there is the less need of this, as there are several important monographs on the subject. We think, however, that it is possible to recognise certain important principles as generally admitted in this period, and we can also distinguish with sufficient clearness the most important points of doubt and controversy. It is clear on the one hand that throughout this period—that is, from the beginning of the tenth century to the accession of Gregory VII—some place was recognised as belonging to the Emperor in the election of a Pope; while on the other hand we can also see that there were grave doubts about the extent of the imperial share in the election, and about the attempt to assert jurisdiction over the Pope, on the part of any men, whether lay or clerical.

The tenth section of the proceedings of the Council held at Rome in the year 898, by Pope John IX, may be taken as representing the circumstances on which the place of the imperial authority in papal elections actually rested in the tenth century. It speaks of the violence to which the Roman See was exposed on the death of a Pope, when the consecration of a successor was carried out without notice to the Emperor, and without the presence of his envoys, who should prevent the occurrence of violence and other scandals at the time of the consecration; and it provides that for the future the elections should be made by the bishops and clergy on the proposal of the senate and people, that the Pope should be consecrated in the presence of the imperial envoys, and that no one for the future should extort from the Pope-elect any oath or promise except that which was in accordance with ancient custom, lest the Church should receive scandal, and the honour due to the Emperor should be diminished.

The document recognises that, while the election of the Pope belongs to the bishops and clergy, acting on the proposition of the Roman laity, the election should not be carried out to its completeness by consecration until the Emperor had been informed and his envoys were present; and the reason specially suggested for this is that without the protection of the Emperor the appointment could not be carried out in peace and freedom.

It is not our part here to attempt to appreciate in its complete historical significance the whole history of the condition of the Papacy in the tenth and the earlier eleventh centuries. It must suffice for us to recognise that when Otto I came for the second time to Italy, and was crowned as Emperor by Pope John XII in 962, he found the Roman See at a very low level, and under the control of the factions of the Roman nobles. John XII crowned Otto as Emperor, but as soon as Otto had left Rome, began, as it was said, to conspire against him. Otto returned to Rome, and then, according to the statement of Luitprand, Bishop of Cremona, held a council in which there sat bishops from Italy, Saxony, Franconia, and the clergy and principal citizens of Rome. The Pope was accused of a variety of moral and ecclesiastical offences, and the council invited him to attend and purge himself of these charges. John replied by threatening to excommunicate them if they endeavoured to appoint another Pope. After further negotiations, the Emperor addressed the Council, and complained that John had broken the oath which he had taken to him, and had conspired with his enemies against him. The clergy and people replied that such an unheard-of offence must be dealt with by unprecedented means, and that the Pope had injured not himself only, but others, by the profligacy of his conduct, and demanded that he should be deposed and another elected. The Emperor assented to their demand, and they, with one voice, elected Leo, the “Protoscrinarius” of the Roman Church, as Pope

(964). It would seem, however, that the apparent unanimity of the Roman people and clergy was superficial, for when the Emperor left Rome, the people rose against Leo VIII, and he fled to the Emperor. Pope John XII died, and the Romans elected Benedict V. The Emperor returned, and Benedict was brought before the Council in the Vatican, and sent into exile in Germany.

In the next year (965) Leo VIII died, and the account of the election of his successor, which is given by the Continuator of Regino's Chronicle, is important. On the death of Leo, the Romans, he says, sent Azo, the Protoscrinarius, and Maximus, the Bishop of Sutri, to the Emperor, who was then in Saxony, to ask him to appoint whom he would as Pope. The Emperor, however, did not do this, but sent Otgar, the Bishop of Spires, and Liuzo, the Bishop of Cremona, to Rome; and then, presumably in their presence, the Roman people elected John, the Bishop of Narni, as Pope.

It would be unsafe to conclude that this narrative presents us with a complete account of the whole circumstances: we must allow for the possibility that the statements may be coloured by the position of their authors.

The action of Otto I and the Council in deposing Pope John XII was parallel to the action of Henry III and the Council of Sutri in 1049. There were precedents in the purgation both of Leo III and Leo IV for some claim on the part of the Church and the Emperor to be concerned with the character of the head of the Church. It is more important to observe that, whatever irregularity there might be in relation to the deposition of John XII, it seems clear that the traditional forms were carefully observed in the elections of Leo VIII and John XIII. As Luitprand relates the matter, it was the clergy and people of Rome who elected Leo VIII, and the Emperor only gave his assent to their election. The narrative of the continuator of Regino seems clearly to imply that on the death of Leo VIII, Otto I did not make any appointment to the Papacy by himself, but referred the election to the Romans, presumably in the presence and with the sanction of his envoys.

This agrees indeed with the provisions of the "Privilegium" of Otto I with regard to papal elections, which is attributed to the year 962, and is thought to be substantially genuine. In this, it is provided that the Roman clergy and nobility are to secure that the election was to be carried out canonically and justly, and that he who was elected to the Apostolic See was not to be consecrated until he had, in the presence of the imperial mission, made the same declaration as had been voluntarily made by Pope Leo; and further, that no one was to interfere with the freedom of the Romans, to whom by ancient custom and to constitution of the holy fathers the right of election belonged—this prohibition extended to the *missi* of the Emperor. These provisions correspond with those of the "Pactum" of Louis the Pious, and the "Constitutio Romana" of Lothair I, they clearly recognise that the right of election belonged to the Romans, while the Emperor retained an important place in the process.

A little later in the century we find that these constitutional traditions were no longer so carefully observed. The life of St Adalbert contains an account of the appointment of Pope Gregory V in the year 996. From this it would appear that the Emperor Otto III was at Ravenna when Pope John XV died. The chief men of Rome (*proceres et senatorius ordo*) sent letters and messengers announcing the death of the Pope, and desiring to receive the royal judgment as to whom they should set up in his place. Otto III selected Bruno, a young and learned clerk of the royal chapel, who was his kinsman, and he was elected *a maioribus*, apparently at Ravenna, and was then sent, with the Archbishop of Mainz and another bishop, to Rome, where he was received with honour. The procedure is much of the same kind as that of which we shall find examples when we come, in the next chapter, to deal with the appointment of bishops.

In a document of a few years later, whose genuineness has indeed been disputed, but probably without sufficient reason, we find Otto III claiming very explicitly that it was he himself who had created Gerbert (Silvester II) Pope in the year 999. How much exactly this may mean it is not easy to

say, but at least it implies that Otto III had a very high conception of his own share in the appointment.

We have very little by way of contemporary observation and criticism on the events which we have recorded; but it is important to observe that Thietmar of Merseburg, writing not later than the first quarter of the eleventh century, expresses his disapproval of the deposition of Benedict V, whom he calls "valentiorem sibi [*i.e.*, the emperor] in Christo", and maintains that no one had authority to judge him except God Himself.

After the death of Otto III the Papacy was comparatively free from the pressure of the Empire, but also it lost its support, and once again it fell on evil days, for, if it was emancipated from the interference of the Germans, it only fell more helplessly under the domination of the local factions, and by the middle of the eleventh century the situation had once again become acute. We do not need to enter into the details of the intervention of Henry III; it is enough for us here to remember that Gregory VI was deposed at the Council held in the presence of Henry III at Sutri in December 1046, and that Suidger, the Bishop of Bamberg, was elected to the Papacy as Clement II.

It need not be doubted that the action of Henry III was well intended, and indeed it succeeded in producing a reformation of the conditions and character of the Papacy which had permanent effects. The question of the propriety of the methods used is another matter.

Clement II died in 1047, while Gregory VI was still alive. Among the most highly respected bishops of the Empire was Wazo, Bishop of Liège, of whom we shall have more to say later. Henry III asked his advice about the appointment of a successor to Clement; but Wazo, as reported by his biographer, replied with great courtesy but with great firmness, warning Henry III against proceeding to any appointment while the legitimate occupant of the Holy See was still alive, and urging that it was the clear doctrine of the holy fathers that no one could judge the Supreme Pontiff but God Himself. It appears that Wazo's reply did not reach Henry III till after Poppo of Brixen had been appointed Pope as Damasus II, but his judgment is very significant.

What Wazo expresses firmly but in cautious and moderate language was expressed much more roughly in an apparently contemporary work of a French Churchman. He denounces the emperor as most wicked, and challenges him to consider how contrary was his action in venturing to sit in judgment upon an ecclesiastic to the example of former emperors and kings. He even suggests that Henry III was not fit to judge even laymen on account of what he calls his incestuous-marriage with Agnes of Poitou, who was his kinswoman. He maintains that as the layman confesses to the priest, the priest to the bishop, and the bishop to the Pope, so the Pope confesses to God only, to God who had reserved him to His own judgment. The emperor, he exclaims indignantly, does not hold the place of Christ, but rather of the devil, when he uses the sword and sheds blood. It is also significant that he protests against the election of the Pope as having been carried out without the counsel and consent of the French bishops, and contends that as they had no share in the election, they were not bound to render obedience.

The attitude of Wazo and of the French writer is very significant, and represents the same principle as that which, as we have seen, was expressed earlier in the century by Thietmar of Merseburg. We must, however, observe that the condemnation of Henry's action does not seem to have been shared by important members of the reforming party in the Church. The most eminent Italian representative of reform was Peter Damian, and it is clear that he had the highest opinion of Henry III and of the services which he had rendered to the Church, especially in attacking the simoniacal practices which were already so prevalent in it. In a treatise written during the pontificate of Leo IX he even says that it was specially due to his services in this respect, that the divine dispensation permitted that the Roman Church should be ordered according to his will, and that no one should be elected to the Apostolic See without his authority.

Another of the most eminent reforming prelates of this period, Humbert, Cardinal of Silva Candida, in his treatise, 'Adversus Simoniacos', refers in the warmest terms to the great service Henry III had rendered to the Church by his action against simony. And, it should be observed, that even Gregory VII refers in the highest terms to Henry III, and speaks of him and his wife with great admiration.

It is at least clear, from the consideration of these divergent opinions, that even those who were most zealous for the reformation of the Church were by no means fully agreed in their judgment upon the action of Henry III at Sutri.

The question of the right of the emperor to some share in the appointment of the Popes was in some respects different. It does not appear that any one had so far seriously questioned the propriety of the emperor having some part in this, but the nature of that part was uncertain. We must now briefly consider the history of the question from the time of the Council of Sutri down to that of Pope Nicholas II and his decree with regard to the method of papal elections.

Henry III had received at Rome the title of "Patricius", and as some writers seem to suggest, this carried with it some special authority in the election of a Pope. As we have seen, Clement II died in 1047, the year after his appointment, and Poppo of Brixen was appointed as Damasus II by the emperor and his court in Germany, apparently before Wazo's letter, deprecating any election while Gregory VI was alive, had reached the emperor. When, however, Damasus II died in the same year, it became evident that the question of the right method of electing the Pope had begun seriously to affect the minds of men. We have more than one account of the election of Bruno of Toul as Leo IX. The first of these, which is contained in the history of the Church of Rheims by Anselm, relates how, on the death of Pope Damasus II, the Romans announced this to Henry III, and asked that he should appoint another in his place. The emperor, having consulted the bishops and "optimates" of the Empire, selected Bruno of Toul, a man distinguished for his character and learning and a kinsman of his own. The "insignia" of the Apostolic dignity were adjudged to him, and he was sent to Rome "ad haec secundum ecclesiasticas sanctiones suscipiendas". On his arrival there he was received with honour by the Roman people, and enthroned in the chair of St Peter as Leo IX.

In the life of Leo IX, however, which was written by Wibert, who had been Archdeacon of Toul under him, we have a great deal of additional and highly significant detail. The author represents Leo as being elected in the presence of the Emperor Henry III at Worms by a council of the bishops and *proceres*. He demanded three days' time for consideration, and spent them in fasting and prayer, and then declared his readiness to accept the office, but only on the condition that he should be assured of the consent of the whole clergy and people of Rome. He drew near to Rome walking on bare feet, and when he reached the city he announced the imperial election, but demanded that they should declare their will, whatever it might be, protesting that according to the canons the election of the clergy and people must precede all other authority, and assured them that he would gladly return to his home if they were not pleased to elect him. It was only when he saw that they unanimously acclaimed him that he finally consented to be enthroned. We must, perhaps, allow for the possibility that the narrative may he, to some extent, coloured by the principles of the writer, but even when we make allowance for this it remains very significant. It does not seem to have been denied that the emperor should have some voice in the appointment of the Pope, hut he could not neglect or override the rights of the clergy and people of Rome as the primary electing body.

The appointment in 1054 of the successor of Leo IX, Gebhardt, Bishop of Eichstadt (Victor II), is described in somewhat different terms by different authorities, but it seems clear that the election was made by the emperor himself, with the advice of his bishops and court, and with the consent of the representatives of the Roman Church.

There is no trace of any consultation of the imperial court in relation to the election of Stephen IX (1057), but on his death in the following year the aristocratic factions in Rome endeavoured to reassert themselves, and procured the election of the Bishop of Velletri as Benedict X. The cardinals, however, refused to recognise him, and with the sanction of the imperial court proceeded to elect Nicholas II at Siena. It was no doubt this attempt of the Roman factions which led Nicholas II to promulgate his famous decree for the regulation of the method of papal elections in April 1059. The most important provisions of this are—the primary place given to the cardinal bishops and the other cardinals in the election : the permission in case of necessity to proceed to the election of a Pope outside of Rome, who should exercise the full authority of the Papal See, even if he could not at once be enthroned in Rome; and, finally, the recognition of the relation of Henry and his successors to the election. The phrases are vague, but certainly seem to imply that in normal circumstances they were to have a legitimate place in the process of the appointment of a Pope.

CHAPTER III.
THE APPOINTMENT OF BISHOPS TO 1075.

In the first volume of this work we have endeavoured to point out briefly the principles which were generally recognised in the ninth century as governing the appointment of bishops in the Carolingian Empire. We have stated our own conclusion that it was held that a proper appointment normally included a number of different elements—the election by the clergy and people of the diocese, the approval of the comprovincial bishops and the metropolitan, and the consent of the prince, and that it was generally recognised that no one of these elements should be neglected. No doubt the practice of the time was often a little uncertain, but the principles acknowledged were clear, and there was no serious dispute about them. We have now to consider briefly the history of the question until the time, *i.e.* 1075, when the great dispute about episcopal appointments broke out between the Papacy and the Empire. It is indeed necessary to consider this with some care if we are to understand the real nature of that great conflict and to do justice to the various points of view represented in it, and if we are to escape from that vicious and unhistorical conception which regards that great conflict as representing either mere ecclesiastical aggression or mere secular tyranny.

It seems to us quite clear that until the beginning of the great conflict the principles represented in the literature of the ninth century continued to be accepted, and that in theory at least it would have been recognised that the election of the clergy and people, the consent of the comprovincial bishops and the metropolitan, and the approval of the prince, were all normally elements in the legitimate appointment of a bishop. We must examine the evidence in some little detail.

In a treatise of Atto, who became Bishop of Vercelli in the year 945 and died in 961, we find the conditions of an episcopal appointment set out with great clearness. The clergy and people, according to the canons, must have the free and unimpeded right of electing the person whom they think best. The person who is thus elected must then be carefully examined by the metropolitan and the other bishops of the province, and if they find him guilty of some grave fault they are to refuse to consecrate. If, however, they find him worthy of the office, then after due notice to the prince of the territory in which the diocese is situated, and with his consent, he is to be consecrated.

The same principles are stated in what seems to be a formula for election contained in a work of *Odoramnus*, a monk of St Peter at Sens, which belongs to the first half of the eleventh century. The Church of Sens proclaims the appointment of a bishop, with the consent and will of the King of the Franks, the comprovincial bishops, the great men, the abbots and clergy, and the faithful of both sexes.

In these passages we have what seems to us to have been the normal judgment of the times upon the proper conditions of the appointment of a bishop. It is true, however, that the discussion of these questions usually arose under the terms of a more or less controversial assertion of the importance of this or that element in the appointment. This has indeed been the source of a certain confusion in the discussion of the subject, for to the unwary or hasty student, such references might often seem to assert the necessity of one element to the exclusion of others. We must, therefore, approach the consideration of the subject with caution.

In the first place, we may consider some passages which assert the principle of election by the clergy and people as normal or necessary. In a work of Abbo, Abbot of Fleury, in the latter part of the tenth century, to which reference has frequently been made in vol. III., we have a very comprehensive affirmation of the election principle in Church and State. There are, he says, three generales" elections known to him : that of the king or emperor, by the agreement of the whole kingdom; that of the bishop, by the unanimous agreement of the citizens and clergy; and that of the abbot, by the wiser judgment of the monastic congregation.

Alongside of this, we may put some more specific references to the question made by Fulbert, who was Bishop of Chartres from 1006 to 1028. In one of his letters he emphatically refused to take part in the consecration of a certain Theodosius as bishop, on the ground that the prince had no right to thrust a person on the diocese in such a way that neither the clergy nor the people nor the other bishops could exercise a free choice. That Fulbert did not, however, intend to deny that the prince had his proper place in determining the appointment to a bishopric seems evident from another letter. This is addressed to a certain Avisgaudus, who had resigned his bishopric, and after the appointment of his successor wished to return to it. Fulbert points out that he has no right to do this, seeing that his successor had been appointed after the election of the clergy, the vote of the people, the grant of the king, and the approval of the Roman Pontiff, by the metropolitan, the Archbishop of Sens.

Later, in the eleventh century, we find the principle of the need of the election by the clergy and people very strongly affirmed and enforced by the reforming school in Church and State. At the Council which was held by Leo IX at Rheims in 1049, a canon was promulgated, that no one should be advanced to rule in the Church without the election of the clergy and people. At the Council held at Mainz by him in the same year, two claimants appeared for the archbishopric of Besançon, Berthold, who claimed that he had received the investiture from Rudolph, the King of Burgundy, and had been consecrated by the bishops of the province; and Hugh, who protested that Berthold had not been elected or received by the clergy and people, but had purchased his appointment from the king with money, while he himself had been elected by the clergy and the people. The Council, after considering the canonical rules, decided that Berthold, inasmuch as he had not been elected by the sons of the Church, and had not been received by them as their pastor, but had always been repudiated, neither could nor ought to have been imposed upon an unwilling people; while Hugh, who had been demanded and elected by the clergy and people as their archbishop, and had held the see for so long a time without reproach, should occupy it in peace, for he was the true shepherd who had entered by the door, and he who came in otherwise was a thief and a robber. It is noticeable that the decree of the Council was not based upon the charge of simony, which Hugh had brought against Berthold, which may not have been substantiated, but on the ground that the rights of the clergy and people in election had been overriden. And it is further noteworthy that, as we have mentioned in a previous chapter, the Emperor Henry III was present at the Council, and that it is specially mentioned that he gave his approval to the decision.

If in these passages we find the clear assertion of the principle that the bishop must be elected by the clergy and people of the diocese, we can also find in the literature of the tenth and eleventh centuries many passages which might be interpreted as implying that the secular ruler, whether king or emperor, really possessed an unlimited power in making ecclesiastical appointments. In the life of St Udalric, which was probably written in the last years of the tenth century, it is in one place said that he asked the emperor that, after his own death, he should confer the bishopric which he occupied upon Adalbero his nephew, and that the emperor promised that he would do this. We shall presently have to consider the passage in which the author of the life describes some of the actual circumstances of the appointment of St Udalric's successor; in the meanwhile it is important to observe the somewhat arbitrary manner in which the emperor is represented as acceding to this very irregular request.

Again, it is noticeable that Ratherius of Verona, while he vigorously maintains the greater dignity of the bishop as compared with that of the king, and urges that while kings are "instituted" by the bishops, they cannot ordain bishops, yet speaks of kings as having power to elect or designate the bishop.

Again, Rodolfus Glaber, while denouncing simony with great vigour, both in his own person and in an address which he represents Henry III as making to the bishops of Gaul and Germany, seems to assume that kings have the right of appointing to sacred offices.

It would be quite natural if the hasty student were to judge from such passages as these that at this time episcopal appointments were for the most part made by the secular rulers without any reference to the wishes of the clergy and people, or other ecclesiastical authorities. And yet, in truth, no such conclusion should be drawn, and the real nature of the situation is best understood when we observe that it is quite possible to find apparently inconsistent statements with regard to this question in the writings of some of the most eminent Churchmen of these times.

In the correspondence of Gerbert, afterwards Pope Silvester II, we can find passages which might serve to defend almost any view of the proper method of appointment to Church offices. In what seems to be a draft of a letter to be written in the name of Adalbero, the Archbishop of Rheims, to the Empress Theophano, the widow of Otto II, she is asked, if there should be a vacant bishopric, not to confer it upon any one who is not recommended to her by the archbishop, and in particular to confer one upon Gerbert. In another letter written in the name of the same archbishop, Adalbero appears as having permitted his nephew to accept a bishopric conferred on him by the king. In another letter again, written probably in the name of the Archbishop of Trier, he denounces the people of Verdun for their unwillingness to accept another Adalbero as their bishop when he had been appointed by the king, with the consent and approval of the bishops of the province. Again, in a letter written in the name of Otto III, Otto is represented as saying that he had bestowed the Abbey of St Vincent, at Capua, upon a certain monk.

If we were to judge from these passages alone, we should naturally come to the conclusion that Gerbert looked upon the appointment to ecclesiastical office as belonging to the secular authorities, with some regard at most to the rights of the comprovincial bishops. When, however, we examine his letters more completely, we find that at other times they represent quite a different attitude. In a letter written in the name of the abbots of the monasteries of Rheims to the monks of Fleury, he speaks with indignation and contempt of someone who claimed an abbey apparently in virtue simply of a royal appointment. Again, in the document announcing the election of Arnulf to the archbishopric of Rheims in 989, the bishops of the province are represented as saying that they, with all the clergy, with the acclamation of the people, and with the consent of the kings, elect him as their head. In the letter of the same bishops announcing the election of Gerbert himself as Archbishop of Rheims, after Arnulf had been deposed by the Council of Verzy in 991, there is a very interesting discussion of the true meaning of the requirement of election by the people. They say that they had elected Arnulf under the influence of the popular clamour, inasmuch as the Scripture said, “The voice of the people is the voice of God”, and the canons required the desire and wishes of the clergy and people in the election of a bishop. They had not, they say, understood that it is not always true that the voice of the people is the voice of God, and that therefore it is not the wishes of all the clergy and people which are to be considered in the election of a bishop, but only those of the simple and uncorrupted. They quote the Fathers as saying that the election of a bishop must not be made by a mob, but that it should be in the hands of the bishops, that they might prove him who was to be consecrated. They, therefore, the bishops of the province of Rheims, with the favour and approval of the kings, Hugh and Robert, and the assent of those of the clergy and people, who are God’s, declare that they have elected the Abbot Gerbert as their archbishop.

When we take account of all these passages, it is plain that Gerbert was well aware that the appointment of bishops and abbots was not a matter for the arbitrary decision of the secular power, but that the community of the diocese, whether clerical or lay, and the bishops of the province, in the one case, and the community of the abbey in the other, had their just and legal rights.

The correspondence of Gerbert may serve to illustrate the great need of caution in the interpretation of the occasional phrases of writers of the tenth and eleventh centuries, and the works of Peter Damian make it very clear that even in the third quarter of the eleventh century the most distinguished representative of the reforming party still recognised the complexity of the elements

which constituted a legitimate and well-ordered ecclesiastical appointment. By this time the Church was alive to the need of dealing rigorously with simony—we shall discuss this question in detail a little later—and reforming Churchmen, like Peter Damian, were continually denouncing this vice, and advocating the most stringent measures for its suppression; but this does not mean that they doubted or denied the propriety of the secular authorities taking their part in ecclesiastical appointments.

In one of Peter Damian's smaller treatises, for instance, he attacks with great vigour the custom of appointing men to bishoprics because of the services which they had rendered in the administration of secular offices, as clerics of the royal or imperial chapels; and he urges upon princes and all others who had the right of appointing to ecclesiastical offices the duty of remembering that they must not use their authority in an arbitrary or capricious fashion. He warns them, that is, against the abuse of their authority; he does not suggest that the authority itself is illegitimate. In another place, in a letter to the clergy and people of Paenza, he recognises indeed very explicitly their right to elect their bishop, and the place of the Pope in his appointment; but he praises them that they had determined not to proceed to an election until the arrival of the King. In a letter to Cadalous of Parma, who had been elected to the Papacy as Honorius II, in 1061, by a synod of German and Lombard bishops, in opposition to Alexander II, Peter inveighs in somewhat unmeasured terms against his presumption in venturing to claim the Roman See without the will of the Roman Church; not to speak of the Senate, the inferior clergy, and the people, he ought to have recognised the place of the Cardinal Bishops, who played the principal part in the election of the Roman Pontiff. The canonical authority decreed that even in the humblest church the clergy should have a free judgment about him who was to be set over them. Further on he sums up the principal elements in a just election to the See of Rome. The Cardinal Bishops, he says, play the first part; then comes the assent of clergy in general, and thirdly the approval of the people. Finally, the matter is to wait until the royal authority has been consulted, unless, as had been the case in the election of Alexander II, the circumstances were of such a kind that it was dangerous to wait. The phrases of this letter seem clearly to refer to the new regulation of Pope Nicholas II for papal elections, and we cite it here as illustrating the fact that Peter Damian recognised both the rights of the clergy and people in election to bishoprics, and also the right of the king or emperor to be consulted.

Perhaps the best illustration of the principles of ecclesiastical appointments during this period is to be found in the accounts of some elections which have been preserved. The first we shall notice is contained in that life of St Udalric, to which we have already referred. It tells us that after his death the envoys of the diocese were sent to the Emperor, carrying with them his pastoral staff. A certain Count Burchardt succeeded in intercepting them, and persuaded them that the Emperor had determined that his son should be the bishop. The envoys are said to have known that it was in their power either to elect him or not; finally they did this, and then proceeded on their way to the Court to obtain the Emperor's confirmation for their election.

With this may he compared the account given by Fulbert of Chartres of the circumstances attending the succession to the Abbey of St Peter. When the abbot was dying a certain Megenard went to Theobald, the Count (of Chartres), to ask for the abbacy. The Count sent him back to the monks, desiring them to receive him as their abbot; but they replied that no one could become abbot while the previous one was still alive, or except by the election of the brethren. When shortly afterwards the abbot died, the monks decided that they did not want Megenard as abbot, and determined to send representatives to the Count announcing his death, and asking for his permission to proceed to an election. Two of the monks, however, went off privately to the Count, and represented to him that the brethren had elected Megenard; and the Count, gratified with their compliance, immediately handed over the pastoral staff. The other monks were extremely indignant, and wrote to the Count denying that they had elected him, but he compelled them to receive him.

We have another interesting and detailed account of an election in the life of St Lietbert, Bishop of Cambrai. On the vacancy of the see he was elected to the bishopric by the clergy and people, and he and the representatives of the Church of Cambrai were then sent to the court of Henry III to report to him the death of the last bishop and the election of Lietbert. Henry announced that he would with them elect Lietbert Bishop of Cambrai. The matter was then reported, with the assent of the bishops of the province, to the Archbishop of Rheims, as metropolitan, in accordance with his legal rights, and he gave his approval.

More important, however, than these narratives is the very detailed account of the circumstances attending the appointment of Wazo as Bishop of Liège. On the death of Bishop Nithard in 1041 he was, in spite of his reluctance, elected unanimously. He protested that his election would be displeasing to the King, and urged that they should wait to know his will; but his objection was overruled, and he was elected and sent to Ratisbon, where Henry III then was. On Wazo's arrival there the episcopal staff was handed over to the King with the letter of the Church of Liège. On the following day the King considered the matter with the bishops and the princes of the palace. A number of them maintained that the election, having been held without the approval of the King, should be set aside, and urged that a bishop should be chosen from the clergy of the royal chapel, among whom Wazo had never served. The opinion of these persons might have prevailed if it had not been for the intervention of Hermann, Archbishop of Cologne, and of Bruno, Bishop of Würzburg, who finally persuaded Henry to accept the election of Wazo.

In these narratives we can probably recognise the normal conception and method of appointment during this period. The clergy and people of the diocese or abbey claimed the right of election, but the prince had to give big sanction. We should gather that the person whom the diocese had chosen was sent with the pastoral staff of the bishop to the king, and, if he approved the choice, he would invest him with this. If, however, the king was not satisfied with their election, he might not only refuse his consent, hut might proceed to another appointment himself. The person thus appointed would then be sent to the metropolitan, for he and the bishops of the province had the right to be consulted before his consecration.

It is well finally to notice that we can also see that in a number of cases in the tenth and eleventh centuries the Pope took an important part in the appointment of bishops. Pope John XIII is spoken of as appointing an Archbishop of Salzburg on the election of the Bavarians, lay and clerical. Pope Gregory V is represented as confirming and corroborating the command of the Emperor, the judgment of the bishops, and the consent and acclamation of the clergy and notables of the diocese, and appointing a certain Arnulf to the bishopric of Auxonne. Clement II confirms the election of an Archbishop of Salerno by the clergy, the people, and the prince. Alexander II gives his formal assent to the appointment of an Archbishop of Rouen by William the Conqueror; and, as we shall have occasion to consider later, the Papacy is said to have claimed, under the advice of Hildebrand, that no election to the archbishopric of Milan was valid without the papal consent. What exactly was the rationale of the papal position in ecclesiastical elections we cannot here discuss, but it is important to observe these illustrations of it.

CHAPTER IV.
THE RELATIVE DIGNITY OF THE TEMPORAL AND SPIRITUAL POWERS.

Enough has been said to make it clear that, while probably every one in the tenth and eleventh centuries would have recognised certain general principles as determining the relative position of the two great authorities, the actual demarcation of the exact sphere of each authority was somewhat uncertain and fluctuating. The secular authority had its ecclesiastical responsibilities, and the ecclesiastical its political, while in the direction and control of many ecclesiastical matters the Christian people, the laity, had an undetermined but real place. It will be useful to notice a little further some of the conceptions of the time, which illustrate j in an undeveloped form the questions round which the later conflicts turned, and the judgment of some great Churchmen on them.

We can find phrases which assert very emphatically the superior dignity of the Spiritual as compared with the Temporal power. We have referred in the last volume frequently to that interesting but somewhat strange prelate of the tenth century, Ratherius of Verona. In his writings we find the confident expression of his conviction of the superiority of his office and position to that of the king. He had become Bishop of Verona through the influence of Hugh, the King of Italy, but quarrelling with him, was imprisoned for a time in Pavia. In his treatise entitled ‘Praeloquiorum’, he deals very frankly with the king, and admonishes him to venerate the bishops, and to remember that they have been set over him, and not he over them, and he cites the story of Rufinus about Constantine, and his humility in presence of the bishops at the Council of Nice. He claims that bishops could not be judged except by God Himself, and that bishops were on a higher level than kings, for kings were created (*instituti*) by bishops, but bishops could not be ordained by kings.

Again, in a treatise ascribed to Pope Silvester II (Gerbert), he urges bishops to remember that no dignity can be compared with theirs, that the crowns of kings are in comparison with the mitres of bishops as lead compared to gold, and that kings and princes bow their necks to the priest and reverence his decrees.

We shall perhaps find the most significant and weighty assertion of this principle in some words attributed to that Wazo, Bishop of Liège, to whom we have already referred several times. His biographer relates how on one occasion, when attending the court of the Emperor Henry III, he asked that he should be provided with a seat, for it was not seemly that one who had been anointed with the holy chrism should not receive due respect. The Emperor said that he also had received his authority with the anointing of the holy oil, but Wazo replied that this unction which he had received was very different from that of the priest, and greatly inferior, for it was the sign of the power of death, while that of the priest was the sign of the power of life.

When, however, we have recognised how emphatic, even in those times, was the claim that the Spiritual power was superior in dignity to the Temporal, we must be careful to observe that this did not at all mean that the ecclesiastical person was not subject to the secular in secular matters. The greater clergy, that is the bishops and abbots of the greater monasteries, were by the end of the tenth century, in almost all cases, the vassals of the emperor or king, or of some great lord, and as such they owed them loyalty and were subject, with respect to their feudal tenure, to the jurisdiction of the feudal courts.

We have cited above the words in which Gerbert, as Pope Silvester II, speaks of the dignity of the bishop as greater than that of the king; but it is important to observe that the same Gerbert, when he was Abbot of Bobbio, speaks of himself as having once indeed been free, but now as the servant of the Emperor. Again, Wippo, in his life of the Emperor Conrad I, in relating the rising of the “Valvassores” in Lombardy against the greater feudal lords, mentions that he seized three of the Lombard bishops and sent them into exile. It gave, he says, great offence to many that the priests of

Christ should be condemned without a trial, and he specially mentions that Henry, the son of Conrad (afterwards Henry III), was much displeased with his father's action. The bishops indeed would have had no claim to honour had they been deposed by a judicial sentence, but before such a judgment they were entitled to the reverence which is due to the priest. The general disapproval of Conrad's action against the bishops without regard to the proper judicial forms, only brings out more clearly the fact that it was recognised that the bishops were liable to the judgment of the proper courts for offences against the Emperor.

This is brought out even more emphatically in the same life of Wazo of Liège which we have just cited. Wiger, the Archbishop of Ravenna, was accused of various ecclesiastical irregularities, and summoned to the court of the Emperor, and the matter was referred to the bishops. There was much hesitation among them, but Wazo declared that an Italian bishop could not be judged by a northern one. At last, when called upon by the Emperor in the name of his obedience to give his opinion on the whole matter, he replied that they, the bishops, owed obedience to the Pope and fidelity to the Emperor; that they had to render account to the latter with regard to secular matters, but to the former with respect to spiritual; if, therefore, the Archbishop of Ravenna had committed an offence against the ecclesiastical order, the judgment on this belonged only to the Pope, but if he had acted negligently or unfaithfully in those secular matters which had been entrusted to him by the Emperor, this without doubt should be dealt with by him.

Wazo's determination to maintain the autonomy of the spiritual authority within its own sphere is evident, but equally evident is his judgment that with regard to secular matters the bishops were subject to the judgment of the secular authority.

It may perhaps serve to bring out most clearly the complexity of men's conception of the character and relations of the Temporal and Spiritual powers if we again consider briefly the position of Peter Damian, to whom we have already referred several times. He was, as we have said, one of the most convinced and energetic promoters of the reform of Church order and discipline in the third quarter of the eleventh century, but died just before the great conflict between the Empire and the Papacy broke into open flame.

It would be quite easy to bring forward passages from his writings which might, if taken alone, seem to show that his position was that of either the one or the other of the two great parties into which Europe was presently to be divided. As we have already seen, he recognised very clearly, in spite of his zeal for the reform of the methods of ecclesiastical appointments, the legitimate place of the secular authority in regard to them. In his letter to the people of Faenza he commends their determination not to proceed to the election of their bishop till the King (Henry III) should arrive. While warning the secular princes against the error of thinking that they have arbitrary rights of appointment, he seems clearly to recognise their rights. Even with respect to appointments to the Papal See, he seems clearly to interpret the decree of Pope Nicholas II as implying that the election was not to be reckoned as complete until it had been submitted to the royal authority. And in his references to Henry III he recognises, as we have seen, in the most unqualified terms the service which he had rendered to the Church in purging it from simony, and compares him to King Josiah, who, when he had found the Book of the Law, overthrew the altars and the abominable idols and superstitions of former kings, and says that it was because he refused to follow the corrupt example of his predecessors that, by the divine dispensation, it had come about that the Roman Church was now ordered according to his will, and that no one should be elected to the Roman See without his authority.

If, however, from such passages as these we may justly infer that Peter Damian admitted the propriety of the intervention of the Temporal power in ecclesiastical affairs, we can also find in his writings phrases which express a very high sense of the superiority of the Spiritual power over the Temporal. In one place he describes the Pope as the King of Kings and Prince of Emperors, who

excels all men in honour and dignity. It is Peter Damian who apparently first used some words which were frequently cited in the later controversies. He speaks of Christ as having committed to St Peter "beato vitae aeternae clavigero, terreni simul et coelestis imperii iura"; and, in another place, as having committed to St Peter the laws of heaven and earth.

These phrases have an important history, and were often interpreted as implying that the successor of St Peter had in some sense authority in temporal as well as spiritual matters and organisations. What exactly Peter Damian may have himself meant by these words is exceedingly difficult to say : the contexts in which they occur do not throw any light upon the interpretation. It seems to us, from an examination of his whole works, extremely improbable that he meant to assert the supremacy of the Spiritual power over the Temporal in temporal matters, but certainly he did mean to assert the great superiority in dignity of the Spiritual power, and the principle that even the greatest men, kings and emperors, were subject to the spiritual authority of the Pope.

Once at least his language suggests an ominous anticipation of the great conflicts which were soon to break out. In a letter addressed to Henry IV he exhorts him to support the Church and the true Pope, Alexander II, against Cadalous of Parma, the anti-pope, who had been elected by a council of Lombard and German bishops in 1061; and he urges that Henry will be worthy of blame if he does not do this, and that the king only deserves obedience when he obeys his Creator—if he disobeys the divine commands he may rightfully (lawfully) be deposed by his subjects.

When, however, we have taken account of the various aspects of the conceptions of Peter Damian, it remains quite clear that his normal judgment on the relation of the Temporal and Spiritual powers is practically based upon what we have called the Gelasian tradition—that is, the conception set out in the fifth century by Pope Gelasius I, of the autonomy of each of the great powers within its own sphere. We think that this is implied in a number of passages in his writings, and under terms which are interesting and important.

In that same letter to Henry IV, from which we have just quoted, Peter Damian speaks of the close union which ought to exist between the royal and the priestly power, for each has need of the other. The priesthood is protected by the kingdom, and the kingdom by the sanctity of the priestly office. The king is girded with the sword to resist the enemies of the Church, while the priest gives himself to prayer that he may propitiate God to the king and people. In another place he very carefully distinguishes the functions of the two powers : the function of the priest is to abound in compassion, and to cherish the children with motherly love; the function of the judge is to punish the wicked, to deliver the innocent from their hands; he must always remember the words of the apostle : "Wouldest thou have no fear of the power? Do that which is good, and thou shalt have praise of the same: for he is the minister of God to thee for good. But if thou doest that which is evil, be afraid; for he bareth not the sword in vain". There is a great difference between the sword of the prince and the *infula* of the priest.

In another place he expresses the same judgment in slightly different phrases. The tribunal of the judge is clearly different from the seat of the priest. The judge bears the sword that he may punish those who live unrighteously; the priest is content with the staff of innocence that he may maintain a quiet and peaceable discipline. And, in yet another place, he sets out the same principle under the terms of the two swords, and he describes the felicity of that condition of things when the sword of the kingdom is joined to the sword of the priest, when the sword of the priest tempers that of the king, and the sword of the king sharpens that of the priest; for these are the two swords spoken of at the time of the Lord's Passion. Then, indeed, will the Kingdom and the priesthood be set forward and honoured, when they are joined in this happy union.

The two swords are both from God : both represent the divine authority, and they ought to be in the closest alliance with each other; but it is very noteworthy that Peter Damian talks of them as

quite distinct and independent, and that he in no way suggests that conception, which appeared later, that both swords belonged to the Spiritual power.

PART II.
THE INVESTITURE CONTROVERSY.

CHAPTER I.
SIMONY.

We have endeavoured to consider the relations of the temporal and spiritual authorities during the tenth century and the first seventy years of the eleventh, and we think that it will he evident to any one who examines the history of the subject dispassionately that, while there was much in these relations difficult and in various ways unsatisfactory, yet that it is on the whole true to say that the relations were friendly and sympathetic. There is no evidence that there was any settled desire upon the part of the emperors or kings to invade the liberties of the Church, or on the part of the Popes or bishops to claim any political authority beyond that which had been recognised in the tradition of the ninth and tenth centuries. We may very well say that so far the two authorities were working together for the progress of European civilisation, not without occasional friction, but on the whole in harmony, and, as far as the best representatives of each were concerned, with a large measure of mutual understanding.

We have to consider the history of a time during which all this was changed, and the peace and cooperation of the earlier time were exchanged for violent conflict and mutual animosity. We must, indeed, guard against a mistake into which the unwary may fall. The conflicts of the two powers were not continual from Hildebrand to Innocent III: during many years in that period the relations of Emperor and Pope were friendly. It may, indeed, be urged that this was abnormal, and that normally during this time their relations were hostile, that no solution of the conflicting claims had been reached, and that these intervals of tranquillity were only like the periods of an armed truce in a great campaign. It would be premature to pronounce a definite judgment upon this view till we have examined our materials in detail: we must bear in mind that it is just this subject which we have to examine, and we must lay aside our preconceptions if we are to hope to do this with any success.

The first aspect under which we must consider the great conflict is that which is generally known as the “Investiture” controversy, or to put it in broader and more correct terms, the question of the place of the secular authority in the appointment to ecclesiastical offices. It is still difficult to be quite certain about all the circumstances which, in the third quarter of the eleventh century, caused this question, with apparent suddenness, to become so important; but it is possible now, at least, to trace and to recognise some of the facts, and some of the movements of feeling and opinion which lay behind this.

It seems to us to be clear that this conflict, like other movements in the Church, arose out of a great spiritual revival. Behind the noise of ecclesiastical strife there lay the profound and far-reaching influence of the religious revival which had found its centre in the latter part of the tenth century in the Abbey of Cluny. It was not, indeed, that the secular authorities were in any way hostile to this reformation; on the contrary, it is clear that some of the emperors, both of the Saxon and Franconian houses, were among its most energetic supporters; and yet it is also true that the movement did ultimately raise questions which proved to be subversive and hard of solution.

The two questions on which in the end the Cluniac reformation brought the Spiritual and Temporal powers into collision with each other were, first, the question of simony, and second, the question of the place of the greater clergy in the administration of political affairs. It is, indeed, true that some of the greatest emperors, like Henry III, did a great deal to assist the reforming Popes and bishops to suppress the venality of ecclesiastical appointments, but it was only some whose convictions were sufficiently strong to enable them to resist the financial temptation. The question of

the place of the greater clergy in the political structure of the Empire and of other countries was probably even more difficult. The bishops and abbots were the mainstay of the national and general as distinguished from the local and particular interests. The development of the hereditary principle in feudalism had in great measure broken up the administrative system of political society; it was only in the twelfth and thirteenth centuries that in England and France the national monarchy slowly built up a new administrative system powerful enough to counteract the disintegrating forces of feudalism. In the tenth and eleventh centuries the bishops and abbots, and the clergy of the royal and imperial chapels, represented the main elements on which the kings and emperors could construct a system of government, and it was a matter of imperative necessity that they should be men of administrative training upon whose personal loyalty they could depend. It was, therefore, of the greatest importance that the secular authorities should possess a predominant influence in the selection of men for ecclesiastical office, and it was natural that they should generally find the men best suited for this among those who had served their apprenticeship in the royal chapel. It was almost inevitable that in the long run the reforming party should come into conflict with the political authorities over this very point, for to the religious reformer it was above all things essential that the bishops and abbots should be men controlled by religious principles and devoted to the interests of the Church. The wiser and more religious-minded rulers, like Henry III or William the Conqueror, would indeed recognise this, but the lesser men, the more unscrupulous and short-sighted, would not do so.

We cannot here discuss the whole history of the growth of simoniacal practices in the mediaeval Church; we must content ourselves with a brief account of the conditions as they appear in the literature of the eleventh century. Rodolfus Glaber gives in general terms a very gloomy account of the conditions as they had existed for some time. Even the kings, he says, who ought to have been careful to see that fit men were appointed to the government of the Church, rather deemed those to be the most suitable from whom they received the largest gifts. In another place, he reports a speech addressed by the Emperor Henry III to the bishops of Germany and "Gaul" on the same matter, and represents him as saying that he was well aware of the extent of the simoniacal practices, and that he acknowledged that his father (the Emperor Conrad the Salic) had been greatly guilty in the matter. He reports also that Henry proposed that it should be decreed for the whole Empire that no clerical rank or ecclesiastical office should be obtained for a price; and that if any one dared either to give or to receive this he should be deprived of his office and anathematised; and that for his part he promised that, as God had freely given him the imperial crown, he would freely give whatever pertained to religion.

Humbert, Cardinal of Silva Candida, was one of those northern ecclesiastics of the reforming school whom Bruno of Toul brought with him to Italy when he became Pope as Leo IX, in 1048. In one place he says that, from the time of the Othos to that of Henry III, the vice of simony had prevailed in Germany, the "Gauls", and Italy. Henry III had indeed done something to remove it, and had desired to destroy it wholly, but had been cut off by a premature death. Humbert denounces with special vehemence the contemporary King Henry I. of France, who had so far persisted in this vice. In another place he says that every one, from the highest to the lowest, was engaged in the traffic in ecclesiastical things; that emperors, kings, princes, and all other secular authorities, who ought to defend the Church, forsook their own proper work that they might possess themselves of the property of the Church. Simony had indeed begun even in apostolic times, but had disappeared in the time of persecution; it was with the restoration of peace to the Church, and the submission of the emperor to the authority of the priest, that it had revived, for the prosperity of the Church stimulated men's cupidity. He represents the matter as having gone so far, and become so open and shameless, that anyone who desired a place of authority in Church or State had to pledge himself by oath to maintain the simoniacal persons in their pretended rights. The emperor himself had to swear that, so far from

maintaining the laws of his pious predecessors against simony, he would render them null and void. He says that he had known it to happen that, in order to pay the price which he had promised, the wretched simoniacal purchaser was actually compelled to strip off the precious marbles of the churches, and even the very tiles from their roofs; and in another place he describes in lamentable terms the ruin and desolation of the churches and monasteries, especially in Italy, which had been brought about by this vice.

Lambert of Hersfeld represents the Archbishop of Bremen and Count Werner, while they controlled the government during the minority of Henry IV, as selling all offices, whether ecclesiastical or secular, and especially the abbacies.

We must not indeed take such statements as these too literally, we must be prepared to allow for something at least of exaggeration in the picture which they present of the condition of the Church; but there is no reason to doubt that it was substantially true, and there was no question of Church order to which the reformers felt it more necessary to turn their attention. We have already dealt with the history of the deposition of the Pope at Sutri, and have noted the gratitude which many of the most eminent reformers express to Henry III for his work both in this matter, and in regard to the whole matter of simony.

We have a detailed account of the proceedings which Pope Leo IX took for the suppression of simony in France. He summoned a Council of the bishops and abbots at Rheims in 1049, and invited the attendance of the King of the French. His courtiers urged upon him that it would be in the highest degree dangerous to the honour of his kingdom if he were to support the Pope in holding a Council in France, and that this had not been permitted by his predecessors, and they urged him to summon the bishops and abbots to attend him on an expedition against the disturbed parts of the kingdom, so that they might not be able to attend the Council. The King accordingly replied to the Pope that he and his bishops would not be able to attend the Council, and urged him to postpone his visit to France. Leo IX replied that he could not do this, and must hold the Council with those who could be present. When the Council met, several bishops and abbots were deposed for various offences, especially for simony, and the Archbishop of Rheims was ordered to present himself at a Council to be held later in Rome, and there to purge himself of the charge of simony which had been brought against him. The Council issued a canon, laying down the principle that no one should be promoted to a bishopric without the election of the clergy and people, that no one should buy or sell Holy Orders or ecclesiastical office, and that if any one did obtain them by purchase they should surrender them to the bishop. The canon also provided that no layman should hold a benefice, and that the clergy should not bear arms, or hold secular office. The life of Pope Leo IX by Wibert, the Archdeacon of Toul, gives us a further account of the strong measures which the Pope took, both in Italy and elsewhere, for the suppression of simony, and relates how he deposed both archbishops and bishops who had been guilty of it.

These severe measures of Pope Leo IX were only the first steps in a determined effort of the reforming party in the Church, now led by the reformed Papacy, to suppress the buying and selling of spiritual offices. Indeed so severe was the attitude of some of the reformers that it finally produced a violent controversy among themselves. Some, like Cardinal Humbert, maintained that ordination or consecration obtained by simony was null and void, while others, like Peter Damian, maintained that they were valid, and that while those who were guilty should he deposed, those who had innocently obtained Holy Orders from such persons should be allowed to retain their position. It is not our part here to discuss the significance of the question raised in this controversy, we are here only concerned to observe how great was the evil, and the determination with which the reformers of the eleventh century set themselves to root it out.

For our purposes this question of simony is important chiefly in its relation to the circumstances which brought about the great conflict between the spiritual and temporal authorities.

As we have seen, until the death of Henry III in 1056, the reforming party in the Church had been supported with an evidently sincere zeal by the secular power in its effort to suppress simony. Behind this problem, however, there lay others which, as we have already pointed out, were even more difficult to deal with. It is very noteworthy that Peter Damian is very clear that the Church suffered as much from the promotion of men to bishoprics and abbeys on account of services which they had rendered in the administrative offices of the State as from actual simony. In a letter addressed to Pope Alexander II he urges upon him that no one should be permitted to be made a bishop or to remain in his office who had obtained this *per proemium*, or, what is even more worthy of condemnation, by service at court. In a treatise, which is really directed against the clergy of the court, he says that nothing seemed to him so intolerable as that some men, in their greedy desire for ecclesiastical office, behaved almost as though they were the serfs of men in great position ; and urges that it is just as much an act of simony to obtain a bishopric by service to the king in his court as to purchase it with money; and he warns princes and others who have the power of appointing to offices in the Church that they must not bestow them according to their mere will and pleasure.

Cardinal Humbert deals with the same subject in fiery and passionate phrases. He evidently does not wish to condemn the administrative work of the clergy altogether, indeed he seems to be conscious that there were occasions when such work was of great service, not only to the State but to the Church, but he denounces in emphatic terms the crowds of greedy clerks who thronged the courts of princes and undertook long and laborious service that they might at length obtain some ecclesiastical office. He would indeed term such men simoniacal above all measure who gave not only money but themselves, and complains that Italy especially was full of men who had received Church offices not for their ecclesiastical work, but as a recompense for secular services, sometimes even of a scandalous and disgraceful nature.

These complaints and contentions were no doubt in a great measure well founded and legitimate, and yet it is also clear that the question raised was one of great difficulty. The State had urgent need of the services of men trained in administrative work, and of men upon whose personal loyalty the kings or emperors could depend, and it is difficult to see where they could at that time be found outside of the ecclesiastical profession.

CHAPTER II
THE PROHIBITION OF LAY "INVESTITURE"

We have thus endeavoured to consider some of the conditions or circumstances out of which the conflict between the Empire and the Church arose. It is clear that there was a great evil in the Church, that the buying and selling of Church offices had grown to a point at which the strongest measures of reform were not only justified, but were imperatively required. It is, however, clear also that during the reign of Henry III the imperial authority had been on the side of reform, and that, while there may have been question as to the propriety of some of the actions which had been taken in promoting reform, on the whole the reforming party recognised his sincerity, and was grateful for his energy. We have now to consider the rapid change in the relations of the spiritual and temporal authorities, which in the course of some twenty years (from 1056 to 1076) passed from those of friendly alliance and cooperation to those of a violent hostility.

The Popes, after Sutri, had set their hands to the work of reform, and in their efforts they had received the support of Henry III. Unhappily, he died before the work had been accomplished, and with his death the ecclesiastical conditions of Europe relapsed into confusion. We have already cited the melancholy account of the ecclesiastical condition of Germany during the minority of Henry IV, under the administration of the Archbishop of Bremen and Count Werner; how they treated all offices, ecclesiastical and secular, as matters of buying and selling to such a degree that no man could hope for promotion in Church or State unless he was prepared to purchase it from them. When Henry IV took over the government himself, it would seem that there was little improvement. The Bishop of Bamberg was summoned to Borne in 1070, and was charged with having obtained his bishopric by simony. Lambert of Hersfeld indeed accuses the Pope, Alexander II, of accepting large presents from him, and consequently acquitting him of the charge; but he also relates that he and the Archbishops of Mainz and Cologne were severely reproved by the Pope for having sold Holy Orders, and for having communicated with simoniacal persons, and were required to take a solemn oath that they would not do this again.

Under the following year Lambert relates that Henry IV simoniacally appointed an Abbot of Reichenau, and endeavoured to force upon the Chapter of Constance as bishop a man who was by them accused of simony and theft. The Pope referred the question to the Archbishop of Mainz, and we have the letter in which he represents the great difficulties in which he was involved on account of his obedience to the Pope—the king had evidently threatened him violently if he should refuse to consecrate the Bishop-designate of Constance.

In a letter of Henry IV to Gregory VII, of the year 1073, he acknowledged his faults, and among others, that he had been guilty of simony, and asked the help of his advice and authority in setting these matters right He also speaks of having been guilty of serious faults with regard to the Church of Milan.

Again, under the year 1074, Lambert relates that the legates of the Apostolic See in Germany were careful not to associate with Henry IV, as he had been accused of simoniacal practices. Gregory VII had sent these legates to Germany to deal with persons accused of simony, and they desired to hold a synod. The bishops stoutly resisted this, maintaining that they could not suffer this to be done except by the Pope himself. The Pope had already suspended the Bishop of Bamberg and certain others from the discharge of their sacred functions, until they should purge themselves in his presence. Henry IV, indeed, according to Lambert, was anxious to support the legates, in the expectation that this would result in the deposition of the Bishop of Worms and others who had opposed him in the Saxon war; it was, however, finally found that the matter was too difficult for the legates to deal with, and it was referred to the hearing of the Pope himself.

It was not only in Germany that the question of simony was urgent. We have already considered the severe measures which Leo IX had taken at the Council of Rheims in 1049 to deal with the matter in France, but it is evident that in spite of his efforts the evil had not been removed. It was indeed in Gregory VII's correspondence with the French bishops that he first began to threaten vigorous measures against the secular authorities. In a letter of the year 1073 to the Bishop of Châlons he describes Philip, the King of France, as having gone further in the oppression of the Church than any other prince of this time, and he threatens that if Philip would not abandon the heresy of simony, he would issue such a general excommunication that the French people would refuse any longer to obey him. In the same year he instructs the Archbishop of Lyons to consecrate the Bishop-elect of Autun without waiting further for the consent of the King of France. In the following year Gregory wrote to the archbishops and bishops of France, and denounced Philip as one who could not be called a king, but only a tyrant. He blamed them severely that they had not used their priestly authority to restrain him from his crimes, and commanded them to meet and jointly to address him and denounce his crimes to his face. If the king should refuse to hearken to them, he bade them withdraw themselves from his communion and obedience, and prohibit the public celebration of all divine service throughout France. If Philip would not even then submit, he gave them to know that he would do all in his power to take the French kingdom from him.

Gregory's letters indicate that the crimes with which he charged Philip were not only against the general wellbeing of the Church—in other letters he refers specially to his plundering of Italian merchants in France—but that the degradation and disorder of the Church in France were caused especially by the prevalence of simony, and demanded the most stringent reform; and it is also clear that it threatened to produce the same collision between the temporal and spiritual authorities as in the Empire after the death of Henry III.

It is thus clear that the relations between the temporal and spiritual authorities were becoming difficult, and we think that it is reasonable to say that behind any particular occasions of difference there lay a more general cause, and this was the fact that after the death of Henry III the temporal authority was no longer cooperating with the spiritual in the attempt at reform, but seemed rather to be responsible for the continuance of grave evils, such as simony and the secularisation of the clergy. It was under these circumstances that the Papacy began to develop the policy of limiting or prohibiting the intervention of the secular authority in ecclesiastical appointments. This may have been justifiable and even necessary, but it must be admitted that it was a step of an almost revolutionary character.

In the first part of this volume we have seen that it was not generally disputed that the king or emperor had a legitimate place in the appointment of bishops and abbots, while the rights of the clergy and people of the diocese in election, and of the metropolitan and the other bishops of the province in confirmation were also generally recognised. In actual fact no doubt the prince often determined such appointments with little reference to the wishes of the electors, but it would be a great exaggeration to say that any responsible person thought that these were negligible. It is, however, true that it was with regard to the question of the adjustment of these rights to each other that there first appeared the signs of the future trouble. We have already seen some clear evidence of the growing urgency with which the reforming Churchmen and Church Councils urged the rights of the clergy and the people of a diocese to be consulted in the appointment of a bishop. We have seen how emphatically the Council of Rheims, in 1049, asserted the principle that no one should be appointed to authority in the Church without the election of the clergy and people, and we have seen how the Council of Mainz set aside one of the claimants to the archbishopric of Besançon on the express ground that he had not been chosen by the clergy and people. Lambert of Hersfeld relates the indignation of the clergy and people of Trier, when on the death of Archbishop Eberhard, in 1066, a

certain Cuono was appointed by the intervention of the Archbishop of Cologne without reference to them.

We have had occasion already to consider some of the principles of the two most important writers of the reforming party—that is, of Cardinal Humbert and Peter Damian—and we must now turn again to their work as illustrating the development of this question, but also as making it clear that at least at the outset, even the most eminent reformers did not intend to deny the temporal authority the right to some place in ecclesiastical appointments. In one place Cardinal Humbert lays down in very emphatic terms the conditions of a legitimate and canonical appointment. The man, he says, who is to be raised to the episcopate must first be elected by the clergy, then asked for by the people, and then only is he to be consecrated by the bishops of the province, with the approval of the metropolitan : he who has been consecrated without regard to any one of these conditions is to be reckoned a false, not a true bishop. Humbert's words, indeed, raise two other questions, the one concerning the impropriety of the creation of a bishop without a definite diocese, the other about the relation of the authority of the metropolitan to that of the Apostolic See, but we cannot here deal with these.

In another place he denounces the arrogance and avarice of the princes of his time, who had, in defiance of all divine and human laws, drawn into their own hands the whole authority of bestowing ecclesiastical appointments, and contrasts this with the conditions of the "imperium Transmarinum" (the Eastern Empire), where the control of such appointments was left to the metropolitans and bishops.

If we were to isolate these passages we might conclude that Humbert meant to exclude the secular authority from any part in episcopal appointments, but that this is not his intention is plain when we consider another passage in the same treatise. Here, indeed, he complains bitterly of the subversion of all true order in such appointments : the first had been last, and the last first; the secular power claimed the first place in election, and the people, the clergy, and even the metropolitan had to accept its decision whether they were willing or not. It must, however, be observed that he states the true method of appointment as being that the metropolitan should confirm the election by the clergy, while the prince should confirm the demand of the people; that is, Humbert very clearly recognises that the prince is to be consulted and his approbation secured.

If we turn to Peter Damian it seems clear from the passages which we have already cited from his works that his position was the same as that of Humbert. He protests emphatically against the abuse of the power claimed by the secular power, and asserts the rights of the clergy and people in the election of their bishop, but also he very frankly recognises that the secular power had its reasonable and just place in such appointments.

The position of the reformers was, we think, clear : they were determined to vindicate the freedom of ecclesiastical elections, and to reduce the claims of the secular power to what they conceive to be reasonable limits, but they did not propose to repudiate these altogether. We can, however, carry the matter further, for we think that the correspondence of Gregory VII himself serves to show that at least in the first years of his pontificate he did not refuse to recognise the claims of the secular authority in episcopal appointments.

In a letter of the year 1073 to Humbert, the Archbishop of Lyons, already cited, he instructs him to consecrate a certain Landric, who had been elected by the diocese to the bishopric of Autun, without waiting further for the consent of the King of France. Gregory no doubt sets aside the rights of the King, but he only does it on account of his negligence and delay. In a letter of the same year to Anselm, the Bishop-elect of Lucca, he forbids him to receive the investiture of the bishopric from the king's hand until he had renounced his intercourse with excommunicated persons and made his peace with the Roman See; but it is noticeable that the prohibition is related only to the actual circumstances of the moment. In a letter addressed, in 1074, to the Count of Dié and the faithful

people of that church, he speaks of the Count as having elected the bishop with the consent of all the others—presumably the clergy and people of the diocese. Again, in a letter addressed in the same year to Hubert, the Count, and the people of Fermo, he says that he had entrusted the church to the archdeacon until by his own care and the counsel and permission of the king a suitable person should be found for the bishopric. In a letter of 1075 to Sancho, the King of Aragon, he discusses the arrangements to be made for a diocese in view of the failing health of the bishop. The King and bishop had proposed to him the names of two clerics of whom the one should be made bishop. Gregory refuses to accept either of them on the ground that they were the sons of concubines, but promises to consider the matter if a man of suitable character were recommended to him by the King and the bishop with the approval of the diocese. In January of 1076, in a letter to Henry IV, while he rebukes him for giving the bishoprics of Fermo and Spoleto to men who were unknown to him, he only expresses a doubt whether a church can be given by any man; he does not positively say that the King had no rights in the matter.

Even after Gregory VII had issued the decree against lay "investiture", we still find phrases in his correspondence which seem to recognise some place for the secular authority in the appointment to bishoprics. In a letter of the year 1077 to Hugh, the Bishop of Dié, he writes that Philip, the King of France, had asked him to consecrate the Abbot of St Euphemia in Calabria to the bishopric of Chartres, but says that he will not do this until he was sufficiently informed about the wishes of the diocese. And again, in a letter of the year 1079 to Rudolph of Swabia, who had been elected as King of Germany by the Diet of Forchheim in 1077, he discusses the election of an Archbishop of Magdeburg as a matter with which Rudolph was concerned, and only suggests that, if they are willing to take his advice, they will elect one of two ecclesiastics whom he recommends, but this must be done with the consent and election of the archbishop and bishops, and of the clergy and laity.

It would appear then that it would be a mistake to think that the reforming party in the Church set out to put an end wholly to the traditional place of the secular authorities in the appointment of bishops. It would seem that, while they felt that the actually existing methods and forms through which this authority had been exercised were inadmissible, and while the freedom of ecclesiastical elections needed to be asserted and safeguarded, it was rather the degree and extent of the authority of the secular power, and the forms through which it was exercised, than the authority itself which they attacked.

As we shall see in later chapters, the question of the forms under which investiture was granted came to play a very important part in the controversy, and it is therefore convenient to consider at this point one of the earliest careful and reasoned discussions of the question. The treatise of Cardinal Humbert against simoniacal persons, to which we have already so often referred, was written in the year 1058-9, and a passage from which we have already cited a few words, deals with the question in detail. Humbert, as we have seen, admits that the consent of the prince must confirm the desire of the people, but he complains that in violation of the canons all proportion and order had been completely destroyed, the secular authority had claimed the first and supreme place in the appointment of bishops, and the consent of the clergy and people and of the metropolitan had to be given whether they were willing or not, and, he contends, appointments made under such conditions were really invalid. It cannot, he maintains, belong to lay persons to bestow the pastoral staff and the ring, for these were the sacramental symbols of spiritual powers and offices, and when they had once been bestowed there remained no freedom of action, either to the people and clergy with regard to election, or to the metropolitan with regard to consecration.

Humbert evidently felt that, when the secular authority invested with the pastoral staff and ring, this represented a wholly false conception of its relation to ecclesiastical appointments : these were the symbols of a spiritual office which could not be conferred by lay authority, and once given

they superseded and overrode the rights of the electors and of the metropolitan. It would appear, then, that at least as early as 1058-9 the objections to the investiture of a bishop with the ring and staff had taken definite form, and it was especially under these terms that the position of the reforming party, with regard to the claims of the secular power to authority in ecclesiastical appointments, gradually took shape. We must, however, be careful to notice that there runs through the whole literature of the subject a certain ambiguity about the term "investiture" : we cannot always be certain whether it is being used in the technical sense of the bestowal of the pastoral staff and ring, or in the more general sense of appointment.

We have then considered the general nature of the circumstances out of which the conflict about investiture between Gregory VII and Henry IV arose, but before we deal with this we must take account of one particular dispute which had been going on for some time, and which may have had a considerable importance in producing the final rupture. This was the question of Milan.

We cannot here deal with the grave troubles which had been caused in many places, but especially in Milan, by the determined attempt of the Papacy, especially after Pope Nicholas's decree of 1059, to suppress the marriage of the clergy. In the year 1059 Peter Damian and the Archbishop of Lucca had been sent to Milan to deal with these troubles, and it is plain that there was great contention in Milan about the exact nature of the authority of the Papal See in that city. We are here concerned with the question which presently arose as to the respective claims of the Pope and the emperor to the power of ratifying or rejecting the election of the Archbishops of Milan. We have a detailed account of the conflict in Arnulf's history of the Archbishops of Milan, and while it is obvious that he writes as a partisan of the Imperialist party, his statements furnish us with an important account of the standpoints of the conflicting parties. He contends that the ancient custom of the Italian kingdom had been that, on the death of a bishop, the king should, at the request of the clergy and people, appoint a successor. The Romans, he says, maintained that this was not canonical, and Hildebrand, when he was Archdeacon of Rome, endeavoured to abolish the old custom and to introduce a new rule that the consent of the Roman See should be recognised as necessary to an election. On the death of Archbishop Wido in 1071 the conflict broke out. Herlembald, who had been one of the principal leaders in the agitation against the married clergy, procured the election of a certain Atto by a part of the clergy and people, and with the permission of Rome. Arnulf maintains that the larger part of the clergy and the wiser people desired to recognise the king's rights and the older custom, and the bishops of the province having received the king's mandate, met at Novara and consecrated a certain Gotofrid as archbishop. Hildebrand, on his accession to the Papacy in 1073, summoned Gotofrid and his consecrators to a synod, and confirmed the election of Atto. For the time being Henry IV submitted, and in the letter already cited he acknowledged his faults and expressed his willingness to accept the papal decision about Milan.

It was in 1075 that Gregory VII issued the decree prohibiting all lay "investiture". Unhappily we have no complete account of its terms : it is not contained in Gregory's Register, and our only precise statement with regard to it is preserved in the work of Arnulf to which we have just made reference. His report is, however, so brief and summary that we cannot be certain that it gives us the exact terms of the decree. He says that Gregory, in a Synod at Rome, forbade the King (Henry IV) to have any "ius" in granting bishoprics, and that he removed all lay people from the investiture of churches. It is possible that it was not intended to publish the decree at once, and that Gregory was willing to consider the possibility of modifying its terms—this seems to be implied in his letter to Henry IV of January 1076. That Arnulf's statement is substantially correct would seem clear, not only from the reference just cited, but from several other distinct references to the subject in his correspondence.

In a letter of March 1077 to the Archbishop of Tours, Gregory says that he understands that the Princes of Brittany were willing for the future to give up the ancient but evil custom of claiming the

right to the "investiture" of bishops and of selling their consent.3In a letter of May 1077 to Hugh the Bishop of Dié he deals with the circumstances of the appointment of Gerard to the bishopric of Cambrai. He had been elected by the clergy and people, and had then received the bishopric from Henry IV, and he pleaded that he had not known of Gregory's decree—the decree forbidding this—and that Henry had been excommunicated. Gregory therefore expresses his willingness to accept his election, but on the condition that Gerard should declare this (*i.e.*, his ignorance) before a council of the Archbishop and bishops of the province of Rheims. Gregory also instructs the Bishop of Dié at this council to make it known to all those assembled that no secular authority or person was to interfere with the bestowing of such offices, and that any metropolitan or bishop who should consecrate anyone who had received a bishopric from a lay person would be deprived of his dignity and office. In March of the year 1078 Gregory accepted the same excuse, that he had not known of the papal decree, from Huzmann, Bishop of Spires, and in view of this confirmed him in his bishopric.

It would seem then to be clear that the statement of Arnulf is correct, and that Gregory had in 1075 issued a decree dealing with the position of Henry IV and with the question of lay appointments to bishoprics in general. In the decree of the Council held at Rome in November 1078, the condemnation of lay "investitures" is clearly expressed. In this decree it is said that, inasmuch as in many cases the "investitures" of churches have been made by lay persons, contrary to the statutes of the Fathers, it is ordained that no ecclesiastic is to receive the "investiture" of a bishopric, abbey, or church from the hand of the emperor or king, or any lay person, man or woman, and that if he should do this the "investiture" would be void, and the person receiving it would be excommunicated. It is also laid down that all appointments which were simoniacal, or were made without the consent of the clergy and people, and the approval of those to whom the right of consecration belonged, were to be reckoned as void. The Roman Council of March 1080 repeated this prohibition, and added some very important provisions. If any person for the future should receive a bishopric or abbey from the hand of any lay person, he was not to be reckoned among the bishops or abbots, and any person either receiving or giving "investiture" was to be excommunicated. When there was a vacancy in any church the Apostolic See or the metropolitan was to send a bishop, under whose direction the clergy and people, without fear or favour of any secular interference, were to elect a pastor, with the consent of the Apostolic See or the metropolitan. If they should act otherwise, the election would be void, and they would lose the power of election, which would pass to the Apostolic See or the metropolitan.

With these decrees of the Council of Rome of 1080 the position of Gregory VII with regard to the relations of the secular authority to the appointment of bishops and abbots was fully developed. This does not mean, however, that we can be quite certain in our interpretation of his position. He does dogmatically and clearly prohibit all lay "investiture", but whether this means that he intended to forbid the secular authorities to have any place in ecclesiastical appointments is not quite clear. As we have already seen, the word "investiture" had a technical sense, but it was not always used technically, and we cannot be confident as to the precise meaning of the phrase in these statements and decrees of Gregory which we have cited. It was only in the course of the controversy which followed that these ambiguities were gradually cleared up.

CHAPTER III.
THE DISCUSSION OF THE "INVESTITURE" QUESTION
I.

We have endeavoured to trace some of the circumstances which led up to the prohibition of lay "investiture" in the year 1075. We have now to consider the history of the controversy which this raised, and to inquire into the precise nature of the matter in dispute, as it presented itself to the minds of the disputants. As we shall see, the controversy frequently tended to turn on the question of the use of the pastoral staff and the episcopal ring in "investiture", but it is clear that this was not the real subject in dispute. The matters which were really important were, on the papal side, the principle that ecclesiastical appointments should not be absolutely controlled by the secular power; on the imperialist, the principle that the secular power was entitled to some voice in such appointments.

We have a temperate statement of the imperialist position in the treatise or letter composed in the name of Theodoric, the Bishop of Verdun, by Wenrich of Trier, in the years 1081-82. He admits that there is some appearance of reason in the contention that bishops should not be appointed by the prince. He complains, however, that the prohibition of this had been put out with undue violence and haste, and that the real motive for it was not zeal for religion, but hatred of the prince (i.e., Henry IV). Appointments made by Rudolph of Swabia and by other kings were sanctioned, or at least treated with consideration, while bishops who were faithful to Henry IV, even though properly elected and received by the common consent, were condemned and excommunicated. And, further, he contends that this custom, that is of appointment by the prince, had at least existed and been approved for many ages, and he cites the accounts of the appointments of priests by the Kings of Israel, the precedents of the Maccabean period, and various passages from the writings of Gregory the Great and Isidore of Seville.

The imperialist position is drawn out much more completely in a work, written probably in the year 1086, by Wido, Bishop of Ferrara. He gives a brief account of the arguments against the imperial "investitures" of bishops, and specially mentions some passages from the writings of St Ambrose which might be cited in support of these contentions, but sets them aside as not really relevant to the matter in dispute. He urges that it is necessary to distinguish clearly between two aspects of the position of the bishop. On the one hand his office is spiritual, and all his spiritual powers are given to him by the Holy Spirit, through the ministry of other bishops. On the other hand he has secular authority and possessions, and these are given to him by the prince. The spiritual powers given to him by the Holy Spirit are not subject to the imperial power, but the tenure of the secular things, as they are granted by the secular power, must be renewed by the successive holders of that authority. It is here that he finds the explanation and justification of the fact that, as he maintains, the power of "investiture" was granted to the emperors by Pope Hadrian I and Pope Leo III. He adds that this was also done in order to prevent the popular disturbances which were often incidental to episcopal elections.

Wido finds a further confirmation of his view of the legitimate place of the prince in episcopal elections in the provisions of the decree of Pope Nicholas II, as he understands it, that no one should become Bishop of Rome without the imperial consent. He attributes this in large measure to the recognition of the disorders attendant upon episcopal elections when they were uncontrolled by the secular power, and especially to the conflict of the three occupants of the Papal See before the intervention of Henry III, as well as to the recognition that all the secular authority of the bishop was derived from kings and emperors, and could not be held except under their grant; and he urges that it was only by this authority that the clergy could claim exemption from any form of taxation. He then quotes from the correspondence of Braulio with Isidore of Seville, some passages to show that

Isidore recognised the authority of the king in the creation of bishops. Finally, he urges that those who contended that the appointment of bishops belonged only to the clergy should remember that it was Moses, although he was not a priest, through whom God gave the law and ordered the priesthood, and that if this had been permitted to one who held no sacred office it need not be thought improper that emperors and kings should appoint to bishoprics, for they received an unction greater and more honourable in some respects than the priest, and they were not to be reckoned as mere laymen.

If we endeavour to consider these arguments and to measure their significance, it would seem that the really important consideration which Wido urged was that the temporalities of the bishop can only be recognised as his, subject to the secular authority, and that it is the prince who must grant them. He was also aware that there was a considerable body of precedents for the secular claim to authority in the appointment of bishops, even apart from the evidence of the spurious documents of Hadrian I and Leo III, which as it seems he was the first to use, and he urged that the imperial authority had been very serviceable in restoring order to the Church.

What importance may belong to his last argument, that the emperor or king was, in virtue of his anointing, no mere layman, we shall have occasion to consider again. The most important contention is the first, for it already foreshadows the nature of the settlement which was arrived at in 1122 at Worms.

We must now compare with the position of Wenrich and Wido, the views and arguments of some of the earlier defenders of the action of Gregory VII in prohibiting lay "investiture". The first of these is Manegold of Lautenbach, whose treatise, 'Ad Gebehardum', was written probably in 1085.

He quotes the prohibition in the form of the decree of the Roman Council of 1078, and maintains with characteristic vehemence that it represents the Catholic tradition, the decisions of Councils, and the judgment of the Fathers. He urges especially a regulation of the so-called Apostolical Canons, the often-quoted affirmation of Pope Leo I that no one could be held to be a bishop who had not been elected by the clergy, demanded by the people, and consecrated by the bishops of the province with the approval of the metropolitan, and the equally well-known saying of Pope Celestine I (which he attributes to Innocent I), that no bishop might be imposed upon an unwilling people; and he argues that if this is true it is obvious that bishops cannot be appointed by kings and princes at their arbitrary will.

A little later he denounces in terms similar to those of Cardinal Humbert, to which we have already referred, the ignoble arts by which many curried favour with the secular authorities, and endeavoured to obtain ecclesiastical offices.

Manegold then, with evident reference to the arguments of Wenrich, discusses the alleged precedents of the Maccabean period, and contends that these had been misunderstood, but that, even if this were not so, they would have no authority, for the Books of Maccabees do not properly belong to the Canon of Scripture. In the same way be argues that the alleged appointment of Sadoc as High Priest by Solomon was a mistake; but that, even if correct, it would not prove anything, for even if such an authority had been given to kings under the circumstances of those times, it would not justify this under the new dispensation.

The contention of Wenrich that St Isidore and St Gregory the Great recognised the rightful authority of kings and emperors in the appointment of bishops he considers at considerable length, and argues that the passages from their writings which Wenrich had cited had been misunderstood, and then brings forward a great many citations to show that the elections to the Roman See had not been subject to any secular authority, while, on the other hand, the Pope had authority in the appointment of bishops, and in the constitution of new dioceses.

Having thus dealt with the arguments which had been used in defence of the appointment of bishops by the secular authority, he urges the absurdity as well as the impropriety of the investiture of bishops by the king with the ring and staff, for these were the symbols of spiritual mysteries and, as Manegold says, it was customary that they should be given again by the consecrating bishops after they had been received from the king; this was a manifest absurdity.

Manegold urges with vehemence his contention against the claim of the secular authority to appoint bishops, as well as against the "investiture" with ring and staff by laymen, but it is not clear that he intended to maintain that the secular authority should have no voice in the appointment. It is the arbitrary action of the prince which he rejects : it does not seem as though his mind would necessarily have been closed to some compromise.

In 1087, the year after Wido of Ferrara had written the treatise which we have considered, Cardinal Deusdedit produced his 'Collectio Canonum', in which he set out a number of authoritative passages which required the freedom of episcopal election, and condemned the appointment of bishops by the secular power. In 1097 Deusdedit set about the composition of a work, 'Libellus contra invasores et symoniacos', in which he argues the question in detail. He begins by setting out the purpose of his work, and describes it as a reply to those simoniacal and schismatic persons who say that the Church of Christ is subject to the royal power, and that the king can appoint the ministers of religion at his discretion, and has the right to transfer the property of the Church to himself or to others as he pleases. He protests, however, that in saying this he must not be thought to be derogating from the royal honour, for the office of the priest is one and that of the king another. Each has need of the other, and neither should intrude upon the functions of the other.

He commences, therefore, by citing the sentence from the so-called Apostolical Canons: "Siquis episcopus saecularibus potestatibus usus ecclesiam per ipsis obtineat, deponatur; et segregentur omnes qui illi communicant." He thinks that this was promulgated by the Apostles foreseeing that the time would come when the Temporal power would be converted to Christianity, and would be tempted to impose its authority upon the Church, and to appoint its ministers by its own authority and at its pleasure. He is aware that the authenticity of these Canons had been questioned, but maintains that they had been recognised by various Councils and Fathers; and he urges that for a long time the Church kept this tradition inviolate, and the clergy and people of each church elected their own bishop. This custom continued until the churches grew numerous and wealthy, and was recognised as binding by Popes and emperors. The first emperors who violated this tradition were some of those whom he calls Eutychian, like Zeno and Anastasius, and their example was followed by some of the later Greek emperors. Deusdedit is aware that at one time even the Roman Church notified the election of its bishop to the emperor before proceeding to his consecration. He then enumerates a number of papal and conciliar decrees which required the freedom of election and forbade the interference of the secular authorities. He finds some difficulty in dealing with the decree about papal elections issued by Pope Nicholas II, and its provision that the emperors were to be notified after his election, but before his consecration. He urges first that this provision of the decree, if indeed it had been thus expressed, had been invalidated by the conduct of the king and his advisers in attempting to depose Nicholas II, and later in setting up first Cadalous of Parma, and then Guibert of Ravenna, as anti-popes. Secondly, he maintains that the copies of the decree had been so much tampered with that they were not consistent with each other. Thirdly, he contends that, if Nicholas did indeed issue such a regulation, it was invalid; for he, being only one patriarch, could not, even with the Council of his bishops, change that which had been ordained by five patriarchs and more than a thousand Fathers, and confirmed by the Christian emperors, for in their decrees no power of interference in the election or appointment of bishops was conceded to the royal authority. He then cites a number of passages from the writings of the Popes and from the Roman law to prove that any action which has been taken illegally and wrongly must be annulled,

and concludes that the decree of Pope Nicholas was null and void. He contends that, in maintaining this, he was not saying anything disrespectful to the memory of Pope Nicholas, for, inasmuch as he was human, it was always possible that he might have been persuaded to do something which was contrary to that which was lawful and right; and he cites the case of Pope Boniface II as having annulled a decree which he had wrongly made, and urges that Nicholas II would have done the same had he seen the opinions of the Fathers collected and knew that they were contrary to his decree.

Deusdedit then deals with the contention that the appointment of bishops by the secular authority at its pleasure was sanctioned by long custom, and argues that, in the case of divergent customs, that must be followed which could be traced back to apostolic times, and that the perversion of this by secular princes could not prejudice its authority. Finally, he urges that it was the appointment to ecclesiastical office by the prince which was the cause of the prevalence of simony and of the neglect of their duties by ecclesiastics, while they crowded to the court to obtain preferment by what were often unworthy services, and he develops this into an attack upon the royal chapels and the clergy.

For these reasons then, Deusdedit contends, Gregory VII had declared all secular appointments to bishoprics and abbeys null and void, and that all secular persons who ventured to give the "investiture" of these should be excommunicated, and he quotes the decree of the Council of Home of 1080.

It is noteworthy that Deusdedit applies the same principle to the question of the private patronage of parish churches, and maintains that the parish priest should be appointed by the clergy and people of the parish, and that no one should be appointed against their will.

If we now endeavour to sum up the main points in the controversial literature, so far as we have examined it, we may say that while much had been urged by the representatives of the imperial party which might be interpreted as a defence of that large power of the secular authority in determining the appointment of bishops, which they had undoubtedly exercised for a considerable time, the protagonists of the imperial party had already recognised that there was an essential distinction between the spiritual and the temporal aspects of the episcopal position, and had admitted that the secular claim to determine ecclesiastical appointments was related purely to the temporal. On the other hand, the supporters of Gregory VII had indeed sometimes seemed determined to refuse to admit that the temporal power could have any place in ecclesiastical appointments, but their emphasis had been laid on the denial of any arbitrary authority to appoint at their pleasure, and in the assertion of the rights of the clergy and people of the diocese to a free election; while they also laid great stress upon the practical evils which had arisen from the abuse of the secular authority. So far they had not discussed and met the contention of the imperial party, which laid stress upon the secular position of the great ecclesiastical officers.

With the end of the eleventh century the controversy began to assume a somewhat different form, and we must now consider this.

CHAPTER IV.
THE DISCUSSION OF THE "INVESTITURE" QUESTION
II.

We must consider the development of the controversy from the last years of the eleventh century to the time of the attempt at a settlement by Paschal II and Henry V. The period was marked by the development of a mediating opinion, which recognised in various terms the elements of reasonableness in the contentions of both parties. It is better to speak of a mediating opinion rather than a mediating party, for we can find this in men who might, in relation to the more general conflict of the time, with which we shall deal later, be described as adhering to either the one or other of the great parties, or sometimes even as not belonging strictly to any party.

It might, indeed, seem that the death of Gregory VII in 1086, and of Henry IV in 1106, might have changed the whole situation, but, so far as the "investiture" question was concerned, this was not the case. The successors of Gregory VII, and especially Pope Urban II, firmly maintained Gregory VII's prohibition of lay "investiture", while Henry V, on the death of his father, maintained his right to it. It is, however, probable that, though the position of the contending parties might seem formally and in outward appearance the same, the removal of the original protagonists did actually in a great measure alter the conditions, and made it easier for the mediating tendency to develop and assert itself.

The writer in whom we may perhaps say that this mediating tendency began to show itself clearly was Ivo, Bishop of Chartres. Ivo was one of the most learned men of his time, as his great canonical works, the 'Decretum' and the 'Panormia', sufficiently show. It is clear from his letters that he was not satisfied with the conditions produced by the conflict on "investiture", and that he was not prepared to accept the total exclusion of the secular authority from a share in the appointment of bishops. In a letter to Hugh, the Archbishop of Lyons, of the year 1096(7), whom he recognises as Primate of France as well as Legate of the Pope, he discusses a question which had arisen as to the appointment of Daimbert as Archbishop of Sens. He contends first that the Archbishop of Lyons claimed an authority over the Archbishop of Sens which was not warranted by canonical authority, and then discusses the objection which Hugh had made to his consecration on the ground that he had accepted the "investiture" from the King of France. He began by saying that he had no trustworthy information that Daimbert had done this, but maintains that even if he had, this was not a transgression against religion. The Popes themselves had recognised the right of kings to grant bishoprics (*concessio episcopatus*) to those who had been canonically elected, and he understood that Pope Urban II had only prohibited *corporalis investitura*, but did not forbid the king, as head of the people, to take part in the election, or to make the *concessio*. He urges that it was quite immaterial under what form the *concessio* was made, by hand, or by word, or by the staff, since kings had no intention of granting anything spiritual, but only meant either to signify their assent to the desires of the electors, or to grant the estates or other temporal goods of the churches to those who had been elected; and he quotes the well-known words of St Augustine in which it is stated that all property is held by human law. Further, while he protests that he had no intention of setting up his own authority against the decisions of the Papal See, as far as they were reasonable and in accordance with the authority of the Fathers, he maintains that these regulations, that is the prohibition of "investiture" by the king, rested not upon any provision of the eternal law, but only on the authority of the Popes.

The position taken up by Ivo in the letter is very significant and important. In the first place, he looked upon the prohibition of lay "investiture" as what we may perhaps call an administrative rule,

which might be enforced or not, as might seem expedient, and not as a permanent part of the law of the Church. Secondly, he did not interpret the prohibition as meaning that the king should have no place in episcopal appointments: he maintains that as head of the people he might have his place in the election, and that he had the right of confirmation or bestowal (*concessio*). Thirdly, he considers that the form under which the king might do this was immaterial: it had no relation to the spiritualities, but was to be interpreted either as expressing his assent to the election, or as the form under which he conferred the temporalities of the diocese; and these, Ivo was clear, must be granted by the king, for all property was held under the temporal authority.

Ivo dealt again with the same question in a letter written by him in the name of the Archbishop of Sens and the bishops of the province to Ioscerannus, the Archbishop of Lyons, some years later, probably in the year 1111 or 1112. Ioscerannus had invited the archbishops and bishops of the French provinces to a Council to consider the question of lay "investiture". Ivo, in the name of his province, declines to attend this, on the ground that it was not competent to the Primate to summon a council of the kingdom, but he also objects to any public discussion and condemnation of the action of Paschal II, who had, in the year 1111, as we shall see later, conceded the right of "investiture" to the Emperor Henry V, but had already written to Ivo and other bishops retracting this concession, and saying that he had only granted it under coercion. Ivo urges that it was not right that they should meet in Council to consider the conduct of the Pope, inasmuch as they had no power to judge or condemn him unless he had departed from the faith. He urges that the question of "investiture" was not a question of heresy or of the eternal law, but, as he had said in the earlier letter, a question of administrative order, and that it was thus reasonable that the Pope should have allowed various persons to purge themselves of the offence of having received "investiture", by surrendering their pastoral staffs, and receiving them again from the Apostolic hand. If any lay person thought that in the giving and receiving of the pastoral staff there was anything of the nature of a sacrament, or that he could give the *res* of an ecclesiastical sacrament, he was indeed a heretic. Finally, he gives his own opinion as being that, inasmuch as this "investiture" by the hand of a layman was an invasion of another man's right, it should be abolished, when this could be done without causing schism, but if it would have this consequence, such

Ivo thus again made it clear that he looked upon the question of lay "investiture" as a matter belonging to the administrative order of the Church, and not to the necessary and eternal law, for it had no relation to the spiritual office of the bishop. It would seem, however, that he had come to the conclusion that lay investiture with the pastoral staff was a cause of scandal, and that it would he well if it could be abolished, provided this could be done without causing serious disorder and strife. Ioscerannus of Lyons, in his reply, maintains that while the act of investiture was not heresy, the opinion that it could be permitted was a heresy.

If Ivo of Chartres represents a mediating tendency among those who on the whole supported the Papal party—and, as we have seen, he is careful to say that he does not presume to criticise or condemn the judgment of the Pope on lay "investiture" — we may take Hugh of Fleury as a good representative of those who were critical of papal action, but who on the question of "investiture" tended to a mediating position. His important treatise, 'De Regia Potestate et Sacerdotali Dignitate', with which we shall later deal more fully, was written in the first years of the twelfth century, and dedicated to Henry I of England. In this he maintains that the king has the right to confer the *praesulatus honorem* while the archbishop confers the cure of souls, and he alleges that this had been the custom until his time. When the people or clergy elect the bishop according to ecclesiastical custom, the king should not tyrannically interfere with the election, but should lawfully give his consent, if the person elected is properly qualified; but both the king and the people have the right to refuse their assent to the election of an improper person. After the election, the king should invest with the temporalities, but not with ring and staff, which should be conferred by the archbishop.

Thus, he maintains, the Temporal and Spiritual powers will each retain that which belongs to their authority.

The position of Hugh is, perhaps intentionally, not quite clear on all points : he does not definitely say that the election always belongs to the clergy and people, but in his treatment of the position of the king he is clear that the king must not act arbitrarily. He also, like Ivo, distinguishes very sharply between the spiritual office of the bishop, which must be conferred by the archbishop, and his secular position, which he receives from the king; and he explicitly condemns the use of the staff and ring by the king in conferring the temporalities of the diocese.

There has been preserved a very important treatise on the "investiture" of bishops which belongs, as it is thought, to the year 1109. The author of the work is unknown, but it is clear that he belonged to the Imperial party; it has, indeed, been suggested that the treatise represents a more or less considered suggestion from that side of the possibility of a compromise. The author maintains, with an imposing array of precedents, the historical right of the temporal authority to make appointments to bishoprics; he cites that spurious decree of Pope Hadrian I, which had, as we have seen, been brought forward by Wido of Ferrara, but maintains that long before this emperors and kings and mayors of the palace had appointed and invested bishops, and that the practice had been recognised by Popes like Gregory the Great. He urges that it is immaterial whether the "investiture" is made by the king, with a form of words, or with the staff, or in any other way; but he suggests that the staff is the more suitable symbol, for it has a twofold meaning, either spiritual or temporal. The author seems clearly to connect the right of the temporal power to invest the bishop with the growth of the temporal possessions and power of the Church. The Church, he says, was poor until the time of Constantine, but when the Christian emperor had conferred upon it so many properties and rights, it was reasonable that the king, who is one of the people, and the head of the people, should invest and enthrone the bishop, to whom he had entrusted so much power in the State. Had the bishops remained as poor as the one described by Gregory the Great as lacking even a winter cloak, the matter might have been different, and there would have been no need to require homage and the oath of allegiance from such a man.

The author relates the right of the king to "investiture" to the possession of the temporalities, and is not greatly concerned with the form under which this may be made; but his reference to the fact that the "investiture", such as it might be, with the homage and oath, should take place before the consecration, is significant as indicating that he was determined to assert the freedom of the royal action in consenting to an episcopal appointment. How far his suggestion, that the royal claim might have been dispensed with had the Church remained poor, may have some relation to the startling proposal of Paschal II for the solution of the conflict, with which we shall deal in the next chapter, we have no means of judging.

Finally, the author urges that the attempt of the Pope to take away the ancient rights of kings in the "investiture" of bishops must cause much fear and hesitation to Christ's people. He admits that if these rights had been abused, this should be corrected by the Popes; but he complains that the Popes insist that if they should do wrong and act arbitrarily in the appointment of bishops, they must not be reproved, saying that the Supreme Pontiff cannot be judged by any man; and he reminds them that more than once, when there had been disputes about the papal elections, these had only been set right by the intervention of the Greek or Frank emperors.

In the last volume we have considered the position of Gregory of Catino as the most dogmatic defender of the conception that it was impious to resist the royal authority, and it is therefore not surprising to find that he maintains very firmly the royal prerogative of the "investiture" of bishops. Even in his case, however, it is worthwhile to observe what he understands this "investiture" to signify, and the nature of the arguments with which he defends it. His treatise, 'Orthodoxa Defensio Imperialis', was written after the accession of Henry V. and it is contended that it should be dated in

the year 1111, about the time when Henry V compelled Paschal II for a short time to admit his right to "investiture".

Gregory is indeed a representative of a very extreme imperialist position, and describes the king as the head of the Church, founding this on some places in the Old Testament, and on a passage which he attributes to St Chrysostom, which seems to be spurious. We shall have to return to this conception later. He urges that, if this is so, it is unreasonable that the emperor should be excluded from the appointment to office of the prelates of the Church, who are his members, and that it is suitable that they should be invested with ring and staff by the emperor before they are consecrated by the bishop.

Again he argues that if the characteristic ornaments of the Popes were given them by Constantine, quoting to this effect one part of the "Donation of Constantine", much more might the emperor grant to the bishops the ring and staff; but he is careful to explain that this "investiture" does not represent any spiritual office or authority, but only temporal possession and authority.

Finally, he urges that while the churches were once poor, now they are wealthy, and hold under their authority soldiers and counts, and that it would be very dangerous to the king or emperor if these were not under his control; and that therefore the prelate of the Church who holds this authority from the royal or imperial power must promise the fidelity of himself and his soldiers to the king or emperor.

There was indeed one writer of the Papal party of this time whose position might be taken as uncompromising—that is, Rangerius, Bishop of Lucca. In his versified tractate, 'De Anulo et Baculo', he maintains that the ring and staff are sacred symbols, which must not be accepted from the hands of a layman; and he describes what he conceives to be their spiritual significance—the ring as the symbol of the union between the bishop and his church, the staff as the symbol of the pastoral and disciplinary office. In another place, after repeating these interpretations, he denies that these had formerly been given by kings. He maintains that the pastoral staff can never be subject to the sword, and therefore he objects also strongly to the bishop taking the oath to the king, and repudiates the notion that the temporalities of the Church could give the king any authority over it, for these were given to God, and could be reclaimed. Again, he refers to the "Donation" of Constantine, and the great gifts and honours which he conferred upon the Pope; but he denies emphatically that these conferred upon the Popes their spiritual authority, which, he maintains, they had always possessed. No doubt Rangerius is quite uncompromising about the "investiture" with ring and staff, and his treatment of the "temporalities" is not conciliatory.

If now we endeavour to put together the more important principles of the writers whom we have just considered, it seems reasonable to say that on the whole they represent a mediating tendency, or at least a clearer apprehension of the questions which were at issue. Ivo, although in most respects an adherent of the Papal party, agrees with the other party that the prince had the right to some place in ecclesiastical appointments, while Hugh of Fleury maintains that the form of "investiture" by the prince with ring and staff should be given up ; and the author of the ' Tractatus ' is evidently willing that this should be done. Gregory of Catino alone maintains that this should be retained, and he sets out a theory about the position of the prince as head of the Church, which we shall discuss later; but even he is clear that the "investiture" represents no spiritual power, but has relation only to the temporalities. It is indeed evident that the defenders of the secular claim were becoming more and more clearly conscious that it was on the political importance of the position of the greater ecclesiastics that this claim rested, and this is well expressed by the 'Tractatus' and by Gregory of Catino.

CHAPTER V.
PASCHAL II AND HENRY V.

We must now consider the history and character of the first attempt at a definite settlement of the "investiture" conflict, an attempt which was indeed startling in its boldness and audacity. For the proposal of Paschal II to surrender the "regalia", that is especially the whole of the quasi-political position and prerogatives of the bishoprics and abbeys, represented a definite attempt on the part of that Pope to secure the spiritual liberty of the Church by the surrender of the temporal authority which it had come to hold.

Before, however, we discuss the complex history of these years, it will be well to observe that in France and England the Papacy and the Temporal powers were able to arrive at an understanding about the question of the appointment of bishops.

It would seem that in France the papal prohibition of "investiture" was gradually accepted, and that in principle the right of election was recognised, though it seems also clear that the king retained his right of approval or confirmation.

In England, Anselm on his return in 1100 after the death of William Rufus, took up a firm position about "investiture" and homage; he would not do homage, and he refused to consecrate bishops who had received "investiture" with ring and staff from the king. He had to leave England again in 1103, but the relations between himself and Henry I were never broken off, and finally a settlement was reached, though we cannot be certain of all its details.

The one statement in which we may no doubt put complete confidence is that of Anselm, in a letter to Pope Paschal, in which he reports that the king had surrendered his claim to the "investiture of churches", and that the king "*in personis eligendis nullatenus propria utitur voluntate, sed religiosorum se penitus committit consilio*".

Eadmer gives two accounts of the settlement at the Council in London in 1107; in the 'Historia Novorum' he reports that the king formally renounced the claim to invest with ring and staff, while Anselm undertook that no one should be deprived of his dignity because he had done homage to the king. In his life of Anselm, he says, "*Rex enim, antecessorum suorum usu relicto, nec personas quae in regimen ecclesiarum sumebantur per se elegit, nec eas per dationem virgae pastoralis ecclesiis quibus praeficibantur investivit*". This statement about election is supported by a Croyland MSS. cited by Spelman, but is flatly contradicted by William of Malmesbury and by Hugo Cantor.

It is not easy to arrive at any certainty as to the precise terms of the agreement between Anselm and Henry, except that Henry gave up the claim to invest with ring and staff, while, as Anselm's letter seems to mean, the king abstained from arbitrary interference in elections, while as would appear from a letter of 1106 to Anselm, Paschal II acquiesced reluctantly in what he hoped would be the temporary concession, that the bishops should do homage to the king.

On the death of Henry IV. m 1106, his son, Henry V., who had hitherto been in alliance with the Papal party against his father, seems to have resumed the practice of appointing to bishoprics and presumably of giving the "investiture" of them. Pope Paschal II, who had succeeded Urban II in 1099, had maintained the policy of Gregory VII and Urban II, and had from time to time repeated the prohibition of lay "investiture". No settlement of the great dispute had therefore been reached, but attempts were made after the accession of Henry to arrange for a meeting which should deal with them and, if possible, discover some solution.

We cannot here follow the events or the negotiations of these years in detail, but we must notice some of the most important stages of them. At a Council held at Guastalla in October 1106, Paschal II renewed the prohibition of lay "investiture", but also arranged with the representatives of Henry V that he would shortly come to Germany. Finding, however, as Sigebert in his 'Chronicle

suggests, that the attitude of the king and of the Germans was uncertain, he turned off to France. Henry would not assent to a formal consideration of the "investiture" question, as it related to Germany, at a Council held outside of German territory. An informal meeting, however, took place at Châlons early in May 1107, and at this meeting, of which the Abbot Suger gives a fairly detailed account, the Archbishop of Trier put forward a statement of the royal claim which is very noteworthy. As far back as the time of Gregory the Great, he said, it was known that it belonged to the lawful right of the Empire that the following form of election should be observed. Before the formal election took place the consent of the emperor to the person to be proposed should be procured, then the formal election should take place on the demand of the people, the election of the clergy, and the assent of the *honoratiores*. After consecration the bishop should go to the emperor to be invested with the "regalia" by means of the ring and staff, and should do homage and fidelity. On no other condition ought he to be in possession of the towns, castles, &c., which belonged to the imperial authority. If, he said, the Pope would agree to this, the kingdom and the Church would be at peace.

We cannot be certain that Suger's account is in every detail correct, but there seems no reason to doubt that it is substantially true, and in that case it has considerable importance, for these proposals represent a substantial advance on the part of Henry V towards a settlement. There are two very significant elements in the statement: the first, that the king demands not the right of appointment, but the right to be consulted before the election, and the veto; the second, that while Henry holds to the claim to invest with staff and ring, this was to follow, not to precede consecration, and this is definitely related not to the general character of the episcopal office, but to the grant of the "regalia".

It would appear from Suger's narrative that for the moment the royal proposals received no serious attention. He represents the Bishop of Piacenza as urging, in the name of the Pope, that if the Church could not elect a bishop without consulting the king, it would be equivalent to reducing the Church to slavery—that the royal investiture with ring and staff was a usurpation of the divine right, and that the ceremony of allegiance was contrary to the dignity of the clergy. The Germans, Suger says, heard the statement with great indignation, and threatened that the quarrel should be settled "not here, but at Rome and with the sword".

At the end of May Paschal held a Council at Troyes and there promulgated a decree for the free election of bishops, and condemned the interference of the laity in ecclesiastical appointments; but it was, at the same time, agreed that Henry V should come to Italy in the following year, and that the whole question should then be considered at a General Council. This arrangement fell to the ground, but negotiations between the Pope and Henry continued, and it has been suggested by Dr Peiser that the 'Tractatus de Investitura', which we considered in the last chapter, belongs to this time, and represents a definite movement of the Imperial party towards a compromise. In the year 1109 Henry V sent an embassy, composed of important bishops, to the Pope to announce his intention of coming to Rome; the envoys were well received by Paschal, and were assured by him, according to the 'Annals of Paderborn', that he would ask for nothing but that which belonged to canonical and ecclesiastical right, and would not in any respect endeavour to diminish the rights of the king.

In August of the year 1110 Henry V set out on his expedition to Italy accompanied by a large army, and by the end of the year he had arrived at Arezzo, and from there entered into communications with Paschal II; from Acquapendente he again sent envoys, and they returned to him along with the representatives of the Pope at Sutri.

In considering the main points of the negotiations which followed it may be well to begin by considering the short account which is given of them by Ekkehard in his 'Chronicle'. The envoys of the Pope declared that he was willing to consecrate the king, and to render him all honour and goodwill, if the king would promise liberty to the Church by forbidding lay "investiture". In return

the Pope undertook that the Church should surrender all duchies, countships, tolls, &c., and all the other "regalia" which it possessed. The king assented to this proposal, but on condition that this arrangement should be established "firma et autentica ratione, consilio quoque vel concordia totius aecclesisae ac regni principum assensu". That is, the king required that this agreement should be sanctioned by the counsel and consent of the whole Church, and the assent of the princes of the Empire. Ekkehard adds that the king did not believe that these could be obtained.

We possess the details of the negotiations and of the events which followed in two forms : the one a narrative, written by an adherent of Paschal II, who was himself an eye-witness, which was embodied in the Register of Paschal II, and passed into the 'Annales Romani'; the other an encyclical letter of Henry V addressed to all Christian people. These not only contain accounts of the events, but also reproduce some of the more important documents in which the attempted agreement was embodied.

The first important documents are those which contain the reciprocal promises of Henry V and Paschal II. Henry V promised that, when the Pope had carried out what in his agreement he undertook with regard to the "regalia", he would surrender all claim to the "investiture", and that the Church should go free with the "oblations" and possessions which did not belong to the kingdom; and that he would restore the patrimony and possessions of St Peter, as had been done by Charles, Louis, Henry, and the other emperors.

Paschal II promised by Peter Leonis, the Prefect of Rome, that if the king fulfilled his undertaking, as expressed in the other document, the Pope, on the day of the coronation of the emperor, would command the bishops who were present to surrender to the king and kingdom the "regalia" which had belonged to the kingdom in the time of Charles, Louis, Henry, and his predecessors. He undertook that he would, in writing, command with "authority and justice", and under the penalty of excommunication, that no one of the bishops, present or absent, or their successors, should interfere with or invade these same "regalia"—that is, the cities, duchies, countships, &c., which clearly belonged to the kingdom. Peter Leonis swore that if the Pope should not carry out his promise he would join the king.

With these mutual undertakings we must now compare a declaration which is included in Henry's encyclical. It is suggested by the editor of the 'Constitutions' that Paschal was to have promulgated this on the day of the coronation. This document contains not only the formal decree commanding the restoration of the "regalia", but also a reasoned statement of the circumstances which had led the Pope to take this measure. He declares that, while no priest ought to take part in secular business or attend secular courts, except for the purpose of assisting any who were oppressed, in Henry's kingdom the bishops and abbots were continually occupied with secular affairs because they had accepted from the king, cities, duchies, and other charges which belonged to the service of the kingdom. To this cause he traces the growth of the custom that no bishop should be consecrated till he had received "investiture" from the king. This had been the cause of simony, and of appointments to bishoprics without election, and it was to remedy these evils that Gregory VII and Urban II had condemned all lay "investiture", and that he had confirmed this action. Therefore he decrees that all the "regalia" which belonged to the kingdom in the time of Charles, Louis, Henry, and the king's other predecessors were to be surrendered, and that no bishop or abbot was for the future to claim them, unless by some special favour of the king, and that no one of his successors in the Apostolic See was to molest him or his kingdom with regard to this matter. He then decrees that the churches, with the oblations and possessions which clearly did not belong to the kingdom, were to be free, in accordance with the promise which Henry had made on the day of his coronation.

It is clear that we have in these mutual promises an attempt to put an end to the "investiture" conflict in a manner which was little less than revolutionary. We can see that it vas recognised that the "investiture" conflict had arisen out of conditions which in some measure justified the demands

of both sides. The Pope admits that it was the fact that the bishops held great political powers, which had led to the claim that the bishop could not be consecrated without the royal consent and "investiture", and he contends that this had led to simony, and the frequently complete destruction of the right of free election. It was, therefore, to destroy the root of the whole trouble that Paschal proposed that the Church should surrender the regalia, while Henry promised in return to surrender "investiture". The proposals were indeed far-reaching and radical. They did not indeed mean that the Church would have been divested of all property : it would have retained the tithes and much of its lands; but they would, if carried out, have completely altered the political position of the Church, especially, no doubt, in Germany, but in a large measure in all European countries.

The encyclical letter of Henry V was intended as a general vindication of his conduct both in regard to these negotiations and to the events which followed. We must consider it therefore first as representing what Henry wished the world to understand as his own attitude to the proposals. He begins by representing himself as anxious to serve the Church and to conform to its wishes, so far as was just. Paschal proposed to him measures which should exalt and enlarge the kingdom, but in reality was treacherously endeavouring to destroy the actual position of the kingdom and the Church. Paschal, he says, proposed without any formal deliberation (*absque omni audientia*) to take away from the kingdom that form of "investiture" of bishops and abbots which it had possessed since the time of Charles, for more than three hundred years. When the royal envoys then asked what would in that case become of the royal authority, inasmuch as his predecessors had given almost everything to the churches, Paschal replied that the king should receive and retain all the estates and "regalia" which had been given to the churches by Charles, Louis, Henry, and his other predecessors, while they should be satisfied if they retained the tithes and oblations. The royal envoys replied that the king was unwilling to do such violence to the churches, and to incur the charge of sacrilege. The Pope faithfully promised, and his envoys swore for him, that he would himself "cum iustitia et auctoritate", take these things from the churches and transfer them to the king and the kingdom. The royal envoys therefore promised that if the Pope carried out his undertaking—though they knew that this could not be done—the king would surrender the "investitures" of the churches.

It is clear first that Henry V was anxious that he should not be held responsible for the proposal to deprive the bishoprics and abbeys of their political position and authority, that it was the Pope from whom this had come; and secondly, that he wished it to be believed that he himself had never thought that the Pope could carry out his undertaking. Ekkehard, as we have seen, says that the king's assent was only given on the understanding that the Pope's promise should be ratified by the counsel and agreement of the Church and of the princes of the kingdom, and it seems probable that this is what is meant by the phrase which Henry reports as having been twice repeated in the papal promise, namely, that this should be done "cum iusticia et auctoritate". It is, as we shall see, the resistance of the bishops and abbots, both German and Roman, which Henry represents as causing the failure of the proposed arrangement.

We turn then to consider the actual events which followed on Henry's arrival in Rome. Henry's encyclical represents himself as having been treacherously attacked when he entered the city; but without allowing himself to be disturbed, he says, he proceeded to the gates of St Peter's and then, to make it clear that he intended no injury to the Church of God, promulgated a statement. He then demanded that the Pope should carry out his promise, as contained in the "Promissio Papae", "cum iusticia et auctoritate". When, however, the Pope attempted to promulgate this, he was resisted to the face by all the bishops and abbots, both German and Roman, and by all the sons of the Church, who denounced his decree as being mere heresy.

Henry's encyclical, unfortunately, is broken off at this point. Ekkehard's account, which is chiefly based upon a narrative composed by a certain David the Scot, whom Henry had brought with

him, gives a similar description of the tumultuous resistance of the "princes" to the proposals of the Pope, which involved the spoliation of the churches, and the loss of their "beneficia".

The account given in the Roman narrative is more detailed. After relating the arrival of the king in Rome, and his reception and designation as emperor by the Pope on the steps of St Peter's, it proceeds to relate that they all entered the church, and the Pope then requested Henry to complete the renunciation of the right of "investiture" and the other promises which he had made, while he on his part was prepared to fulfil what he had promised. Henry, however, instead of at once complying, withdrew with his bishops and princes into a part of the church near the "secretarium", and there deliberated with them. At last, after a long delay, the German bishops returned, and declared that the written agreement could not be confirmed "auctoritate et iustitia". The Pope replied by urging that "the things which are Caesar's should be given to Caesar", and that no one in the service of God should involve himself in secular matters; but they persisted in what the Roman narrative calls their "deceitfulness and obstinacy".

The tenor of the arguments which are attributed to the Pope seems clearly to refer to the surrender of those rights of the bishops which did not belong to their spiritual office, and it would seem therefore that, by the agreement which the German bishops said could not be confirmed, they meant the agreement to surrender the "regalia", and that, when they said that it could not be confirmed "auctoritate et iustitia", they meant that the consent of the Church was necessary and would not be given.

The negotiations thus broke down, and we must consider briefly what followed. The discussions continued all day till the evening was coming on; it was then proposed by the friends of the Pope that he should proceed at once with the coronation of the emperor, while the further negotiations should be postponed till the following week. The representatives of Henry would not, however, agree to this, and finally the Pope and his companions were held captive. On the following day the Romans vigorously attacked the German forces, and on the third day Henry retreated from Rome, carrying the Pope and cardinals with him. The Pope was held in captivity, while Henry demanded that he should formally recognise the royal right of "investiture"; but he also declared that the right which he claimed had no reference to the churches or the spiritual functions of the bishop, but only to the "regalia". Finally Paschal, overcome by the representations which were continually made to him of the devastation of the Roman territory, the ruin of the Roman city and Church, and the imminent danger of schism, gave way, saying that he was compelled to do that for the liberation of the Church which he would never have done to save his life.

The documents containing the actual terms of the agreement are contained in the Roman narration and in a second imperial report. The terms under which the papal concession was first made are very important. The Pope promises to confirm by a "Privilegium" the following arrangements. The bishop or abbot is to be freely elected without simony, with the assent of the king. He is then to be "invested" by the king with the ring and stall. The bishop or abbot who has thus been freely "invested", is freely to receive consecration from the person to whom this belongs. No one, who has not received "investiture" from the king, may be consecrated, even though he has been elected by the clergy and people. Archbishops and bishops are to be permitted to consecrate those who have received "investiture" from the king. The surrender to the imperial claim was very complete, but it should be noticed that Henry V conceded in principle the right of a free election, and only claimed for himself the right to give or refuse his assent. The concession may be construed as formal, but is not unimportant.

The actual "Privilegium" repeats the terms of the promise, but it contains some important additions. It states that the right of "investiture" had been granted by Paschal's predecessors to former emperors, and thus apparently admits the authenticity of those spurious documents according to which this right had been granted by Pope Hadrian I and Pope Leo III. We have already noticed

the citation of these by Wido of Ferrara. More important, however, is the reason given for this, namely, that the grant of the "regalia" to bishops and abbots had been on so great a scale that the safety of the kingdom was dependent on them. This reference to the importance of the "regalia" to the Empire corresponds with the statement which we have just noted, that Henry V's claim to the right of "investiture" had reference only to the "regalia" and not to the spiritual office of the bishop.

Ekkehard narrates these events briefly, and concludes with the expression of joy that at last the glory of God and peace on earth had been reached, and the long scandal of division had been removed; but his joy was premature, for the action of the Pope was almost immediately repudiated by a large part of the Church, and within a short time Paschal II found himself compelled to repudiate the concession which he had made.

CHAPTER VI.
THE DISCUSSION OF THE ACTION AND THE PROPOSALS OF PASCHAL II.

For the moment and under coercion Paschal II had yielded to the demands of the Emperor Henry V, and had conceded the right of "investiture": but it was only for a moment. Within a year the feeling of the Church as a whole had declared itself so emphatically against his surrender that Paschal II found himself compelled to withdraw it.

It is important to consider the contemporary discussion of his action, for it indicates that the way of compromise was not really closed; and it is also important to consider the discussion raised or suggested by his proposal to surrender the "regalia."

The mood of the extreme papal party is well represented in some letters written at the time by Bruno of Segni. In one of these, which is addressed to Paschal himself, Bruno, while protesting his love and devotion to him, urges that he must love Christ more, and denounces the agreement which had been made under circumstances of violence and treachery. He appeals to Paschal's own earlier condemnation of lay "investiture", which he says was in harmony with the apostolic order, and he denounces as heretics men who contradict the faith and doctrine of the Apostolic Church.

terms in a treatise or letter by Geoffrey, the abbot of Vendôme, addressed to Paschal after his concession to Henry V, and before the Lateran Council of 1112, at which Paschal retracted it. The Church, he says, lives by faith, chastity, and freedom, but the toleration of lay "investiture" destroys all of these; and he bluntly says that though the shepherd of the Church must be endured, even though his character should be evil, if he falls into heresy he is no longer to be reckoned as the shepherd. This is a very uncompromising statement, and illustrates forcibly the fact that there were eminent Churchmen who felt so strongly upon the question that they were prepared even to revolt against the Pope himself rather than to accept what they conceived to be ruinous to the freedom and purity of the Church.

This was no doubt the predominant feeling, and it was to this that Paschal II was compelled to defer when he revoked his agreement with Henry V; but it would be a serious mistake if we were to think that the mediating tendency which we considered in Chapter V had been overpowered and had disappeared. On the contrary, it survived in the attitude of Ivo of Chartres, and what is more remarkable, it began to find expression even in the utterances of men who urged the prohibition of lay "investiture" with great determination.

We have already considered the position of Ivo of Chartres in his letter to Ioscerranus, the Archbishop of Lyons, probably written before the Council of 1112, and the formal retractation by Paschal II of his concession. He refuses to recognise that lay "investiture" could be treated as a heresy, and maintains that the permission or prohibition of it belonged to the administrative order of the Church and not to the "eternal" law. Possibly we may see the impression made upon Ivo's mind by the vehement resentment which Paschal's action had produced, in the fact that he now was disposed to the view that it would bo well that lay investiture should be abolished; but he qualifies this by adding the condition that this should be done if it could be effected without causing schism.

More remarkable, however, is the standpoint of a treatise written probably shortly after the retractation. The author states the arguments against lay "investiture" with ring and staff with much force, and urges that these were the symbols of spiritual things, and could not be granted by kings. On the other hand, he seems to admit that it is for the king to grant the "regalia," and suggests that he could do this with the sceptre, the symbol of his authority over his country, with which he grants

dukedoms, countships, and the other "regalia". It is noteworthy that this writer thus suggests the actual form under which in the settlement of Worms the emperor was to confer the "regalia".

The most noteworthy as well as the most detailed discussion of the questions raised by the concessions and by the proposals of Paschal II is, however, to be found in a very important work by Placidus of Nonantula, written apparently towards the end of 1111, for he deals not only with "investiture", but also with the whole question of Church property. His position seems at first sight in the highest degree uncompromising, for he might seem to deny altogether that there was any ground for the claims of the secular power. A closer examination, however, leads us to modify this judgment, and to suggest that while he demands the abolition of lay "investiture", he is not unwilling to accept some middle course upon the matter, and that his arguments about Church property are directed not so much against the royal claims as against Paschal's proposal to surrender the "regalia".

He repudiates, indeed very firmly, the action of Paschal in granting to the emperor the right of "investiture", and demands that he should repudiate this concession. He denies that the anointing of the emperor gave him any claim to appoint bishops or abbots. He was aware of the contention that Pope Hadrian I had formally granted the right of "investiture" to Charles the Great, and he was not apparently in a position absolutely to deny the authenticity of the grant, though, in referring to it, he frequently suggests a doubt. He argues, therefore, that it had some other and innocent meaning, or it was related to some conditions of that time, and might have been useful then, but must now be rescinded on account of the mischief which had arisen; or it had been granted by Pope Hadrian in human weakness and error, for Hadrian himself, in the Eighth Synod, had explicitly condemned all interference by the lay authorities in episcopal elections. The Popes themselves, while they have authority, "novas condere leges", cannot alter the laws which the Lord or His Apostles, or the Fathers who followed them, had established. He is therefore clear and emphatic in demanding the abolition of lay investiture, and he cites a number of the well-known canonical regulations which lay down the principle that bishops must be elected by the clergy and people of the diocese; and in another place he adds that the election of the bishops is to be subject to the judgment of the Pope and his vicars, or of the archbishops.

So far, then, it might well seem that Placidus was wholly uncompromising, but this impression is corrected when we look a little further. He admits that there is force in the contention of those who urge that it is unreasonable that the emperor or prince should be excluded from any part in the election of the bishops, while this is permitted to the people, and he affirms that this is not what he intends. The emperors or princes have their part in such elections, like the other people in the diocese,—that is, in those dioceses of which they were, more especially, the sons,—but not as masters or lords; and they should confirm the election in this sense, that they should defend it with the material sword, for it is their proper function to compel those who do not fear the spiritual sword, by the terror of the material one. This is not unimportant, though the statement is evidently carefully guarded; but Placidus goes much further than this. We shall presently deal with his treatment of Church property, but in the meanwhile we must observe that he frankly recognises that the tenure of this property may involve certain obligations to the secular power which the Church must fulfil. The Church, he says, must pay tribute, and it must render other services to the prince, which Placidus does not specifically define, especially in those cases where some special rights were reserved by him when the property was granted to the Church. He admits, in one passage, that if the prince desires to give something of that which belongs to himself to a bishop, he may properly invest him with this under the same forms which would be used in the case of other men, while he must not do this with the ring and staff; and in another place he makes a definite proposal, and expresses the hope that it may tend to the establishment of a firm peace between the "regnum" and the "sacerdotium", if it is arranged that when the bishop has been canonically elected, invested, and consecrated, he should, either in his own person or by his representatives, go to the emperor and ask for the imperial

"præceptum" with reference to the Church property which has been committed to him. The emperor should then gladly grant and confirm to him that which his predecessors had granted to the Church, and promise the bishop and his church the imperial protection.

It is clear that the position of Placidus, as well as that of the author of the 'Disputatio vel Defensio Paschalis Papae', represent a real advance on the part of the supporters of the papal policy towards an understanding—certainly it is evident that they appreciate in some measure the more important aspects of the contention of men like Wido of Ferrara.

We must, however, turn aside for a moment to consider the whole treatment of the nature of the property of the Church by Placidus. It seems to us probable that this is in the main directed against the proposals of Paschal II for the surrender of the "regalia", and these proposals were of so far-reaching a kind that anything which we can find which will throw light upon them is of great importance.

In the Prologue to the work with which we are dealing, Placidus cites the words of some writers, speaking in the name of the secular rulers who said that, as the Church was spiritual, it had no property in earthly things, except in the actual church buildings, and that if Churchmen desired earthly possessions they could not obtain them by the law of the Church. If it had not been for the gifts of the temporal rulers the clergy would possess nothing except the oblations brought to the altar, the tithes and the first-fruits : all other property belongs to the prince, and therefore those who desire bishoprics and abbeys must obtain them from him, or cease to possess what belongs to him. If the clergy were content with the tithes and first-fruits and oblations, the matter was in their own hands; but if they desired to have the property which was formerly given to the Church, they could only obtain this from the prince.

Placidus denounces these principles as abhorrent to all true Catholics, inasmuch as it is the Holy Spirit who has granted to the Church not only spiritual but also material things, and wills that bishops should have both the small and the great possessions which have been dedicated to God in their power. That which is given to the Church is given to Christ, and those who take it away are guilty of sacrilege. That which belongs to the Church ought to be in the power of the bishops, who are elected not by any earthly authority, but by the clergy and laity of the diocese, and are confirmed by the other bishops. The Church owes nothing to kings except the payment of "tribute".

These positions are further developed in the body of the treatise. What has once been given to the Church belongs permanently to Christ. It is impossible to separate the material possessions of the Church from the spiritual without rending it in two : for just as a man cannot live without a body, so the Church cannot exist in the world without material things. Some, he says, maintained that the Church possessed in the full sense of the word only tithes, first-fruits, and oblations, and that immovable property like castles and estates only belonged to it so far as the bishop received these from the hands of the emperor. This, Placidus maintains, was false, for that which has once been given to God belongs to Him for ever. Again, he refers to the contention that, while the church itself, being consecrated to God, belonged only to God and His priests, those things which the Church in its glory now possessed, such as duchies, countships, and cities, belonged in such a sense to the emperor, that unless the grant of them was renewed to each bishop on his succession he could not have them, and from this it followed that it was for him to grant "investiture".

Placidus repudiates these contentions with great energy, and maintains that not only the small possessions which the Church had before Constantine, but the great property which it had received since his time all belonged to the Church, because they were all given to God; and he interprets the rule that the bishop or abbot should receive the pastoral staff from the consecrating archbishop, as signifying that he received not only the authority of ruling the people, but also the temporal possessions of the Church from the Lord Himself. Another contention which he put forward is important—namely, that the property of the Church is the property of the poor, and could not be

taken by the clergy for their personal use, except to provide themselves with the necessary food and clothing, and could not therefore be given to princes.

This is all very uncompromising, but we must bear in mind those passages which we have already considered, in which Placidus proposed some recognition of the position of the emperor with regard to those possessions which his predecessors had conferred upon the Church. The impression which is left upon us is, that what he is really concerned to do is to repudiate the principles which may have lain behind Paschal II's offer to surrender the "regalia".

It is most unfortunate that we have practically no other immediately contemporary discussion of this question. In the works of Gerhoh of Reichersberg, written between 1126 and 1169, we have indeed very important discussions of the whole question, but it seems to us on the whole better to consider these later. For though it is probable that the considerations which made him doubt the advantages of the tenure of the "regalia" by the bishops were of the same kind as those of Paschal II., we cannot be wholly confident of this. And in any case, the subject is so large and important that it requires a separate treatment.

CHAPTER VII.
THE SETTLEMENT OF WORMS.

The first attempt at a settlement of the "investiture" question had failed, and for a few years it might have seemed as though no progress had been made. At a Council held in the Lateran in March 1112, Paschal related the circumstances under which he had been coerced into his concession to Henry V, and, while protesting that he would not excommunicate him, left it to the Council to determine how it should be rescinded. On the last day of the Council he solemnly reaffirmed the decrees of Gregory VII and Urban II, and the Council formally condemned the "Privilegium". The more determined Churchmen were not, however, satisfied with this, and in September 1113, Guido, the Archbishop of Vienne (afterwards Pope Calixtus II), held a Council at Vienne, which declared that lay "investiture" was a heresy, and formally excommunicated Henry V, and then wrote to Paschal peremptorily requesting him to confirm their action, and intimating that a refusal to do this would force them to renounce their obedience to him. Paschal evidently felt himself compelled to give way, and in his reply to Guido confirmed the proceedings of the Council at Vienne. In 1116, at a Council held in the Lateran, Paschal again declared the "Privilegium" given to Henry null and void, and excommunicated those who gave or received lay "investiture"; and Cardinal Kuno reported that he had excommunicated Henry V at various Councils in Hungary, Lorraine, Saxony, and France. It is clear from the narrative of Ekkehard that the Papal party was again supreme among the bishops in Germany, and that the political disorders in Germany were again growing rapidly.

Paschal II died on January 21, 1118, and it had become evident that Henry's success at Rome in 1111 had been merely apparent, and that a settlement upon these lines was impossible. His successor, Gelasius II, was elected on January 24. According to Ekkehard, Henry V at first gave his assent, but finding that Gelasius withdrew himself from communion with him, he set up Maurice, the Archbishop of Bruges, as antipope. Gelasius and a number of the cardinals retired to Capua, and on April 7 excommunicated both Henry V and the antipope. The Cardinal Legate held a Council at Cologne in May, and proclaimed the excommunication; and Ekkehard reports that the princes proposed to hold a meeting at Wurzburg, when Henry should be requested to answer in person, or, if he refused to attend, should be deposed.

Gelasius II died on January 29, 1119, and on February 22 Guido, the Archbishop of Vienne, who had, as we have seen, been the most vehement opponent of Paschal's concession to Henry, was elected Pope as Calixtus II. The election was made by the cardinals and other Roman clergy and laity at Cluny, where Gelasius had died, and it was at once accepted and confirmed by the cardinals who were in Rome, and by a Council held at Tribur in Germany in June. Calixtus summoned a Council to meet at Rheims in the autumn, and Henry was compelled to set his face towards some understanding with the Pope.

It was under these conditions that the second attempt to arrive at a settlement of the "investiture" question was made, and a detailed account is given of this by Hesso. The initiative was taken by two eminent French Churchmen, William of Champeaux, now Bishop of Châlons, and the Abbot of Cluny. They visited Henry V at Strassburg, and urged on him the need of surrendering the "investiture" of bishops and abbots, but William of Champeaux, while he told him that neither before nor after consecration had he received anything from the hand of the king, also assured him that he faithfully rendered to the King of France all those military services and dues which the German bishops rendered to their sovereign. Henry replied that he wanted nothing more than this, and they undertook to endeavour to bring about peace. On this basis the negotiations were initiated, and terms of agreement were drafted and provisionally concluded, which were to be confirmed at a meeting between Calixtus and Henry, which was to be held at Mouzon on October 24. Under these terms

Henry was to surrender all "investitures" of all churches, and to make peace with those who had maintained the cause of the Church, restoring their churches and possessions. Any question arising out of these terms, if it related to ecclesiastical things, was to be determined by canonical judgment; if to secular things, by the secular judgment. The Pope promised to give peace to Henry and his supporters, and to restore their possessions, under the same terms as in the agreement of the emperor. It seemed for a moment as though a settlement had been reached, but it is clear that there had either been a misunderstanding about the significance of the terms used, or that the emperor on reflection became convinced that he was surrendering too much.

Calixtus II reached Rheims on October 18, and provisionally opened the Council, which was attended by two hundred and fifteen archbishops and bishops, besides abbots, and the King of France. He proceeded to Mouzon on October 23, and Henry V encamped near. Before, however, they could meet, doubts had arisen in the papal circle about the real meaning of the phrases which were to be accepted by Henry. These stated that Henry was to surrender "all investiture of all churches", but it was suggested that these phrases were ambiguous and needed interpretation, lest under cover of these he should lay claim to the possessions of the churches, or to the right to invest with these possessions. It was also urged that the Pope's promise might be construed as meaning that he would recognise the bishops of the Imperial party who had been intruded into sees which were already occupied by legitimate bishops, or had been canonically deposed. William of Champeaux and the Abbot of Cluny, accompanied by the Cardinal-Bishop of Ostia, the Bishop of Viviers, and other papal envoys, were sent to the emperor, and they set out the meaning of the draft agreement in the terms which had been agreed upon in the papal circle. The emperor at first flatly denied that he had promised any of these things. William of Champeaux declared that he was prepared to swear that the emperor had confirmed all these promises, and that he had understood the emperor in this sense. When the emperor was at length compelled to confess that this was true, he complained that these promises which he had made by their advice could not be carried out without grave injury to the position of the Empire. William of Champeaux replied by assuring him that the Pope had no wish to diminish the authority of the Empire, and that he declared emphatically that the bishops were to render to the emperor the same services, military and other, as they had always done. Henry then asked for a day's delay that he might consult with the princes, but when the papal envoys returned on the following day he asked for a further postponement, until he could hold a general consultation with the princes of the Empire, without whose consent he could not venture to surrender the "investiture". William of Champeaux indignantly broke off the negotiations, and the Pope returned to Rheims, and a few days later, October 29, brought forward the decrees which he desired the Council to accept.

In the Council, however, there at once appeared a grave divergence of opinion. The second decree as proposed by the Pope read : "Investituram omnium ecclesiarum et ecclesiasticarum possessionum per manum laicam fieri modis omnibus prohibemus", but there was so much opposition to this on the part of many of the laity, and even of some of the clergy, that the discussion continued throughout the whole day. It was contended that under these terms the Pope was endeavouring to take away the tithes and other ecclesiastical "beneficia" which the laity had of old time possessed. The opposition was so determined that on the next day the Pope proposed the decree in another form : "Episcopatuum et abbatiarum investituram per manum laicam fieri penitus prohibemus. Quicunque igitur laicorum deinceps investire presumpserit, anathematis ultioni subiaceat. Porro, qui investitus fuerit, honore, quo investitus est, absque ulla recuperationis spe omnimodis careat". In this form the decree was unanimously accepted, together with another decree affirming the right of the churches to all those possessions which kings and other Christian people had bestowed on them, and anathematising any one who should venture to seize them.

The attempt to arrive at a settlement had for the time failed, but it is important to observe the causes and conditions of the failure, so far as we can arrive at them from the narrative of Hesso. William of Champeaux and the Abbot of Cluny had proposed a complete surrender of the right to "investiture", urging upon the emperor that this would make no difference at all in the political obligations of the bishops and abbots. Henry had accepted this proposal in the form that he surrendered the right to invest with the churches. The advisers of the Pope, however, suspected that this might mean that he reserved the claim to the temporalities of the Church and the right to invest with them, and urged that the phrases required interpretation. Hesso does not say what precisely was the interpretation which William of Champeaux and his colleagues communicated to Henry, all that he tells us is that Henry repudiated it; but we may conclude that the agreement was construed as implying the surrender of all claim to invest, even with the temporalities. Henry refused to ratify this, maintaining that in such a grave matter he must consult the whole body of the princes. If this interpretation of what passed is correct, it would seem that though the negotiations had failed they had brought out the fact that the emperor was willing to consider the possibility of distinguishing between "investiture" with the temporalities and "investiture" with the spiritualities—a distinction which, as we have seen, had been urged by a number of writers on the subject. The narrative of Hesso, however, brings out more than this, for it shows that there was a serious division of opinion among the supporters of the Pope. This is clear from the fact that Calixtus had to withdraw the form in which he first proposed his decree about "investiture" to the Council at Rheims. In the first form it explicitly concerned lay "investiture", not only of churches, but also of ecclesiastical possessions; but the feeling against this among the clergy, as well as the laity, was so strong that it had to be withdrawn, and the decree was only accepted in a form which left this question undetermined. We shall probably be right in concluding that even in papal circles the importance of the distinction between "investiture" with the temporalities and with the spiritualities was being recognised.

The attempt at a settlement had for the time failed, but the conditions of the failure were, as we can now see, such as to suggest the possibility of an agreement upon such terms as were actually accepted at Worms three years later. Formally, no doubt, the breach was complete, for Calixtus not only excommunicated Henry V and the antipope, but also absolved Henry's subjects from their oath of allegiance, unless he repented and did satisfaction to the Church. Calixtus thus reasserted a claim which had not been explicitly made since the death of Henry IV, but it must be observed that it was made as against an emperor who, in setting up an antipope, had himself claimed a similar authority with respect to the Papacy.

We are, fortunately, able to follow the movement of opinion during the last years of the pontificate of Paschal II and the first years of Calixtus in some contemporary writings. We have already cited the severe and even violent phrases in which Geoffrey, the Abbot of Vendôme, addressed Paschal II when he had yielded to Henry V, and he continued to maintain this condemnation of lay investiture in the strongest terms during the years before 1119. Between the years 1116 and 1118 he wrote a letter to Rainald, who claimed to have been elected Bishop of Angers, in which he deals first with the matter of episcopal elections and then with the question of lay "investiture". Geoffrey urges that Rainald's election had been irregular and invalid; he had learned that Rainald had been tumultuously elected by the laity, who had then endeavoured to intimidate and coerce the clergy into consent. This leads to a discussion of the principles which determined what was a right election. The whole appointment of a bishop, Geoffrey says, depends upon election as well as consecration, for a due election must precede consecration. The apostles were chosen and consecrated by Christ Himself : now this must be done by the vicars of Christ. The clergy are His vicars in election, and the bishops in consecration. Others, that is the laity, may ask for a certain person as bishop, but they cannot either elect or consecrate. Geoffrey desires clearly to assert very emphatically the need of election for a valid appointment, and also to limit the election

proper to the clergy. He goes on to deal very drastically with lay "investiture", and maintains that the Catholic doctrine was that which Gregory VII had declared; he distinguishes, indeed, between the heresy of lay "investiture" and that of simony, but he maintains that the first is even more mischievous than the second, for the only reason why the secular authority claimed this right was, either that it might simoniacally extract money, or that it might reduce the bishop to subjection. Investiture with ring and staff was, he maintains, a sacramental action.

In another treatise which was written, it is thought, a little later, Geoffrey repeats a great part of what he had said, and adds an emphatic assertion that not even Some could alter the law of the Church on this matter. He refers clearly to the action of Paschal II, and it may be conjectured that he also wished to repudiate the position represented by Ivo of Chartres.

So far, Geoffrey's position was rigorous and uncompromising, but in a treatise which seems to belong to the year 1119 we find a new tone and another attitude. It is not easy to determine the relation of this treatise to the negotiations at Mouzon and the Council at Rheims, for in some respects its principles and proposals go far beyond what apparently Calixtus II was at that time prepared to concede, and he evidently deprecates any extreme measures against the emperor. The treatise exists in two forms—a short one, which contains an exhortation to Calixtus to stand fast against the heresy of lay "investiture" with ring and staff; and a longer one, in which Geoffrey argues that there was another sense in which lay "investiture" might be admitted. He protests, indeed, that there was no legal nor canonical authority for lay "investiture" with ecclesiastical possessions, and he seems to maintain that it is not reasonable that those things which had been once granted to the Church should be granted again; but he admits that all property is held by human law. By the divine law men are subject to kings and emperors, and the Church cannot hold possessions except by the human law; and he quotes the most significant phrases of that discussion of the nature of private property by St Augustine, to which we have frequently referred. He contends, therefore, that there was no reason why the king should not, after due canonical election and consecration, invest the bishop with the property of the Church under some form, and urges that by this concession peace might be restored to the Church and the State. He concludes with a warning against an injudicious use of excommunication, which was evidently intended to suggest a doubt whether it was wise to excommunicate the emperor, even if he refused to come to terms with the Church, and with a reference to the action of St Peter and St Paul in making concessions to Jewish prejudices.

The position represented by the treatise is very significant. It recalls the treatment of "investiture" by Ivo of Chartres in his letters, with respect to the relation of the temporalities to the secular power, and also to the possibility of conceding an "investiture" with the temporalities under some form; and it also corresponds with some of the suggestions of Placidus of Nonantula; but it gains an additional historical significance when we recall the rigorous position taken up by Geoffrey in his previous writings. We do not know, as we have said, what relation exactly the treatise may have had to the deliberations at Mouzon and Rheims, but it certainly serves to bring out the fact that there was already in papalist circles a movement towards compromise, and may help to explain how it was that Calixtus was compelled to withdraw his proposal to condemn lay "investiture" with relation not only to churches, but also to Church property, and to substitute the ambiguous condemnation of "investiture" of bishoprics and abbeys.

Two shorter treatises which, according to one MS., were addressed by Geoffrey to Pope Calixtus, may belong to the same time, or, at any rate, to the years between 1119 and 1122, and may reasonably be interpreted as being related to the mediating position which Geoffrey had now taken up. In the first of these he contends that "dispensationes" should sometimes be given by the authorities of the Church, under which something not wholly perfect might be done or permitted, in order to avert some grave danger to the Christian faith ; and he gives as examples the action of St Paul in circumcising Timothy, and of St Peter in requiring some of the Gentiles to observe the Jewish

law. Such "dispensationes" might even change the customs of churches and abbeys. It is true that he says that these must not permit what is actually evil, and that if the Vicar of Christ were to do this he would be a blind leader of the blind; but it seems fairly evident that he is retracting or at least restating the judgment which he had expressed in an earlier treatise.

In the second of these treatises Geoffrey states briefly the chief conditions which he deemed to be essential for the life of the Church. The Church, he says, must be Catholic, free, and chaste—Catholic, for it must not be bought or sold; free, for it must not be subject to the secular power; chaste, for it must not be corrupted with bribes. When a Church is bought or sold the faith is made void, for men think that what God has made beyond all price can be bought by men. When the Church is subjected to the secular power she loses that charter of liberty which Christ wrote for her on the Cross with His blood. When the Church is corrupted with bribes she loses her chastity. These phrases had already been used by Geoffrey in earlier treatises, and they may have no special significance in this place; but it is also possible that they may be intended to summarise the essential points which, in Geoffrey's judgment, would have to be taken account of in any settlement, and he may possibly intend to suggest that, so long as these principles were safeguarded, concessions might be made on other points.

Finally, in a treatise addressed to Cardinal Peter Leonis, which may belong to the year 1122, Geoffrey put together the substance of his earlier treatises, that is especially the condemnation of lay "investiture" as he had expressed it in the second and third of these, and also the admission, as he had stated it in the fourth treatise, that a lay "investiture" with the temporalities, after a canonical election and free consecration, might be accepted. It should be observed that almost the only new point urged in this treatise is that consecration as well as election must be free, and that a consecration which is preceded by an oath is not free. It may reasonably be judged that this has reference to the discussion of the terms of settlement at Worms.

The change in the position of Geoffrey of Vendôme which is indicated in these treatises is highly significant, and seems to indicate very clearly that, in spite of the failure of the negotiations at Mouzon, real progress had been made on both sides in the apprehension of the possibility of a settlement which should recognise both the principles for which the Popes had been contending, and the reasonable claims of the Temporal Power. This impression is confirmed by an examination of two works which belong to this time—the verses of Hugo Metellus on the conflict between the Pope and the King, and the verses of Hunald on the Ring and Staff. These writers were not men of any great importance, but their attitude is not the less significant.

Hugo Metellus represents the king as urging that former Popes had acquiesced in the custom of royal "investiture", and that this signified the grant of the "regalia" : what harm, the king asks, could it do that he should grant these under the symbol of the pastoral staff. The Pope replies that his predecessors had indeed tolerated lay "investiture", but unwillingly, and only because the kings of those days had been benefactors of the Church, and maintains that the ring and staff were the emblems of pastoral office and could not properly be used to signify the "investiture" with the temporalities. The king then appeals to the concession of Paschal II, but the Pope replies that this was invalid, for it was granted under coercion. The king then suggests that if the Church were willing to forego the "regalia" he might surrender his claim to "investiture", and that in ancient times the Church did not possess these; but the Pope refuses to entertain this proposal. The verses end with an agreement on the part of both that the matter was one for consideration in reason and wisdom.

Hunald describes the papal contention that the ring and staff are sacred signs of sacred functions. The king agrees to the principle that it is for priests to give sacred things, and only claims the right to bestow the "regalia". Hunald concludes that he would venture to say that the Pope and king were fighting about nothing, for neither sought to injure the other.

The negotiations at Mouzon had broken down, but it soon became evident that the attempt to find some solution would have to be renewed. In June 1121 Henry marched to besiege Mainz, while the Archbishop of Mainz, the leader of the Papal party in Germany, summoned the Saxon princes to his help. Before, however, the actual conflict began, the leaders on each side entered into negotiations with each other, and Henry was persuaded to agree that the dispute should be settled by the judgment of the leading men on each side. It was agreed that a meeting of the princes of the whole kingdom should be held at Michaelmas in Wurzburg to determine this settlement. The Saxon Annalist gives a detailed account of the conclusions arrived at in this meeting. The emperor was to submit to the Apostolic See, and the conflict between him and the Church was to be settled by the counsel and help of the princes under such conditions that the Emperor should keep what belonged to him and the kingdom, and the churches what belonged to them. The bishops who had been canonically elected and consecrated were to occupy their sees in peace until the meeting of a council to be held in the presence of the Pope. The princes expressed their intention to settle the complaints of the Church against the emperor with regard to "investitures" in such a way that the kingdom should retain its honour. If in the future the emperor should take measures against any one for his part in these conflicts, the princes agreed that, by the consent and permission of the emperor himself, they would unitedly, though with all care and reverence, admonish him not to act thus. If, however, the emperor neglected their advice, they would act according to the agreement which they had made with each other.

This report is of the greatest importance, especially as indicating the attitude of the princes—that is, that they were determined to impose a reasonable settlement both upon the emperor and upon the Church. Ekkehard summarises the proceedings, and adds the important information that the meeting appointed envoys to communicate what had been done to Rome, and to ask for the convocation of a General Council by the Pope.

There was some delay before the Pope replied to the envoys, but in February 1122 he wrote to Henry in terms which were indeed not wholly conciliatory, but represented a new attempt at an understanding. Calixtus addressed Henry not only as emperor but as his kinsman, and urged him to grant peace to the Church, assuring him that he had no desire to take away anything which belonged to him or to the Empire. He also, however, warned him that if he still refused to render to the Church what was its due, he would provide for the well-being of the Church by religious and wise men, without regard to the injury which this might inflict upon Henry.

Another embassy was sent by Henry V and the bishops and princes, consisting of the Bishop of Spires and the Abbot of Fulda, who expressed Henry's desire for peace and concord between the "regnum" and the "sacerdotium", if this could be obtained without injury to the majesty of the Empire. In response to this, Calixtus sent Lambert, the Cardinal-Bishop of Ostia, accompanied by two other cardinals, as his legates to Germany, with instructions that they were to endeavour to effect a settlement; and they invited Henry to meet a council of the bishops, which, as it was proposed, should meet at Mainz on the festival of the Nativity of the Virgin.

The Council met at Worms in September, and the deliberations lasted a month or more. We learn from a letter which Adalbert, the Archbishop of Mainz, wrote to Pope Calixtus shortly after, that the negotiations were at first difficult. Henry could not at first be persuaded to surrender what he considered to be his hereditary right to invest with the ring and staff, and the laity who were present seem to have supported the emperor in his claim. At last, after consultation with the cardinals, and with what Adalbert represents as their reluctant consent, it was agreed that the election of bishops in Germany should be held in the presence of the emperor; and we may gather that it was in view of this concession that Henry waived his right to invest with ring and staff.

The most important provisions of the settlement as finally agreed upon were as follows : Henry surrendered all claim to "investiture" with ring and staff, and granted to all churches in the empire

the right of free election and consecration. The Pope, on the other hand, granted to Henry that all elections to bishoprics and abbeys in the German kingdom, which belonged to the kingdom, should be held in his presence, but without simony and violence; and that, in the case of disputed elections, he should, with the counsel and judgment of the metropolitan and comprovincial bishops, give his assent and support to the wiser party. The bishop-or abbot-elect was to receive the "regalia" from him "per septrum", and was to fulfil the lawful obligations which he owed for this. In the other parts of the Empire the bishop or abbot, within six months of his consecration, was to receive the "regalia" from the emperor "per sceptrum", and was to discharge all his lawful obligations ; the only exception being in the case of all which belonged to the Roman Church.

If we endeavour to estimate the main character of the settlement which terminated the conflict of fifty years between the Spiritual and the Temporal Powers with respect to the appointment of bishops and abbots, we may say that it is clear that in the main it represents the triumph of that mediating tendency whose development we have endeavoured to trace, and not the complete victory of the extremists of either party. When, however, we attempt to interpret the principles of the settlement in detail, we have need of great caution, but we may perhaps reasonably make the following observations. The emperor, in surrendering the investiture with ring and staff, and in admitting the right of free election and consecration, made it plain that he made no claim to bestow the spiritual office and authority, and that he recognised the rights of the diocese and the province. On the other hand, the Church recognised the justice of his claim to give or to withhold the feudal possessions and authority of the bishops and abbots as exercising temporal lordship. In the provision that the election should take place in his presence, the Church recognised that the emperor could not be excluded from all part in the election to the great ecclesiastical offices, in which, indeed, on the canonical principles, the laity had their just and lawful place. In the provision for the determination of disputed elections, the emperor was no doubt to be guided by the advice and judgment of the metropolitan and the comprovincial bishops; but the Church admitted that the emperor was entitled to an important part in such decisions. Probably the most important concession of the Church was contained in the provision that the bishop, or abbot, elect should ask for and receive the "regalia" from the emperor before his consecration; for this probably meant that in the case of an insuperable objection to the elected person by the emperor, the whole matter could be reconsidered. On the other hand, the most important concession of the emperor was that which dealt with his relation to the bishoprics and abbeys outside of the German kingdom. Here he made no claim to a part in the election, and accepted the provision that the bishop or abbot was to apply for the "regalia" after the consecration—that is, after the whole process of appointment was completed; and this no doubt meant a very great change in the relation of the emperor to the Italian bishoprics.

We have reached the end of our consideration of the first aspect of the great conflict between the Empire and the Papacy, but in the course of this conflict other questions had arisen, and other claims had been made which represent a profounder aspect of the relations of the Spiritual and Temporal Powers in the Middle Ages, and we must now turn to the consideration of these.

PART III.
THE POLITICAL CONFLICT OF PAPACY AND EMPIRE

CHAPTER I.
THE POSITION AND CLAIMS OF GREGORY VII

In the first volume of this work we have set out what appears to us to be a reasonable interpretation of the relations of the Spiritual and Temporal Powers in the ninth century, and have urged that these represent in substance the acceptance of the principles set out by Pope Gelasius I in the fifth century—that is, that the two authorities are each divine, and are each supreme within their own spheres, that neither can claim authority over the other with respect to its specific functions. It is quite true, and we have endeavoured to recognise it frankly, and to illustrate it sufficiently, that in actual fact the spheres of the two authorities were not in the ninth century thus clearly separate, but that we find each intervening from time to time in matters which belonged to the other. It does not, however, appear to us that this really affected, in the minds of the men of that time, the validity of their general judgment, or the sincerity of their conviction that the Spiritual and the Temporal Powers were autonomous in their relations to each other.

It is, however, true, and we have laid some stress upon it, that in the ninth-century restatements of the Gelasian principles we find some important modifications and additions. Where Gelasius had said that the burden laid upon the priest is heavier than that which was laid upon the king, for in the divine judgment he will have to give account for the soul of the king, Jonas of Orleans calls the person of the priest "praestantior", for he is responsible to see that the king does his duty even in the discharge of his office; and Hincmar of Rheims says that the "dignitas" of the bishop is greater than that of the king, for it is the bishop who consecrates the king. But the most fundamental modification of the Gelasian phrases was made by Jonas of Orleans and the bishops in the 'Relatio' of 829, where they say that the two great offices of the priest and the king are offices not in the world, as Gelasius had said, but in the universal Church, which is the Body of Christ. How far this modification was conscious and deliberate we cannot say, but it is none the less important. It may reasonably be contrasted with the phrases of Optatus of Milevis, when he rebukes the Donatists for their want of respect for the Empire: the Church, he says, is within the commonwealth—that is, the Roman Empire—and not the empire within the Church.

This conception is indeed one of far-reaching importance, and is characteristic of the whole political and ecclesiastical theory of the Middle Ages. In our second volume we have cited a passage from Stephen of Tournai, one of the most eminent canonists of the later years of the twelfth century, which represents this principle very effectively. In the one Commonwealth, he says, and under the one king, there are two peoples, two modes of fife, two authorities : the commonwealth is the Church, the King is Christ, the two peoples are the two orders in the Church—that is, the clergy and the laity; the two modes of life are the spiritual and the carnal; the two authorities are the priesthood and the kingship ("sacerdotium et regnum"), the twofold "iurisdictio" is the divine law and the human : give to each its due, and all things will be brought into harmony.

There is only one Commonwealth, that is the Church of Christ, and of this Commonwealth Christ Himself is the King; but He commits his authority to two persons, to the priest and the king, and not to one alone. There is no question in Stephen's mind of an authority of the one over the other, within its own sphere, nor does he even suggest any question of the priority of the one over the other. And yet it would seem that when the commonwealth was conceived of as the Church, it would be difficult to avoid this question completely. At any rate, even in the ninth century, Jonas of Orleans and Hincmar of Rheims anticipated in some measure the actual form which the question was to take.

Jonas, as we have seen, calls the person of the priest "praestantior", for he is responsible to see that the king does his duty; and Hincmar calls the "dignitas" of the bishop greater than that of the king, for the bishop consecrates the king to his office. It is in these two phrases that we may see the first germs of those claims of the Church and the Papacy which we have now to examine.

In the first part of this volume we have endeavoured to set out briefly some illustrations of the conception of the superiority of the Spiritual over the Temporal Power, and of the conception that it had some authority in determining the claim to secular authority. The most significant phrase is perhaps that of Rodolphus Glaber, writing towards the end of the first half of the eleventh century, when he says that no one can be recognised as emperor who has not been chosen by the Pope as suitable in character, and unless ho has received from him the tokens of empire. A little later we find the reforming Popes and their friends using phrases whoso precise meaning is indeed difficult to determine, but which are at least very significant. Pope Leo IX, in a letter to the Patriarch of Constantinople, in which ho maintains the authority of the Roman See over all Churches, also urges that the Roman See has an earthly as well as a heavenly empire, that the Roman See has a royal priesthood, and he confirms this by a reference to the "Donation of Constantine". Unfortunately, he does not indicate clearly the meaning which he attached to its phrases. In the first volume we have set out the reasons which have convinced us that originally, and in the ninth century, the political authority referred to was understood to relate to the papal claims on the exarchate of Ravenna, and the other Byzantine territories in Italy. Whether Leo IX understood its phrases in this sense, or in a more general one, is not clear.

He proceeds to quote a considerable part of the "Donation of Constantine", including those sentences which refer to his handing over his authority in Italy and the Western regions to the Pope.

A few years later again we find Peter Damian, as we have already seen, using phrases whose significance it is very difficult to determine. He recognises indeed very explicitly that the royal power derives its authority from God Himself, and he distinguishes very emphatically the nature of the functions of the king and the priest; and when he refers to the two swords, he speaks of them as belonging, the one to the king and the other to the priest, and does not suggest the doctrine sometimes maintained later, that both strictly speaking belonged to the priest. On the other hand, in a letter to Henry IV, exhorting him to help the Roman See against the antipope Cadalius, he says that the king is to be respected when he obeys the Creator; but when he goes against the divine commands he is lawfully held in contempt by his subjects. In another place he speaks of the Pope as the king of kings and prince of emperors, who excels all living beings in honour and dignity; and in another place still he speaks of the Roman Church as having been founded by Christ, who committed to Peter ("beato eteenae vitae clavigero") the laws both of the earthly and heavenly empire, and this is repeated in another work, where he speaks of Christ as having committed to Peter the laws both of heaven and of earth. We have already considered these phrases in Part I of the volume, and we have dealt with the interpretation of some of them by the canonists of the twelfth century in volume II, and we can only repeat that it is very difficult to say what Peter Damian may have meant by them.

Another of the most eminent of the reforming Churchmen of the time used phrases which are noticeable as indicating the rationale of the later claim of the spiritual power. Cardinal Humbert recognises and states very emphatically the distinction of the spheres of the two orders : the clergy may not interfere in secular matters, any more than the laity in ecclesiastical affairs. In another passage, however, he says that, if we are to find a just comparison between the priestly and the royal dignities, we may say that the priesthood resembles the soul, and the kingdom the body, for they love each other, and have need of each other. As the soul is greater than the body and commands the body, so is the priesthood in regard to kingship; and thus, that all things may be rightly ordered, the priesthood like the soul admonishes men what things are to be done; as the king should follow the

ecclesiastic, so the lay people should follow the king; the priest should teach the people, the king should rule them.

We do not feel that it is possible to say exactly what Peter Damian and Humbert and other reforming Churchmen may have understood by such phrases, we doubt indeed whether they attached to them any clearly defined meaning. They must not therefore be considered unimportant and insignificant; and it only needed some new conditions to bring out their significance, perhaps we should rather say, new conditions and a more determined temper.

The new conditions developed with that great change which we have discussed in the last section of this volume. Till the death of Henry III it is clear that in the main the reforming party in the Church had the general and hearty support of the imperial authority, but with his death this was changed. During the minority of Henry IV the authority of the emperor became involved in the most glaring abuses, and when Henry IV himself took over the reins of government this was only confirmed.

It is not our part here to discuss the truth of the charges which were brought against Henry's personal character—the statements of his political and ecclesiastical enemies must be received with caution. But it does not admit of dispute that both in his private conduct and in his ecclesiastical actions he gave serious cause of offence. It may suffice here to mention the great scandal which was caused when, in 1069, Henry made public his desire to divorce his wife. In a letter of Archbishop Siegfried of Mainz to Pope Alexander II he describes the indignation with which this had been received. In another letter of the same archbishop we have a good example of the relation of Henry to the ecclesiastical scandals of the time. Siegfried had been forbidden by Alexander II to consecrate the bishop-designate of Constance, on the ground that he was charged with simony; and he reports that Henry was much incensed with him on this account, and that he was afraid that Henry would take further measures unless the Pope protected him against the royal anger. Indeed, if we accept the statements of Henry IV's own letter to Gregory VII of 1073, it would seem evident that he was conscious, or allowed himself to be represented as being conscious, of grave faults, both personal and ecclesiastical.

When Hildebrand was elected to the Papacy in 1073, as Gregory VII, the division between the reforming party in the Church, and the authorities of the State in the Empire, and also in France, was already very marked; and while it is true that for a considerable time Hildebrand had exercised a great influence in determining the policy of the Papacy, it is also true to say that with his formal accession to power this policy became clearer and more determined. Since the Council of Sutri the Popes had steadily maintained the policy of reformation, and especially with regard to two questions—one, with which we are not here directly concerned, the marriage of the clergy, the other the buying and selling of Church offices or simony. Hitherto this had been expressed mainly under the terms of stringent proceedings against the clergy who were guilty of simoniacal practices, but with the accession of Gregory VII the Papacy turned its attack upon the secular authorities themselves as being, in its judgment, mainly responsible for this condition of things.

It has been sometimes maintained or suggested that this was due to some more or less definite and conscious intention to establish the power of the Papacy as supreme over the Temporal Power: we doubt whether there are sufficient grounds upon which to found any such judgment, and we think that it would be wiser for the historian to confine himself to the observation of the actual development of the new policy of the Papacy. It is, however, true that the new policy developed with great rapidity; that indeed from the first year of his pontificate Gregory VII showed that he was prepared to use every power which the Papacy had ever claimed, or exercised, to secure reform.

The new policy, if we may call it such, took shape first in relation to the French monarchy; it was not till 1076 that the breach with Henry IV took place. We must therefore begin by observing the relations of Gregory VII and France during the first years of his pontificate.

In an earlier chapter we have dealt with the stringent measures which Pope Leo IX had taken against simony in the French Church. When Hildebrand became Pope he found the evil still rampant, and in his judgment it was the king himself, Philip I, who was the real source of the evil. In December 1073, the year of his accession, Gregory VII wrote to the Bishop of Châlons a letter, in which he denounces Philip as being among all the princes of that time the greatest offender against the true order and freedom of the Church, and as being especially guilty of the most outrageous simony. He expressly lays the blame upon him, for he speaks of the French kingdom itself as singular in its piety and devotion to the Roman Church. He does not, however, confine himself to denouncing the wickedness of the king, but threatens, in the plainest terms, that, if Philip would not amend his evil ways, he would lay the kingdom under a general excommunication, and thus compel the French people to withdraw their obedience from the king.

We have indeed here startling evidence of a new policy, of the fact that the Roman See was now under the control of a Pontiff who was prepared to use every weapon at his disposal in order to secure a complete reform in the conditions of the Church. The policy and determination which are manifest in this letter were further developed in the succeeding years. In September 1074, Gregory VII wrote to the Archbishops of Rheims, of Sens, of Bordeaux, to the Bishop of Chartres and the other bishops of France, reproving them for their failure to resist the wickedness of the king, and bade them as one body to remonstrate with him, and to denounce to him the wickedness of his deeds. If he would not listen to them they were to warn him that he would not escape the apostolical sword, and they were, in obedience to Rome, to separate themselves from his obedience and communion, and to interdict the public performance of all divine service throughout France; and finally, if Philip would not even then repent, he desired that every one should know that he would leave nothing undone to deprive him of the French kingdom.

In November of the same year Gregory wrote to William the Count of Poitou, and exhorted him to remonstrate with Philip on his iniquities, and more especially with regard to his conduct in plundering Italian merchants in France, and told him that, while he was prepared to accept his repentance, if he did not amend his evil ways he would excommunicate him and all those who continued to render him obedience. Again, in December of the same year he wrote to Manasses, the Archbishop of Rheims, on the same matter, denouncing the new and unheard-of crime of the king, that he plundered the merchants of Italy and other countries, and warns him that if the king persisted in these crimes he must expect to have the Roman Church and the Pope as his determined enemies. In the Council held at Rome in February 1075, he decreed that, unless Philip gave security for his amendment to the papal envoys who were to be sent to France, he was to be held excommunicate.

The terms of this letter of Gregory VII certainly mark the appearance both of a new attitude of the Papacy towards the Temporal Powers, the determination to deal directly, not merely with the clergy who were guilty of simony, but with the secular authorities, when they were responsible for this, and also the assertion of the right of the Papacy both to excommunicate and to depose princes. It was not till later that a reasoned justification of these claims was set out by Gregory, but it is noticeable that in a letter of 1074 to Sancho, King of Aragon, he asserts that Christ had made Peter prince over the kingdoms of the world; and in a document which has been dated as belonging to the year 1075, and contains a summary and statement of the nature of papal authority, we find an explicit assertion of the principle that the Pope can depose emperors, and release the subjects of wicked rulers from their allegiance. There is indeed no doubt that the Church had constantly claimed a full spiritual authority over kings as much as over lesser men, but the conception that this involved the right to depose kings was a somewhat different matter. In our first volume we have cited certain passages which indicate that the conception was not unknown, and had been at least sometimes recognised in the ninth century; but the determined phrases of Gregory VII certainly seem to represent a new confidence as well as a new policy.

If the new policy became apparent first in the relations of the Papacy to the French monarchy, it was in its relations with the Empire that it was developed. We do not pretend here to relate the history of the great conflict between Gregory VII and Henry IV in detail, but we must follow its course, so far as is necessary to understand the principles which were at issue. We have already mentioned the grave scandal caused by Henry IV's proposal in 1069 to divorce his wife, and by his connivance with simony. When Hildebrand succeeded to the Papacy in 1073, Henry IV had not been personally and explicitly excommunicated; but he had refused or neglected to separate himself from the society of excommunicated persons, and was therefore indirectly under the ban of the Church. It should, however, be observed that Hildebrand was careful to avoid giving offence to Henry IV, and seems to have recognised his claim to be consulted before his actual consecration.

Gregory's attitude to Henry on his accession to the Papal See is well illustrated by a letter to Godfrey, Duke of Lorraine. He assures him that no one could desire Henry's well-being more than he does, and that he would greatly rejoice if Henry would follow his admonitions and counsels in maintaining justice; but he also says very plainly that no respect of persons would withhold him from exercising justice upon him who held God in contempt. Again, in a letter of September 1073, to Anselm, the Bishop-elect of Lucca, he bids him not to receive investiture from Henry until he had done satisfaction to God for his communion with excommunicated persons, and had made his peace with the Papacy.

Gregory's accession to power was almost simultaneous with the outbreak of the great revolt of the Saxons against Henry IV. In the third volume of the work we have dealt with its significance in relation to the history of the development of political ideas. We cannot here repeat what we have said, nor can we discuss in detail the circumstances, but it is necessary to bear in mind the political situation in Germany, as it doubtless contributed much to the development of the papal position. It was no doubt, in part at least, the serious danger of the revolt which induced Henry to express himself so humbly and penitently as he did in that letter of the year 1073, which we have already cited. He acknowledged very humbly that he had misused his powers, and that he had been guilty of simony, and he begged Gregory to counsel him, and promised obedience. In a very important letter, written in December 1073 to the Archbishop of Magdeburg and the other Saxon princes who were in revolt against Henry, we have the first important example of Gregory's intervention between Henry and his subjects. He laments the hostilities which had arisen between them, and the consequent devastation of Germany, and was evidently genuinely desirous to restore peace; but it is noteworthy that from the first he assumed towards them and the king a position of authority as well as of mediation. He tells them that he has entreated and admonished the king, in the name of the Apostles Peter and Paul, to abstain from hostilities until he could send envoys to inquire into the causes of the conflict and to restore peace; and he admonishes them to observe the same truce; he assures them that he would endeavour to establish justice, and that he would, without fear or respect of persons, give the favour and the protection of the apostolic authority to that party which had suffered injury and injustice. The tone of the letter is courteous but also authoritative.

It would seem that Henry had been unreconciled to the Church, but from a letter of Gregory to the Empress Agnes, the mother of Henry IV, written in June 1074, it is clear that by this time Henry had been restored to the communion of the Church, and thus a grave danger to his kingdom had been, as Gregory says, averted; for Gregory could not meet Henry while he was outside of this communion, and his relations to his subjects were very difficult. In a letter written by him to Henry in December 1074, we have a statement, friendly but severe, in which he warns him that he could only hold his kingdom rightly if he used his power for the restoration and defence of Christ's Church. In another letter of the same time, we seem to have an expression of Gregory's feelings towards Henry when he was completely assured of his repentance and reformation. He expresses his constant affection for Henry, laments that men sow discord between them, and urges him to turn

away his ears from such men. He tells Henry that his own desire was to accompany an army to the sepulchre of the Lord, and to bring help to the oriental Christians; and that if by God's help he was able to do this, he desired to leave the Church in Henry's care, that he might guard it as his mother, and defend its honour. He concludes by praying that God would absolve him from all his sins, and lead him in the way of His commandments, and bring him to eternal life. In a letter written to Henry after his victory over the Saxons on the Unstrut, he expresses his joy that the divine judgment should have given him this triumph over the Saxons, who were unjustly resisting him, while he laments that so much Christian blood should have been shed; and he assures him that he was willing to open the Church to him, and to receive him as one who was at the same time lord and brother and son, on the condition that he would consult his

In January of 1076, however, we find that the relations between Gregory and Henry were seriously strained. On the 8th of that month he exhorted him again to separate himself from the excommunicated persons, and complained of his conduct in bestowing the bishoprics of Fermo and Spoleto on persons who were not even known to Gregory. It was only a few weeks later that the final rupture took place, and Gregory VII and Henry IV were arrayed in open war against each other. The circumstances of this are set out by Lambert of Hersfeld, by Gregory VII, and by Bruno. According to Lambert the papal legates appeared in Germany, and summoned Henry to appear at a Council to be held in Borne in the second week of Lent to answer to the charges brought against him, and declared that, if he failed to do this, he would without further delay be cut off from the Church by this apostolic sentence. Henry was profoundly moved by this announcement, and at once, dismissing the legates with contumely, summoned all the bishops and abbots of the kingdom to meet at Worms on Septuagesima Sunday, to consider the deposition of Gregory, for this was necessary for the safety of himself and the kingdom. Gregory, in his letter to the faithful in Germany of August 1, 1076, after a long account of his relations with Henry IV, relates that he had written to him warning him that if he would not separate himself from the society of excommunicated persons he would have to reckon him as one separated from the Church, and that Henry, indignant at being rebuked, had persuaded many of the bishops in Germany and Italy to renounce their obedience to the Apostolic See.

The Council met on the appointed day, and its action will be best understood by considering the letters which the bishops themselves and Henry IV issued announcing its decisions. We cannot here discuss all the points raised in the letter of the bishops, but the most noteworthy are the following. They complained that he had stirred up strife in all the churches, setting the people against the bishops and clergy; that he had arrogated to himself the right of sanctioning or annulling the appointment of bishops; that he had forbidden them to bind or loose any one whose offence had been in any way brought before him. They suggested that his election to the Papacy had been irregular, and contrary to the decree of Pope Nicholas II; and they charged him with a scandalous familiarity with some woman and with allowing her to interfere in ecclesiastical affairs. They concluded, therefore, that they would no longer recognise him as Pope.

Henry, in his letter to Gregory, says that he had attacked the bishops who were his friends, and then had turned upon the head himself, and had threatened to take from him his soul and his kingdom. He had in consequence summoned a general meeting of all the chief men of the kingdom, and by them it had been decided that Gregory could no longer be recognised as Pope. Henry had assented to their judgment, repudiates Gregory's claim to the Papacy, and bids him descend from the see of that city of Rome, of which by the grant of God and the sworn assent of the Romans he was Patrician. In his letter to the Roman people Henry transmits to them the previous letter, and urges them to rise against Gregory and compel him to descend from the papal throne, so that another Pope might be appointed by Henry, with the consent of all the bishops and of the Roman citizens, who might heal the wounds of the Church.

It is perhaps deserving of notice that the letter of the bishops lays stress in the main upon alleged ecclesiastical grievances, and the alleged irregularity of Gregory's election; while Henry deals mainly with the threat to excommunicate him, and the alleged threat to depose him. Whether he means that this was implied in the threat of excommunication, which is all that is mentioned by Lambert, or whether there had been some other statement by Gregory, as may be meant by Henry's words in his letter to him, "scilicet ut tuis verbis utar", we cannot tell. Henry clearly alleges that Gregory had threatened to depose him. It is beyond the scope of this work to deal with the question how far the contention of the bishops, that Gregory was claiming new powers over them, was well founded or not. It is no doubt true that the Papacy in its attempt to reform the conditions of the northern churches was extending its activity to an immense extent, but how far this represented innovations in principle is another matter.

We are concerned here with the question of the relations of the Spiritual and Temporal powers, and we must turn from the proceedings of the Council of Worms to those of Gregory in the Council which met in Borne in February. In this Council, and under the terms of an invocation addressed to St Peter, Gregory solemnly excommunicated Henry, deposed him from the kingdoms of Germany and Italy, and absolved all his subjects from their oath of allegiance. He did this on the ground that Henry had refused to obey the Lord, had joined himself to those who were excommunicated, and had attempted to divide the Church; and he claimed this authority in the name of Peter, to whom Christ had given the power of binding and loosing in heaven and upon earth.

The conflict had at last become open war, and the greatest Temporal power in Europe was arrayed against the Spiritual power of Rome. We must now examine the documents in which Henry and Gregory justified their action. The first important statement which we must consider is contained in a letter written by Henry to Gregory on March 27, 1076, presumably on hearing the news of his excommunication and deposition at the Council of Rome in February. He addresses his letter to him not as Pope but as the false monk Hildebrand, and accuses him first of having overturned all due order in the Church and treated the bishops as his slaves; he had, he says, patiently endured all this, but Hildebrand, mistaking his humility for fear, had at last turned upon the royal authority which had been given him by God, and had threatened to take it away from him, as though Henry had received the kingdom from him. The tradition of the holy Fathers had taught that the anointed king could be judged only by God, and could not be deposed for any crime except heresy. He therefore, and all his bishops, bids Hildebrand descend from the apostolic throne and make way for another. The letter sets out two very important principles or claims : the first, that Henry had been appointed by God, and was subject only to the judgment of God, and could be deposed only if he forsook the faith; the second, that the king and the bishops had the right to judge and depose the Pope : but this is more vaguely put, and the grounds and conditions of the claim are not expressly stated.

Henry's position is more carefully set out in another document, which is thought to be a summons addressed by him to the bishops to attend a council to be held at Worms at Whitsuntide. In this he states with some care the principle of the separation of the two authorities, the "regnum" and the "sacerdotium", which Christ had established in His Church under the type of the two swords, and he describes their respective functions. The "sacerdotium" is to secure obedience to the king, after God, and the "regnum" is to conquer the external enemies of Christ, and to compel men within the Church to obey the "sacerdotium". It was this order which Hildebrand was striving to overthrow, and in doing this was really destroying the position and authority of both powers. Incidentally he denies that God had called Hildebrand to the "sacerdotium".

The position of Hildebrand was set out by him in reasoned terms in a letter which he sent to Hermann, the Bishop of Metz, in August 1076. He addressed himself primarily to the contention of those who maintained that it was not proper to excommunicate a king. He cites various authorities and historical precedents to show that this was lawful, and that it had been done; and then argues that

the conception that any man could be exempt from ecclesiastical jurisdiction was intrinsically absurd, for it would mean that he was outside of the Church, and alien from Christ. In arguing that it was lawful to excommunicate kings, he cites the alleged deposition of the last of the Merovingian Kings of France by Pope Zacharias, and the words of a letter of Gregory the Great, in which he had threatened kings who resisted his judgment not only with excommunication, but also with the loss of their office. It is to these presumably that he returns when he asks why the Apostolic See, which judges spiritual matters in virtue of the authority committed to it by God, should not also judge of temporal things. Some people had suggested that the royal dignity was greater than that of the bishop; he indignantly protests that the truth was just the opposite, and that this was evident from its origin : kingship had its beginnings in human pride, while the bishop's office was created by God. Finally, he stringently forbade any one to absolve Henry : this must be left to the papal judgment.

In a letter addressed to the faithful in Germany on September 3, Gregory set out the position, and the power which he claimed, with some important additions. He directs them to the decree of the Council which had excommunicated Henry for a statement of the grounds on which this action had been taken, and he bids them understand that Henry had been not only excommunicated, but also deposed, and that all his people had been absolved from their oath of allegiance. He desires them to show him mercy if he repented, especially for the sake of his father and mother; but Henry must learn that the Church was not his handmaid, but was set over him. If he would not repent another was to be elected to the kingdom who would promise to observe what Gregory had enjoined, and to do whatever should seem necessary for the Christian religion and the welfare of the whole empire. He requires them to report to him the person selected and his character, in order that he might confirm their election and the new order, as the holy Fathers had done. Finally, he refers to some oath which had been made to the Empress Agnes, and requires them, if they had determined to remove her son from the kingdom, to consult her and himself about the person selected to succeed him.

If we now endeavour to sum up the principles and claims which are set out in these documents, we shall recognise that the conflict arose immediately and directly out of the claim of Gregory to exercise spiritual jurisdiction even over the king. It was the summons to Henry, to answer in Rome for the ecclesiastical offences of which he was accused, which was the immediate cause of the open breach. The first and fundamental contention of Gregory was that even the king was subject to the ecclesiastical censures of the Church, and even, if need should arise, to excommunication. Whether Gregory had formally threatened to depose Henry is not clear; but Henry understood that he had done this, whether implicitly or explicitly. He accordingly set up the counterclaim that he and the bishops had the power of sitting in judgment upon the Pope, and, acting upon this claim, they declared the deposition of Gregory at Worms. Gregory replied by excommunicating and formally deposing Henry as a rebel against God and the Church, and justified this action by various arguments and precedents. Henry's reply to this was twofold : first, the claim that the king was subject only to the judgment of God, and could not be deposed except for heresy; and second, he appealed to the Gelasian tradition of the separation and autonomy of the two powers. Gregory, it should be observed, in the letter to Hermann of Metz, does not explicitly deny this, but reiterates the claim to spiritual authority over the king, and seems to assume that this carried with it the power of deposition; and he puts forward, in vague but significant phrases, the contention that, if the Holy See could judge spiritual matters, it could also judge secular things. With special reference to the actual situation, he also claimed the right to consider and approve the person whom the German people should elect to take Henry's place.

Such, then, were the first stages of the great conflict, and the nature of the claims as they were first set out by the two parties. We must now consider briefly the development of the historical situation, and the further development of the principles which had been put forward.

It might have seemed as though Henry was able to command the allegiance of Germany, and even of the German bishops, in his quarrel with Gregory, but in a short time it became evident that this was not the case. The victory of the Unstrut in 1075 seemed to have crushed the revolt of the Saxons and to have secured Henry's supremacy in Germany; but in the course of 1076 a new and more formidable rising broke out, and in a short time the political situation was completely transformed.

The Saxons and Swabians broke into open revolt, and Henry was obliged to bow to the storm. The accounts given by the historians differ in detail, but they agree in some of the most important parts. Henry was compelled to make his submission to Gregory, and the princes determined that if he were not absolved within a year he would cease to be King, and they invited the Pope to come to Germany to put an end to the conflict. Henry's letter to Gregory VII and to the German Princes declaring his submission are expressed in the most explicit terms.

Henry accepted the terms proposed by the revolting princes, and retired to Spires, but seeing the great importance of being absolved before the anniversary of his excommunication, determined to set out for Italy, to present himself before Gregory and to obtain absolution. Gregory at the same time had set out from Rome on his journey to Germany, and had reached Canossa when Henry arrived. We need not relate the story of Henry standing barefoot before the gate of Canossa, but the conditions of his absolution are of the highest importance. The Register of Gregory VII contains what professes to be a record of the promises which Henry made on 28th January 1077. In this Henry undertook, with reference to the complaints which had been brought against him by the archbishops and bishops and other princes of the German kingdom, either to do justice according to the judgment of the Pope, or to make peace according to his counsel, within the term which the Pope should appoint, unless he or the Pope should be prevented by a "certum impedimentum". The account given by Lambert of the conditions of absolution is of little historical value, but is important as illustrating the standpoint of some of Henry's enemies. Henry is represented as promising that he would appear on a day and at a place to be appointed by the Pope, at a council of the German princes, and would then reply to the charges brought against him; that the Pope should, if it seemed well, act as judge, and that Henry should, according to his sentence, either retain the kingdom, if he were able to purge himself of the charges brought against him, or should lose it if the crimes were proved, and he were declared unworthy, according to the ecclesiastical laws, of the regal dignity. If he were confirmed in the kingdom, he promised that he would be subject and obedient to the Pope, and would manfully help him in correcting those evil customs which had long existed in the kingdom contrary to the ecclesiastical laws. If Henry did not fulfil these promises, the absolution was to be void, and the princes would be entitled to elect another king.

It is evident that Lambert's account not only contains more detail, but that it is more strongly expressed; the substance, however, is not very different, for in the document contained in the Register, Henry promises to submit to his judgment or to follow his counsel. We must compare the statement of the circumstances, contained in the letter which Gregory sent to the German princes announcing Henry's submission and the fact that he had absolved him from the sentence of excommunication.

Henry's submission at Canossa was apparently complete, but the whole situation only became more complex. Gregory VII says explicitly in the declaration of the excommunication of Henry in 1080, that while he had absolved Henry at Canossa, he had not restored him to the kingdom, and that his action was determined by his desire for justice or peace between him and the bishops and princes who had been in revolt. It was these bishops and princes who, hearing that Henry was not keeping the promises which he had made to Gregory, and despairing of him, elected Rudolph as king without consulting him ("sine meo consilio vobis testibus, elegerunt sibi Rodulfum ducem in regem"). He

reasserts this emphatically in a letter which is undated, but is thought to have been written between 1081 and 1084.

It seems therefore clear that the action of the German princes who elected Rudolph at Forcheim in March 1077 was taken without the advice of the Pope, and it soon became clear that Germany was completely divided, and that the election of Rudolph was only accepted by a section of the nation. Towards the end of May in the same year (1077) we find Gregory addressing a letter to the faithful in Germany, in which he says that both the kings had asked the help of the Roman See, and that he desired to go to Germany, and with their consent, to decide the dispute, and to render his help to that one that of the two whose cause should appear to be just. If either of the kings were to refuse him the necessary safe-conduct, he should be excommunicated, and he cites the words of Gregory the Great, that those kings who acted against the command of the Apostolic See were to lose their dignity, and repeats the words which he had used in his letter to Hermann of Metz, that if the See of Peter judges spiritual matters, much more could it judge earthly and secular matters. He concludes by assuring them that he had made no promise to either king that he would do anything except that which was in accordance with justice.

Gregory's letter of instruction to his legates of the same date sets out the same principles, but in more detail. They are to demand of both the kings safe-conduct for him to Germany, for he desires to consider the case between them with the counsel of the German clergy and laity who fear God, and to declare to which party justice belonged. They know that it is the duty of the Apostolic See to decide the graver affairs of the Church, and this matter is so weighty and dangerous that if he were to neglect it, the whole Church would suffer the most grievous injury. If, therefore, either of the kings were to resist his purpose and their mission, they were to deprive him of the kingdom, and to cut off him and his supporters from the communion of the Church, and they were to call together a council of the clergy and laity to confirm him who obeyed Gregory's command in the kingdom, and to enjoin upon all, both clergy and laity, that they should faithfully serve him.

In the Register of Gregory VII we have several documents which indicate the development of the situation in the year 1078. The "Acta" of a Council held at Rome from February 27 to March 3 report that it was determined that, in view of the danger caused to the Church by the grave dissensions in Germany, legates should be sent to hold a council of all religious men, lay and clerical, with whose help they might either bring about peace or might learn to which side justice belonged, and give to it the help of the Apostolic authority. A letter by Gregory, addressed to the Germans of all ranks, announces the decision of the Council, and urges them all to strive for peace. On July 1 Gregory wrote again to all clergy and laity in Germany, telling them of the Council which was to be held in Germany in the presence of his legates to decide between Henry and Rudolph.

In February 1079 the envoys both of Henry and Rudolph appeared at a Council in Rome, and the Register contains the undertakings which they made for their masters. The envoys of Henry swore that before Ascension Day, unless hindered by lawful cause, they would come to conduct the papal legates to Germany, and that Henry would obey in all things according to justice and their judgment. The envoys of Rudolph swore that if the Council was held in Germany, according to the Pope's injunction, Rudolph would attend himself, or by his bishops and other faithful men, and that he would be prepared to accept the judgment of the Roman Church with regard to the kingdom; that he would put no obstacle in the way of the meeting of the council, and would do what he could to enable the papal legates to attend.

The Council accordingly resolved to send legates to Germany who should call together an assembly both of the clergy and laity, which should either make peace or declare the canonical judgment upon those who were the cause of strife, and declared that any person obstructing the work of the legates, or making war while the negotiations were being conducted, should be excommunicated.

It is to this decision that Gregory refers, in a letter of the same month addressed to Rudolph of Suabia. He assures him that, though he had been constantly solicited by the envoys of Henry IV to espouse his cause, he was firmly resolved to discover and to maintain that which was just. In another letter to Rudolph and the bishops and princes of his party, he exhorts them to stand fast for the truth of religion and for their own liberty; but he refers them to his legates and letters for an account of the measures which had been taken in the Council at Rome for the establishment of peace in the German kingdom. The second of these letters is not easy to reconcile with Gregory's protestation of impartiality. Two letters written at the beginning of October in the same year seem to illustrate very clearly the position of Gregory. One is addressed to his legates in Germany, and says that he had received complaints that they were not carrying out his instructions; and, though he gave no credence to these complaints, he warns them of the need of the utmost caution, that they might give no grounds of suspicion that they favoured one party more than another, for he was determined to follow no other end than that of justice. It is very significant that he strictly forbids them to declare any judgment upon the archbishops or bishops who were charged with having received lay investiture, and that they were to let him know at once if the king (Henry IV) came to an agreement with them about summoning a meeting for the restoration of peace in the kingdom. The other is addressed to the faithful in Germany. He had heard, he says, complaints that he had behaved "seculari levitate", but he assures them that no one had suffered more than himself. Almost all the lay people were on the side of Henry IV, and accused him of harshness and want of "pietas" towards him. He had hitherto resisted this pressure, and had not, except so far as equity and justice demanded, inclined to either side. If his legates had done otherwise he was grieved ; but they had done this only under violent coercion, or had been deceived.

It was in March 1080 that the breach between Gregory VII and Henry IV was completed, and that Gregory again excommunicated and deposed Henry and acknowledged Rudolph as king. Gregory announced this in a declaration to a Council at Rome, in which he sums up the events and his own actions since Canossa. He declared that while he had absolved Henry at Canossa, he had not restored him to the kingdom, but was resolved to do justice or to make peace between him and those who had revolted against him. The election of Rudolph was carried out without his advice, but he had resisted the prayers of Henry that he should help him against Rudolph. Finally, both kings had asked him to do justice, and he had decreed that a meeting should be held in Germany to make peace or to determine to which party justice belonged; and because he knew that the party which was in the wrong would try to hinder this meeting, he had excommunicated anyone who attempted this. Henry and his supporters had prevented the meeting, and therefore, trusting in the judgment and mercy of God and the Blessed Virgin, he now excommunicated him and them, and in the name of God and the Council deposed Henry from the kingdoms of Germany and Italy, forbade all Christian men to obey him, and absolved them from the oath of obedience which they had taken or might in the future take. He solemnly granted that Rudolph should reign in the German kingdom to which the Germans had elected him; and to all those who should faithfully obey him he gave absolution from their sins and the blessing of the Council in this life and the next. Finally, he exhorted the members of the Council to act so that all the world might know that, as they had power to bind and loose in heaven, so also they could take away and grant kingdoms, principalities, and all other possessions of men, according to men's merits. Let the kings and princes of the world learn how great was their power, and fear to disobey the command of their Church.

It is very important to observe the principles represented in this statement. First, Gregory claims that he had authority to excommunicate and depose Henry for hindering the meeting to which he had promised to submit the question between him and Rudolph. Secondly, he claims authority to sanction the appointment of Rudolph to the German kingdom; but it must be observed that he is careful to say that the Germans had elected him. Third, he associates the Council in Rome with

himself in this action. Fourth, he urges upon the Council that they should make it clear that they have authority to grant and to take away all political authority in accordance with men's deserts. These claims represent a considerable advance upon those which Gregory had made in 1076 : he had then excommunicated Henry for a definite and deliberate revolt against the Church, for presuming to judge and depose the Pope; he now excommunicated and deposed Henry for refusing to accept the authority of the Pope in the determination of the political affairs of Germany. It must, however, be borne in mind that, as we have seen, and as Gregory is careful to recall, both parties in Germany had appealed to him to judge between them, and had sworn to accept his decision. The last clauses of Gregory's declaration, however, it must be noted, set out in very large and sweeping terms the claim that the Church has a general power to give and to withdraw political authority.

The action of Gregory was followed almost at once by Henry, who summoned a Council at Brixen which decreed the deposition of Hildebrand from the papal throne. They justified this action by the allegation that his election had been secured by violence, and in contempt of the decree of Pope Nicholas, which required the assent of the emperor, and by the charge that he had subverted all the order of the Church and the peace of Empire. They then elected Guibert, the Archbishop of Ravenna, as Pope.

In February 1081, in a Council at Rome, Gregory renewed the excommunication of Henry and his supporters, and in March he set out in another letter addressed to Hermann, the Bishop of Metz, a detailed justification of his action. In this letter he goes over again much of the ground which he had already traversed in his letter to Hermann of August 1076; but the principles are more fully drawn out and the conclusions more sharply stated. He begins by repudiating the contention that the Apostolic See could not excommunicate kings, and absolve their subjects from their allegiance, as being contrary to the authority of Scripture and the Fathers. He cites the words of our Lord giving to St Peter the power to bind and loose, both on earth and in heaven, and various passages from Gregory the Great and other writers, and asks how it can be maintained that he who has the power of opening and closing heaven has not the power of judging in the world. All earthly authority which has been created by man is subject to that authority which God Himself has created. In words which have often been quoted he urges the base and sinful origin of secular authority: kings and princes derive their origin from men, who in pride, rapine, perfidy, and murder, and under the guidance of the devil, aspired in blind and intolerable presumption to make themselves the lords of their equals. It cannot be doubted that the priests of Christ are the fathers and masters of all the faithful. He urges the example of the humility of Constantine, who at the Council of Nice sat below the humblest of the bishops, saying that he could pass no judgment upon them, but called them Gods, and said they were not subject to his judgment, but rather he to theirs; and he cites the words of Gelasius, in which he declared that the greater burden belonged to the priests, for they would have to give account in the day of judgment even for kings. It was in virtue of such authorities that various Popes had excommunicated or deposed kings and emperors in former times; and he mentions particularly the alleged deposition of the Emperor Arcadius by Pope Innocent I, the deposition of the last of the Merovingians by Pope Zacharias I., and the excommunication of Theodosius by St Ambrose. Finally, he urges that any good Christian should be reckoned as a king rather than a wicked prince. There have been few kings who have been really religious, while St Peter has conferred upon his successors a perpetual sanctity. Those whom the Church calls to kingship or empire should be humble, should honour God, and administer justice.

The final breach between Gregory VII and Henry IV had scarcely taken place, and Rudolph been formally recognised as king by Gregory, before a new situation was created by the death of Rudolph from wounds received at the battle of the Elster in October 1080. The standpoint of Gregory himself in view of the situation is clearly defined in the letter which he addressed to Bishop Altmann of Passau in 1081. So far from abating his claims or lowering his demands, he rather expresses them

more sharply and raises them still higher. He tells the bishop that on the death of Rudolph almost all those who were faithful to him besought him to receive Henry, who was prepared to make large concessions, into his favour. They urged that almost all the Italians were on his side, and that if Henry were to invade Italy Gregory could expect but little assistance from Germany. Gregory sets aside these fears and advice without hesitation : he had evidently no thought but that another king should be elected in Rudolph's place, and is more concerned that the person elected should be suitable, than occupied with the immediate danger. He urges that there should be no undue haste in electing a successor to Rudolph; it was better that there should be some delay in the choice than that an unworthy or unsuitable person should be elected. The Church would not accept any one who would not prove obedient and serviceable to it. He then defines, in strict and significant phrases, the oath which he would require of the prince to be elected. He must swear that he would be faithful to St Peter and his vicar Pope Gregory, and that he would faithfully observe whatever command the Pope should impose upon him in the name of his true obedience. He must come to such an agreement with the Pope with respect to the ordering of the churches, with respect to the lands and revenues which the Emperor Constantine had given to the Church, and the churches and estates which others had bestowed upon the Apostolic See, that he would be free from the danger of sacrilege and the destruction of his own soul. On the first occasion when he should meet with the Pope, he must by his own hands become the soldier of St Peter and the Pope. Gregory leaves the details to be settled by the bishops, but insists upon the full and exact promise of obedience and fidelity.

These phrases represent a higher level of Gregory's claims—at least with respect to the German kingdom—than anything which we have so far seen; for the last words of the oath which he demanded may perhaps be interpreted as meaning that the king was to acknowledge himself to be the vassal of the Roman See. And even if it is uncertain whether they were intended to have so clearly defined a meaning as this, the whole oath represents a very extreme claim to obedience.

The negotiations between the two parties in Germany were soon broken off, and Hermann of Salm was elected to be king by the opponents of Henry, and was crowned on December 26, 1081 We do not pursue the course of historical events from this time to the death of Gregory VII in May 1085; for, though these years were crowded with great and dramatic events, no new principle emerged with regard to the relations between the Empire and the Papacy.

We have thus endeavoured to set out the nature of the principles and claims of Gregory VII. with regard to the relations of the Temporal and Spiritual powers, as they are represented in the historical events and in his own words; but that we may estimate more completely their real and permanent significance, we must now examine the criticism and exposition of them in the literature of the time and of the years that followed.

CHAPTER II.
DISCUSSION OF THE ACTIONS AND CLAIMS OF GREGORY VII.
I.

We have pointed out in earlier chapters that there are not wanting, even before the accession of Gregory VII to the Papacy, occasional statements in the writings of the Churchmen of the reforming party which indicate the existence of the conception that the Church, or rather the Papacy, possessed an authority which was, in some sense, supreme over all secular authorities, but it is difficult to say what sense exactly these writers attached to the phrases which they used. With the accession of Gregory VII all this changed; as we have seen, he did not merely set out general theories, but embodied these theories in definite and precise action, or perhaps it would be better to say that he threatened and took action in which some general theory was implicit, and in and through which those who followed became partly conscious of certain general theories and principles. We must not, however, assume that these formed a coherent and logically developed system, even in Gregory's mind, nor must we assume that even those who were his convinced and consistent supporters actually followed Gregory in all the developments of his principles. We must not make the mistake of reading back the extremest papalist theories of the thirteenth and fourteenth centuries, or the systematic thinking of the thirteenth century, into the eleventh. We must, therefore, now consider the more or less contemporary criticism and defence of Gregory VII's actions and claims, and endeavour to learn what were the conceptions about the relations of the Spiritual and Temporal powers winch developed in the course of the conflict.

We have very little literature which belongs to the first stages of this, but fortunately there has been preserved a correspondence between Bernard, the master of the school at Constance, and a certain Adalbert and Bernald, the author of the 'Chronicle'. The correspondence is thought to belong to the year 1076, and the writers were even then supporters of Gregory; but their tone is somewhat different from that of their later writings, to which we shall presently refer. Adalbert and Bernald had written to consult Bernard with regard to the propriety of the forms under which Gregory VII had excommunicated certain persons whom they term publicos et contumaces apostolicae sedis prescriptores", meaning by these, presumably, the persons who had taken part in the Council of Worms, 1076, and also to ask his opinion with regard to the sacraments performed by simoniacal and excommunicated persons. We cannot deal with the details of Bernard's reply, but it contains certain points of importance for our purpose.

Bernard urges first that the Apostolic See is supreme, and that this supremacy is not affected by the worthiness or unworthiness of him who occupies it; but while the Roman See is supreme the Popes had often permitted their subjects to admonish them, for they desired to live under the rule of law and according to the canons. He does not say that the procedure of Gregory had been irregular, but his treatment of the subject suggests that he was a little doubtful. He also discusses the objection which had been made to Gregory's tenure of the Papacy, that he had bound himself by an oath not to accept it without the Emperor's consent. Bernard does not contradict the story, but argues that even if it were true, the Roman Church could not be deprived of its right of free election.

Bernald and Adalbert, in their reply to Bernard, accept his view that the Popes might be admonished by their subjects, as Peter was by Paul, and then give that important account of the proceedings at Worms and Rome to which we already referred. They condemn the proceedings at Worms in the strongest terms, but it is noticeable that they are not quite clear about the question whether the Pope was not liable to the judgment of a properly called Church Council. They cite, indeed, various authorities which go to prove that no one could judge the Roman See, and especially the proceedings of the Synod of Rome, which refused to discuss the charges which were made against Pope Symachus, and left them to the judgment of God; but they seem to except the case of

heresy; and they assert that Gregory VII had repeatedly expressed his willingness that a Council to be held at Rome or elsewhere should consider the circumstances of his appointment and his conduct, and that he would descend from the Apostolic throne if he were found worthy of deposition. It does not appear upon what authority they made this statement: there is no other evidence to confirm it. To us its importance lies in the fact that men who were supporters of Gregory VII should have said it. The writers then give an account of the proceedings of the Council at Rome in 1076, and especially of the excommunication and deposition of Henry IV, and maintain that there could be no doubt of the canonical promulgation of this excommunication, as he had been repeatedly warned and waited for. We shall deal with the later opinions of these writers further on.

The other writings with which we shall now deal all belong to the period after the second excommunication and deposition of Henry in 1080, and after the Synod of Brixen and the election of the Antipope, Guibert, by Henry and his supporters in the same year. It may, perhaps, be convenient to begin by considering two works written shortly after this, which represent the opinions of moderate representatives of the two parties, Gebhardt, the Archbishop of Salzburg, and Wenrich of Trier.

Gebhardt was one of the most moderate but also the staunchest supporters of Gregory VII during the conflict with Henry, and in a letter or treatise addressed to Hermann, the Bishop of Metz, he sets out some of the considerations which seemed to him the most important. He traces the origin of the conflict chiefly to the neglect of the rule of the Church, which commanded the faithful to avoid the society of those who were excommunicated, and especially those excommunicated by Rome, and to the error of those who refused to recognise that a sentence of excommunication, whether men considered it just or unjust, was binding until it was reversed by competent authority, and he urges this with special reference to the excommunications which had been made by the Roman Council of 1080. He then deals with the question of the deposition of Gregory VII, and the appointment of the Antipope in the Synod of Brixen in June 1080, and contends that this had been done in contradiction to the evangelical and apostolic doctrine that the Pope could not be judged by any man. He then discusses the arguments of those who maintained that they could not violate their oath of allegiance to Henry, and urges that it is clear that oaths which have been wrongly taken, or involve some great wrongdoing, must not be kept. Gebhardt then turns upon the clerical supporters of Henry, and asks whether they think that it is in accordance with the character of the priestly office that they should by their counsel and help assist a Christian prince to compel men to violate the Christian law, to persecute the faithful, to seize the sanctuaries of God, and to pollute the sacred places with the slaughter of the servants of St Peter. They say that they are faithful to St Peter, but that it was right that they should attack the occupant of the See of St Peter because he had published an unprecedented and unjust sentence of condemnation upon the King and many bishops. He urges them to consider that even if the Pope had acted with unnecessary harshness, it would have been becoming to orthodox bishops to persuade the prince to seek for some remedy by ecclesiastical procedure, and not by means which destroyed the laws of the Church, by means of slaughter and devastation.

Finally, he urges that it was idle for them to endeavour to justify themselves by complaining of the harshness and unprecedented character of the action of the Pope, for it was they themselves who were the cause of all the trouble. It was their action at Worms (1076), when they had pronounced the sentence of deposition against Gregory, which was the origin of all this calamity : the Pope had not then issued any decree of excommunication against them, it was they who had renounced their obedience to him. This was in Gebhardt's judgment the real beginning of all the trouble, and for this there was no justification.

These contentions are to us specially interesting, as they indicate that in Gebhardt's opinion—and it would seem to be that of a moderate man who was not prepared in every respect to approve of

the action of Gregory VII—the conflict had arisen not so much from a revolutionary innovation of Gregory, as from the more revolutionary action on the part of Henry and his supporters among the bishops in attempting to judge and depose the Pope. In face of such an attempt and its consequences, Gebhardt could not hold it to be unreasonable that the oaths which bound men to obey Henry should be treated as null and void, and should be formally set aside.

If we find in Gebhardt of Salzburg's treatise a good representation of the moderate opinion which supported Gregory VII, we find in a letter written by Wenrich of Trier, in the name of Theodoric, Bishop of Verdun, probably between October 1080 and August 1081, a very forcible statement of the position of the moderate supporters of Henry IV. For it must be observed that the letter is written as from the standpoint of one who still recognised Gregory as Pope, and who had even suffered much in maintaining his cause. Theodoric of Verdun was indeed one of those who frequently wavered, being found sometimes on the side of Gregory, sometimes on that of Henry.

Wenrich begins his letter by recognising the high character and abilities of Gregory. Though he also gives at some length the charges of violence and ambition which were made against him, he does not himself assert the truth of these charges, as being matters outside his own knowledge. He does, however, gravely censure him for the subversive character of the steps which he had taken to suppress the "incontinence", *i.e.*, the marriage, of the clergy; he charges him with stirring up the laity against the clergy, and thus destroying the whole order of the Church. This is, however, only introductory.

He turns then to the action of Gregory in deposing Henry and sanctioning the election of Rudolph, and contends that such action was wholly illegitimate : there was nothing new, he says, in the rebellion of secular persons against the king, but it was a thing new and unheard-of that the Pontiff should take upon himself to bid the king descend from the throne of his fathers, and to excommunicate him unless he promptly obeyed. He reminds Gregory that Ebbo, the Archbishop of Rheims, had been deposed for his rebellion against Louis the Pious, and he contrasts his conduct with the conduct and principles of Gregory the Great, who had enjoined upon men reverence and obedience to their rulers, and had expressed himself as bound to obey the commands of the Emperor, even when he disapproved of them. He then discusses the question of the validity of excommunication, and, supporting his arguments with many citations from the Fathers, urges that excommunications made for unjust reasons have no real effect. He does not, indeed, directly controvert the principle which is represented in Gebhardt of Salzburg's treatise, that a sentence of excommunication must be accepted until it has been rescinded by competent authority, but he clearly wishes to qualify the effect of the papal sentence. He then proceeds to argue with great vehemence against Gregory's claim to absolve Henry's subjects from their oath of allegiance, and flatly denies that the Pope had any such power, even though it were true that Henry was really an impious and wicked prince; and he retorts by making a violent attack upon the character of Rudolph of Suabia and of other rulers who were favoured by the Pope and had obtained their territories by violence and crime. He also discusses the question of lay investiture of bishops, but we have considered this in an earlier chapter, and incidentally refers to the authority of the Emperor in confirming elections to the Papacy, citing the case of Gregory the Great.

It is noticeable that Wenrich does not justify the action of Henry and his supporters in deposing Gregory from the papal throne, though he suggests excuses for this, nor does he maintain directly that the Pope had no authority to excommunicate Henry; but he does deny that the Pope's excommunication was necessarily valid, and he emphatically repudiates the authority of Gregory to depose Henry and to absolve his subjects from their oath of allegiance.

These treatises of Gebhardt and Wenrich will serve well to illustrate some of the main principles which were at issue in the conflict, and, as is frequently enough the case in controversy, each is more successful in stating his own case than in meeting that of the other, in criticising the

attack which had been made on one side or the other than in defending the action of the party which each represented. These works belong to the period immediately following the final deposition by Henry of Gregory and the election of an Antipope by Henry, but the majority of the controversial tracts and pamphlets which have been preserved were written a few years later.

The first of these with which we shall deal was written probably in 1084, when Henry IV had occupied Rome. It is the work of a certain Peter Crassus, who may have been a teacher of Roman law at Ravenna: the author at least makes a great display of legal knowledge, and represents his position as being that of one who desired to show that the case of Henry rested upon the laws; and, if Gregory VII should refuse to recognise the authority of the Roman laws, he proposes to send to Henry a work in which, as he said, Gregory the Great had collected both systems of law, meaning by this the civil and canon law, for use in the Church.

He contends that it was the Emperor who had given the Church peace, and that it was Gregory who had broken the peace, and he advises Henry to call together a council which Gregory should be summoned to attend. He charges Gregory with sorcery, and appeals to those who attend as judges to deprive him of his ecclesiastical privileges, and to hand him over to the secular authority for punishment. He speaks of Gregory's action in excommunicating Henry and plotting against his kingdom as being contrary to the law, and he urges upon the Saxons that Henry held his kingdom by right of hereditary succession, and that it was no more legitimate to question the right of a king to the kingdom which he had inherited from his ancestors, than that of a private person to the hereditary ownership of his property. He contends, therefore, that neither they nor Gregory had any claim to sit in judgment upon Henry with respect to his right to the kingdom which he had inherited from his father and received by the divine appointment. This contention of an indefeasible hereditary right to the kingdom is noteworthy; it is interesting as anticipating a later development of political theory, but obviously enough has as little relation to the Roman law as it has to the traditional principles of the earlier Middle Ages. He further urges the wickedness of persuading men to violate their oaths of allegiance, and the respect and consideration due to kings and their divine authority, and concludes by calling upon the Saxons to submit to the judgment of Henry and to ask for his mercy.

This treatise, in spite of its pretentions to represent a special knowledge of the Roman law, contains little of importance in the way of argument. We have in a former volume dealt with the political theories of the lawyers of Bologna in the twelfth century,2 and it would be difficult to establish any relation between their work and the rather crude dogmatism of Peter Crassus.

We find a more serious statement of the position of the thoroughgoing supporters of Henry in an anonymous treatise winch is thought to belong to about the same time. We have in this a reasoned argument, based, at least in some measure, upon important historical considerations.

The question to which the writer primarily addresses himself is the right of the Emperor to a place in the determination of elections to the Papacy. He begins with an emphatic statement of the primacy of Rome over all churches, and one MS. includes a declaration that Rome judges all, but is judged by none, except in the case of a papal election which is unjust and contrary to the Imperial dignity, or in the case of a disputed election. He then brings forward a number of cases in which it was the Emperor who had, as he maintains, decided which of the rival claimants should be recognised as the legitimate Pope. These examples extend from the election of Damasus I in 366 A.D. to the action of Otto I in 963 and 964. The author concludes this enumeration by saying that after the intervention of Otto, the Senate and people of Rome swore that they would not for the future elect a Pope without the consent of himself and his son. He then relates that the Emperor Henry III, after deposing certain Popes, made a similar regulation, and that he obliged Hildebrand, at that time sub-deacon, to swear "nunquam se de papatu intromissurum" without his permission. He gives an account of that part of the decree of Pope Nicholas II and his Council with regard to elections to the Papacy, which refers to the Emperor, and says that by this decree, which was made

with the consent of the whole Roman clergy and people, it was established that whoever should stir up factions with regard to a papal election, or should be made Pope without the consent of the Emperor Henry and his son, should be held not as Pope, but as Satan and an apostate. He specially adds that Hildebrand swore to this and subscribed the decree.

Having thus dealt with the past, and justified by these historical precedents the claims of the Emperor to a certain authority in the appointment of the Pope, the author briefly describes the situation of his own time. He alleges that Hildebrand had obtained the Papacy by the assistance of one of the Roman nobles, Chinchius, and the party which they had formed. Henry had sent envoys protesting against his assumption of the Papacy, and bidding him descend from the papal throne, but without effect; and only at last, after wars, seditions, murder, rapine, and conflagrations, had Henry succeeded in occupying Rome, and had then after the ancient custom established Clement as Pope, and received from him the Imperial crown. He concludes by pointing out that the Roman Emperors had refused to accept certain men as unworthy to be Popes, had deposed some, had themselves appointed some, and had ordered others to be appointed.

We may distinguish in the treatise two lines of argument of unequal value. The statements which he makes about the election of Hildebrand do not seem to represent anything more than the gossip of the Imperial party. The treatment of the place of the Emperor in papal elections, on the other hand, is well stated, and shows a just apprehension of the historical foundation of the Imperial claim.

A treatise written by Wido, afterwards Bishop of Osnaburg, of which we have unfortunately only extracts, compiled apparently about the year 1118, is concerned primarily with the vindication of the election of the Antipope, Guibert of Ravenna. He defends this on the ground, first, of the legitimate place of the prince in papal elections ; and, second, of the justice of the deposition of Gregory VII. He contends that by the long custom of the Church the Emperor should be consulted before the institution of a Pope. Wido recognises, indeed, that in the first ages there was no such custom, but after the conversion of Constantine and the enrichment of the Church, the Papacy became an object of men's ambition, and the succession was factiously and violently disputed, and it was found necessary that the Roman prince should intervene to secure that the elections should be conducted in a regular and canonical manner. It then became the custom that, when a Pope was elected, he should not be consecrated until the election was reported to the prince and he was satisfied that it had been properly conducted, and until he had issued his mandate for the consecration. He then sets out a number of examples to establish this contention, and to show that the place of the prince in the election had been consistently recognised, and had never been condemned.

Wido is, however, careful to add that this does not mean that the prince possessed any arbitrary power in this matter : it is only with the consent of the clergy and people that he has power to appoint the Pope; he may not appoint any one to whom there is a canonical objection, and he may not claim for himself anything which canonically belongs to the Pontiffs. This is how Wido interprets the canonical rule that the laymen have no power of disposing of ecclesiastical things. He adds, however, that the king is not really a layman, for in virtue of his anointing he has a share in the priestly ministry.

The second extract from Wido's treatise deals with the question of the excommunication of the Roman prince. He asserts that no Pope before Hildebrand had excommunicated the prince, even though he had been guilty of serious offences against the Church. The reason of this was, not that they feared to lose human favour, hut because they bore in mind the apostolic injunction, to do all things to edification. He points out that the result of the conflict of Hildebrand and Henry IV was more intolerable than a civil war, and he therefore describes his action in excommunicating Henry as unrighteous and unjust. He endeavours to prove that the action of St Ambrose against the Emperor Theodosius was not really a case of excommunication.

The third extract deals with the question of the absolution of Henry's subjects from their oath of allegiance, and Wido contends that even if the excommunication of Henry had been just, and pronounced by a proper person, this would not give any sanction to the claim to absolve his subjects from their oaths. Those who had taken such oaths could not break them without perjuring themselves, and he who permitted and commanded men to violate their oaths rendered himself guilty of perjury. It was therefore clear that in absolving Henry's subjects from their oaths, Hildebrand had violated the law of God and the order of the Church, had been the cause of the destruction of peace, had stirred up sedition and schisms, and had brought innumerable calamities upon the Church and the kingdom. He therefore concludes that it was just that Hildebrand should have been deposed, inasmuch as he had abused the authority of the Papacy, and had set the "sacerdotium" and the "regnum" against each other, for while the two heads of the Church were at war with each other no good could come to body or soul.

These treatises, and especially the second and third, represent very clearly the main principles of those who supported Henry IV after the final breach of 1080. The strength of these arguments lay undoubtedly in the appeal to the historical relations of the Empire and the Papacy, in the many precedents by which they seek to prove the Imperial right to be consulted with regard to elections to the Papacy, and to intervene in cases of disputed elections. Not less important, however, is the restatement by Wido of Osnaburg of the contention of Wenrich of Trier, that even if the excommunication of the prince was within the power of the Pope, this did not carry with it any right to depose him and to absolve his subjects from their allegiance.

We must now turn to the arguments of the supporters of Gregory VII, and consider some works which were written about the same time as those which we have been considering.

The first with which we deal was written probably by the same Bernard, the master of the schools at Constance, with some of whose correspondence at the time of the beginning of the conflict in 1076 we have already dealt. The treatise with which we are now concerned was written in 1085, and if it is indeed by the same author, shows that in the meanwhile his judgment had cleared and hardened. It consists mainly of a catena of passages arranged under various heads from ecclesiastical writers, which seemed to the author to vindicate the position of the papal party.

The author, like Gebhardt of Salzburg, evidently felt that the origin of the whole conflict, and the first foundation of the position of Gregory VII, should be looked for in the principles of excommunication and its consequences, and he therefore begins by setting out the strict ecclesiastical doctrine that the Christian man must have no dealings with excommunicated persons, on pain of rendering himself liable to excommunication. He is aware of the difficulty which arises from the fact that the excommunication may be unjust, but maintains that the sentence must be respected until it has been rescinded. Having thus cleared the ground, he comes to the main subject of the treatise, the excommunication of Henry and the deposition of Gregory VII. He first cites some passages from St Augustine and from a supposed work of St Chrysostom, which might seem to show that it was not lawful to resist the king, but then puts together a catena of passages showing that no one was exempt from the spiritual authority of the Pope, and enumerates a great number of cases in which, as he maintained, kings and emperors had been excommunicated and deposed. He then deals with the deposition of Gregory VII, and maintains that the Pope was not subject to any man's judgment, but that even if he were thus subject, Gregory had been judged and condemned without any of the necessary canonical forms. A little farther on he discusses the question of the sanctity of the oath of allegiance, and argues that those who swear fidelity to a lord do so only as far as the Catholic law permits. To serve a lord in his perversity is not to be faithful, but unfaithful to the oath. To obey an excommunicated person, or one who communicates with excommunicated persons, is a greater crime than perjury. No oath is to be kept which is contrary to the safety of a man's country and the laws of the Church; no man must take the oath of fidelity except in the Lord, nor must he keep it against the

Lord, and he illustrates this with a story about the Emperor Otto and Adelgisus of Beneventum, and justifies it with a number of quotations from St Ambrose.

If there is nothing new in the treatise, it at least restates with clearness and with a considerable array of learning the case of the papal party, and it concludes with a vigorous invective against the Antipope, Guibert.

The most considerable political work of the time is the treatise of Manegold of Lautenbach, 'Ad Gebehardum'. We have in the last volume discussed his theory of the nature of political authority in detail, we are therefore here only concerned with his treatment of the relations of the Temporal and Spiritual powers, and of the actual conflict between Gregory VII and Henry IV. Manegold's treatise is what we may call a reasoned defence and justification of Gregory's policy, in reply to the criticism of Wenrich of Trier, and in the main be follows that order in the development of his subject whieh Wenrich had adopted.

He begins by defending the character of Gregory against the charges which Wenrich had made or reported, and proceeds to a vindication of his policy of Church reform, laying special stress upon the prevalence of simony and of what he calls the "fornication" of the clergy; and he justifies his action in calling upon the laity to refuse the services of the clergy guilty in this respect. He then gives an account of the outbreak of the great conflict, of the proceedings of the Council of Worms, at which Gregory was deposed, and of the Council of Rome, at which Henry was excommunicated and deposed. This leads to the most distinctive and important part of his work, the right of subjects to depose a tyrannical king, and to the discussion of the real meaning of the authority of the Pope in absolving subjects from their oath of allegiance. He repudiates Wenrich's suggestion that papal elections needed the Imperial consent, and he defends the prohibition of lay investiture.

We have already dealt with Manegold's discussion of the Investiture question, and we are not here specially concerned with his defence of Gregory's character, but we must consider a little more clearly his account of the beginnings of the conflict between Gregory and Henry, and his justification of the excommunication and deposition of Henry. Manegold's description of the proceedings at Worms and at Rome is apparently taken in the main from the Chronicle of Bernald and from Gregory's letters. He represents Gregory as having for several years remonstrated with Henry about his various offences, and as having finally warned him that unless he repented he should proceed to excommunicate him. Henry, instead of acknowledging his evil deeds, called together the bishops and princes at Worms, and then by their advice and instigation declared the deposition of Gregory, and announced this by his envoys to the Roman Council. It was for this reason that at last Gregory and the Council at Rome decreed the excommunication of Henry and his deposition from the throne. Having thus set out the circumstances and cause of the action, Manegold brings forward a number of historical precedents. He alleges that Gregory the Great had approved the deposition and execution of the Emperor Maurice, that the Emperor Constantius had been reckoned as a heretic by Pope Felix, that Louis the Pious had been compelled by the bishops to do penance, that it was by the authority of Pope Stephen that Chilperic had been deposed and Pippin elected King of the Franks, and that Pope Nicholas had excommunicated the Emperor Lothair on account of his concubine Waldrada. (We are not here concerned with the historical accuracy of his statements). He then cites a number of cases in which kings had been deposed by their own subjects, and this leads up to that discussion of the nature of kingship with which we have dealt at length in the last volume, in which he maintains that the king holds his authority in virtue of that agreement or contract by which he has promised to uphold law and justice, and the people have promised obedience, and argues that the crimes which Henry had committed amply justified his deposition.

We are not concerned with this question, which we have already considered in the last volume, but with Manegold's treatment of the action of the Pope, and we should therefore observe that he at once returns to the main argument, and this is, that Henry IV and his supporters had conspired

against the authority of the Holy See and the unity of the Church, and that it was therefore just that they should be coerced both by spiritual censures and by secular force. It is clear that he looks upon the action of Gregory VII as being justified primarily by the action of Henry and his supporters at Worms; while he is clear that such action—namely, the excommunication and deposition of Henry—was within the authority of the Pope. In his treatment of the question of Gregory's action in absolving the subjects of Henry from their oath of allegiance, he vindicates this, as we have pointed out in the last volume, as being nothing more than the public and authoritative declaration that the oath was already void.

The work of Bonizo, Bishop of Sutri, entitled 'Ad Amicum', contains in its seventh and eighth books an important but not always entirely trustworthy account of the events of the pontificate of Gregory VII. He was an ardent partisan of Gregory, but, while his statements must often be received with caution, he had taken a considerable part in the events of the time, and has preserved much important information—especially with regard to the "Pataria" in Lombardy and the affairs of the Church of Milan. His account of the deposition of Gregory VII by the Council of Worms in 1076, and of the excommunication and deposition of Henry IV by the Council of Rome in the same year, contains nothing specially new, and he justifies the action of Gregory very much as we have already seen. It was just, he says, to excommunicate the kiang for endeavouring to expel Gregory from the Holy See, and he cites a number of precedents to show that the Popes had in former times both excommunicated and deposed kings. He very emphatically attributes the election of Rudolph at Forcheim, in 1077, to the German princes, and speaks of it as the cause of much evil to the world.

A short treatise, attributed to Anselm, the Bishop of Lucca, which is thought to have been written shortly after the death of Gregory VII in 1085, contains a violent invective against the Antipope, Guibert, and attributes the conflict in large measure to the simony of Henry, and his attempt to destroy the liberties of the Church.

Several treatises have survived, written by the same Bernald, whose correspondence with Bernard in the year 1076 we have already considered. In one of them, which was written probably in 1086, after the death of Gregory VII, he contends strongly for three points : first, that the faithful must avoid the society of excommunicated persons, and therefore especially that of Guibert the Antipope and his followers; secondly, that kings are subject to the authority of the Church, and are liable, like other men, to excommunication; thirdly, that Gregory had not driven men to perjury, but had released men from their oath of obedience by the same authority by which he excommunicated and deposed their rulers. He deals with these matters in a highly significant way in another treatise of uncertain date, and argues, first, that if the successors of Peter had, as he has shown, authority to bind and loose, and thus to depose even the Patriarchs of the Church, much more must they have power to depose secular princes, whose dignity was a matter of human creation, and he confirms this by citing some often-quoted passages from St Gregory the Great and some of the usually alleged examples; secondly, that if they had authority to depose the rulers, clearly they must have power to absolve their subjects from their obedience and oath of fidelity; thirdly, that such oaths were in reality only taken to the ruler as long as he held his office, and were in no way binding if he were legitimately deposed, and that in such cases the Church only formally declared men to be absolved from their oaths for the sake of the weaker brethren, who might not in such cases understand that a thing was done unless it were specially mentioned.

The most interesting work of the time is, however, a treatise written by Wido, the Bishop of Ferrara, in the year 1086, after the death of Gregory VII, but before the election of his successor. It was written at the request of the Antipope, Guibert (Clement), and its purpose may have been to suggest that, now that Gregory VII was dead, it might be possible even for his supporters to accept Clement. The strange thing about the work is the force and clearness with which, in the first part of the work, he sets out the defence of Gregory VII; indeed it is one of the most effective statements of

his case—more effective both in substance and force than his presentation, in the second part of the treatise, of the charges which Henry IV's followers brought against Gregory.

In the first part of the treatise Wido begins by setting out the high character and energy of Hildebrand, and the orderly and canonical circumstances of his election to the Papacy. He then gives a grave account of Henry IV's personal vices and simoniacal practices, and of Gregory's attempts to bring him to a better mind and conduct. Henry, however, refused to listen; and finally, being threatened with severe measures by Gregory, he called together the bishops of Germany and Lombardy and commanded them to condemn him. It was only then that Gregory and the bishops at Rome, finding Henry wholly impenitent, excommunicated and deposed him. Wido then cites a number of passages from the Fathers to illustrate the authority which the Church claimed even over kings and emperors, and a number of cases in which kings and emperors had been excommunicated and deposed. He gives an account of the attacks made upon Gregory because he had raised up Rudolph of Swabia against his King, in spite of his oath of allegiance; but he argues, first, that Gregory had always maintained that it was not he who had appointed Rudolph; and second, that Henry had been legitimately deposed, and that Rudolph was therefore released from his fidelity, and that if Gregory consented to his election he was not doing wrong. He meets the charge which was made against Gregory—that he had stirred up the Germans to war against Henry—by the argument that he was only carrying out the judgment of the Fathers that it was right to attack and coerce the wicked : it might be proper for the saints not to defend themselves, but the maintenance of justice was another matter. When Gregory released the Germans from their oath of allegiance to Henry, he was only declaring that the oath was already null and void. It was alleged that Gregory had stirred up the laity to attack and ill-treat the simoniacal and married clergy; but Wido replies that he had always, while condemning their conduct, lamented the violence which had been done to them, and brings forward various passages from the Fathers to justify Gregory's action in forbidding the faithful to receive the sacraments from them. He cites various authorities which seemed to justify Gregory's action in prohibiting lay "investiture", and he briefly describes the arguments of those who maintained that the election of Guibert (Clement III) was invalid. He concludes the first part of the treatise with a short account of the occupation of Rome by Henry, the appearance of the Normans to relieve it, their sack of the city, and the final withdrawal and death of Gregory.

As we have already said, the defence of Hildebrand is well considered and effectively stated.

In the second part of the treatise Wido sets out the main charges against Gregory, and the arguments which would justify his deposition and the election of Guibert as Pope. In the first place, he contends that Gregory was elected in defiance of the constitution of Nicholas II, without the royal consent; and he reports, but as a doubtful matter, the stories that he had procured his election by bribery. In the second place, he argues that even if Gregory had been rightfully elected, he had forfeited his dignity by the misuse of his powers. He had waged war against all the prescriptions of the Fathers; he had been the cause of much slaughter and perjury in setting up Rudolph and absolving the Germans from their oath to Henry; he had taught, in contradiction to the doctrine of the Fathers, that the sacraments of schismatic and excommunicated persons were invalid; he had excommunicated Henry and various other men unjustly, and without regard to the necessary forms of procedure. In the third place, he urges that, even if the charges against Gregory and the conclusion that he had forfeited his authority were passed over; even if it were admitted that Guibert's election had been in the first place irregular, there was no reason why he should not, now that Gregory was dead, be recognised as Pope, and he brings forward parallels which would justify such a course of action. We have already dealt with Wido's treatment of the "investiture" question, and need therefore here only observe that Wido represents the secular right of investiture as having relation only to the temporalities of a bishopric. He concludes his treatise by urging that there were two arguments which proved that Gregory deserved to be condemned: the first, that he caused Rudolph to be set up as

king, and thus caused the slaughter of many men and involved many of the Germans in perjury; the second, that he was guilty of schism, in that he forbade the people to receive the sacraments of unworthy and excommunicated priests, and that he denied that these were sacraments.

A few years later there was written a work entitled, 'De Unitate Ecclesiae Conservanda', with the examination of which we may conclude this chapter. It was written between the years 1090 and 1093, as is evident from various references in the text, but the authorship is uncertain. There is much of importance in it with which we cannot here deal, and especially the account of the political and ecclesiastical conditions in Germany in the years from 1086 to 1092. We must confine ourselves in the main to the examination of the author's discussion of the claim of Gregory VII—that he had authority to excommunicate and depose kings and emperors—and of the whole question of the relation of the Temporal and Spiritual powers which arose out of this.

It is of great interest to observe that, for the first time, we have a critical historical discussion of the alleged precedents for the excommunication and deposition of kings. He considers first the alleged deposition of Chilperic, the last of the Merovingian kings, and the appointment of Pippin as King of the Franks, by Pope Zacharias and Pope Stephen. He does not indeed deny that these Popes took part in this; but he maintains that they only gave their consent and authority to that which had been done by the common consent and authority of the Frank princes, and he therefore protests that Gregory had completely misrepresented the whole matter when he said that it was the Popes who, by their sole authority, had deposed Chilperic and absolved the Franks from the oath of fidelity. The author then discusses the cases of excommunication Gregory had cited : he does not indeed deny that St Ambrose excluded Theodosius from the communion, but he urges that when St Ambrose thus excluded Theodosius he did not attempt to interfere with his political authority or position, and that he and the Popes did not attempt to do this in the case of heretics like the Emperor Valentinian and his mother Justina and other heretical rulers. On the other hand, he doubts the truth of the alleged excommunication of the Emperor Arcadius by Pope Innocent I, and argues that there is no mention of this in the historical documents, that there seemed to be no sufficient reason why it should have been done, and that the relations between Arcadius and the Church were of a friendly character, as is testified by his legislation.

This critical examination of the alleged historical precedents is interesting and effective, for no doubt it fixed upon a weak point in the Hildebrandine position; but this is not all that is important in the treatise. Indeed, its most significant aspect is its careful statement and discussion of the principle of the distinct functions and the equally divine authority of the two powers. He quotes some of the most important passages from the writings of Pope Gelasius I to establish the principle that it was God Himself who ordained the two powers—that is, the Temporal and the Spiritual—to govern the world, and that Christ separated the two from each other. It is the function of the Temporal power to punish the evil and reward the good. It is clear that God had not ordained that all crimes should be punished by the heads of the Church, many of them are rather to be dealt with by the secular authority; the priest has only one sword, that of the Spirit. He also urges that it had often happened in former times that kings or emperors had been the friends and defenders of heretics; but even under such circumstances the bishops and Popes had addressed them in deferential and conciliatory terms, that they might secure peace to the Church, and he illustrates this with various passages from the letters of the Popes Gelasius and Anastasius. It never entered into the minds of the Pontiffs that they should endeavour to depose the Emperors, but they left them to the judgment of God. The author returns to this in a later part of his treatise, and, reaffirming the principles of the distinctiveness and independent divine authority of the two powers, contends that Hildebrand and his bishops had really attempted to overthrow the divine order, and to usurp an authority which belonged not to them but to the king.

This treatise is thus of great importance in that it raises more clearly than had hitherto been done the question of the whole significance of Gregory VII's claims. He does not indeed refer directly to the very emphatic and highly developed form of these which had been made by Gregory in his later statements, but he urges with much force what he felt to be the significance of the whole of Gregory's action, and maintains that this confusion between the two powers could only end in the destruction of both. We have in the last volume dealt with this treatise as seeming in some measure to illustrate the survival of the tradition of Gregory the Great that the royal authority was in such a sense divine and derived from God, that all resistance to it was unlawful and impious; but this position must not be confused with his contention that the Hildebrandine claim destroyed the divinely appointed distinction between the Spiritual and the Temporal powers.

We may finally observe the terms in which the author discusses the question of the election of the Antipope Guibert, and his claim to be recognised as Pope, at least after the death of Gregory VII. He represents Henry as coming to Rome, desiring either to come to terms with Gregory, or, if that could not be done, to procure the appointment of another Pope. It was only when Gregory refused to receive him, unless he resigned the kingdom into his hands, that he was compelled to use force. When he had occupied the city the Roman Church elected Guibert as Pope, and he consecrated Henry as Emperor. The author passes over the fact that Guibert had been elected as Pope by Henry and the bishops of his party at Brixen in June 1080, evidently wishing rather to rest his claim to the Papacy on his reception or election by the Roman Church in 1084. In a later chapter, however, he suggests that even if there had been some irregularity about his original election, this was no sufficient reason why he should not be recognised as Pope after the death of Gregory, and he cites cases in which the appointment of Popes had been irregular, but they were afterwards recognised and accepted by the Church. The treatment of the subject is very similar to that of Wido of Ferrara.

If we now endeavour to sum up the main points in the literature we have just examined, we shall recognise the great need of caution in dealing with the principles at issue. We do not find in these writers a systematic theory of the respective powers of the spiritual and temporal authorities; we must be very careful not to attribute to them theories which we may think to be logically connected with their opinions; indeed, it may be said of all, or almost all of them, that they are not so much concerned with a general theory of the relation of the two authorities as with the actual situation of the moment.

There were two main questions immediately at issue between the two parties—the question of the right or authority of the King of the Germans and the bishops of the Church to appoint or depose a Pope, and the question of the authority of the Pope to excommunicate and depose the King. The supporters of Henry IV contended that no Pope could be elected without the consent of the King or Emperor, and they were no doubt able to bring forward a great amount of historical evidence in support of the contention, and some of them maintained that Gregory VII had never obtained this consent. Several of them maintained that in certain circumstances at least it was lawful to judge and depose the Pope, and contended that the conduct of Gregory VII had been such as to justify the action of Henry and his deposition.

The supporters of Gregory do not for the most part discuss the question of the right of the Emperor to be consulted with regard to the election of a Pope. Manegold, however, repudiates it. We have seen that there was perhaps some hesitation in their minds about the question whether the Pope could be judged by anyone, but on the whole they repudiated the contention.

The Hildebrandine party look upon the conflict as having arisen ultimately from the urgent need for the reformation of the Church, and the refusal of Henry to accept this. This is urged with great force, not only by Manegold, but also by Wido of Ferrara, in his exposition of the case for Gregory. And, with regard to the great and revolutionary events of 1076, it must be observed that the supporters of Gregory urge that he only excommunicated and deposed Henry in consequence of his

action in first deposing the Pope. It is very noteworthy that Gebhardt of Salzburg puts this point very emphatically, and urges that it was Henry, and the bishops who followed him, who were the authors of the whole trouble. This is also urged not only by Manegold and Bonizo, but also by Wido of Ferrara. It is apparently true to say that, as far as the authors of these treatises are concerned, the supporters of Gregory were not at first quite clear in their minds whether his action had been wholly wise. Gebhardt seems to admit that it might be thought unduly hard, and Bernard was not at first clear about his procedure, but they are throughout clear that his action was legitimate.

They are emphatic in asserting that no one, not even the king, was exempt from the spiritual jurisdiction of the Church and the Pope, and they brought forward a number of alleged precedents for this. They do not, strictly speaking, argue that the power of excommunication necessarily implied the power of deposition, but rather seem to assume it on the ground of a certain number of alleged precedents, especially that of the alleged action of Pope Zacharias in deposing Chilperic, the last of the Merovingian kings. It is possible that we get nearer the real ground of these views in the contention of Bernard in the 'Liber Canonum contra Heinricum Quartum', that an oath of fidelity to an excommunicated person cannot be thought of as binding. It is indeed evident that the generally received principle that the faithful must have no dealings with an excommunicated person made the position of an excommunicated king very difficult.

The supporters of Henry IV met these contentions in various ways. In the first place, Wenrich maintains that a sentence of excommunication was not necessarily just, and an unjust sentence was, ipso facto, void. Others, however, carried the criticism further, and examined the alleged cases. Wido of Osnaburg does not say that the Popes had no authority to excommunicate the Prince, but denies that they had ever done this before, and this not from any fear of man, but because they saw that it would not tend to "edification", and would bring about the gravest evils. The author of the treatise 'De Unitate' does not deny that Theodosius had been excluded from the communion of the Church by St Ambrose, but he examines with considerable historical acumen the statement that the Emperor Arcadius had been excommunicated by Pope Innocent. What is, however, more important, is the criticism which was directed against the assumption that the power of excommunication necessarily implied the power of deposition, and against the alleged precedents for this. Wenrich urged that even if it were admitted that Henry IV. was all that Gregory alleged him to be, the Popes had no authority to absolve his subjects from their oath of allegiance, and that it was a thing unheard of that the Pope should bid a king descend from the throne of his fathers. Wido of Osnaburg maintains that, even if the excommunication of Henry had been just and valid, this gave Gregory no authority whatever to absolve his subjects from the oath of allegiance. The author of 'De Unitate' deals with the subject by means of a careful criticism of the alleged deposition of Chilperic by the Popes, and urges with important examples, that the fact that a ruler was separated from the Church, had not as a matter of fact been considered a sufficient reason for assailing his political authority.

It is indeed in this treatise, as we have said, that we find the broadest apprehension of the nature of the questions which the great conflict had raised. As the author sees the matter, the question at stake was really the question of the independence of the two great powers. It is very significant that he restates with great emphasis and insight the Gelasian principle of the separation of the two powers by Christ Himself, and that he urges that there are vices and crimes which the Church cannot deal with, for the Church has only one sword—that is, the sword of the Spirit. It must, however, be observed that he does not meet the contention of the supporters of Gregory, that the conflict had arisen primarily from the attempt of Henry and his bishops to interfere with the freedom of the Roman See, and therefore of the Church as a whole.

Finally, it must be noticed that no one of the writers who maintain the cause of Gregory makes any claim that the Church, or the See of Rome, possesses a general authority in temporal matters.

There is nothing which corresponds with some of the phrases used by Gregory VII. in his letter to Bishop Altmann of Passau, or even to that of his declaration at the Council of Rome in 1080.

CHAPTER III.
DISCUSSION OF THE ACTIONS AND CLAIMS OF GREGORY VII.
II.

We do not propose to follow the sequence of historical events after the death of Gregory VII in any detail. We have been compelled to do so for his pontificate because the development of the claim to political authority was so closely connected with the actual circumstances of the time. Gregory died at Salerno on May 25, 1085, and it was not till May 24 of the following year that Desiderius, the Abbot of Monte Casino, was elected in his place as Victor III. It has been suggested that he was inclined to come to some understanding with Henry IV. We doubt whether the evidence for this is adequate, but it is noteworthy that, while in the Council held at Beneventum in August 1087 he repeated the excommunication of the Antipope Guibert, and of all those who should receive "investiture" of any bishopric or abbey from lay hands, and any emperor, king, or duke who might presume to give "investiture", there is no direct mention of Henry IV, and no reference to the question of his being deposed. Whatever may have been the mediating tendencies or intentions of Victor, he died in September 1087, before anything could come of them.

There was again a considerable interval of time before a successor was found: it was not till March 1088 that Otto, the Bishop of Ostia, was elected and consecrated as Urban II. He was a Frenchman, and a monk of Cluny, who had been brought to Rome and elevated to the Cardinalate by Gregory VII, and had been one of his staunchest supporters. In his first declaration of policy he seemed determined to maintain the policy of Gregory VII in its entirety. On March 13, 1088, the day after his election, he wrote to the bishops and others of the papal party in Germany : he announced to them his election, and assured them that he desired in all things to follow in Gregory's steps—what Gregory had condemned he condemned, what Gregory had held he held, what Gregory had approved he also approved, and in all things he thought as Gregory had thought. He exhorted them, therefore, to stand fast manfully as the Lord's warriors in the day of His battle. In April 1089 he wrote to Bishop Gebhardt of Constance, appointing him his legate in Germany, and informed him that after long deliberation with the brethren on the question of excommunication, it had been determined that in the first grade the Antipope and Henry IV. should be held excommunicate. In September of the same year he renewed the prohibition of lay "investiture".

The political situation in Germany had again changed. In 1088 Hermann of Thuringia had died; no other claimant to the throne had been set up, and men's minds turned to thoughts of peace. In 1089 the princes who adhered to the papal party approached Henry and offered their submission if he would give up his support of the Antipope Guibert. Bernald, in his 'Chronicle', represents Henry as being personally inclined to do this, but as being dissuaded by the bishops of Guibert's party. The negotiations were renewed in 1091, but again they failed. The opportunity had passed; and in 1093, Conrad, who had been crowned at Aix-la-Chapelle in 1087, rose against his father, and the whole political condition changed in Germany and also in Lombardy. Several of the great Lombard cities—those named by Bernald are Milan, Cremona, Lodi and Piacenza—formed a league against Henry. Conrad was crowned by the Archbishop of Milan, and two years later, 1095, at Cremona he swore fidelity to Urban II, and was received by him as a son of the Roman Church. Urban promised him his help to obtain the kingdom and the Imperial crown, but always saving the rights of the Roman Church and the abolition of lay "investiture".

Urban was now at the height of his power: from Lombardy he passed into France, and at the Council of Clermont, held in November 1095, he proclaimed the Crusade, renewed the prohibition of lay investiture, and excommunicated Philip, the King of France, for deserting his wife and living in

adultery. When he died in July 1099, the papal cause was again powerful, both in Germany and in Italy.

Paschal II was elected on the 13th of August of the same year, and in a letter of January 18, 1100, to Gebhardt of Constance, whom he had continued as papal legate in Germany, he assures him that the rumour that he was about to make concessions to Henry IV and his followers was false. In September 1100 Guibert of Ravenna, the Antipope, died, and there were movements towards a settlement between Henry IV and the Papacy; but nothing came of those, and in January 1102 we find Paschal II exhorting the Count of Flanders to attack Henry IV and those who supported him, in every possible way, assuring him that he could render no better service to God than this. In March 1102, at a Council in Rome, Paschal formally renewed the excommunication of Henry IV. He stoutly maintained the prohibition of lay "investiture", as we can see from his correspondence with Anselm and Henry I of England, and in one letter he forbade the clergy to do homage to a layman. In 1104 he urged upon the Catholics of Bavaria and Swabia that Henry IV was excommunicated.

It was in the last days of 1104 and the first of 1105 that a new revolt broke out against Henry IV. His elder son, Conrad, had died in 1300, but now a more dangerous rising was organised in Germany by his younger son, Henry. He asked for Paschal's absolution from his oath to his father, and Paschal sent him his blessing, and absolution from the oath, if he promised to be just in his dealings with the Church. In May Henry summoned a Council at Nordhausen, at which he made profession of profound deference to Rome; but, as it would seem from Ekkehard's account, without any very specific promises. In November of the same year Paschal, in a letter addressed to the Archbishop of Mainz, restated, in view of the new conditions, the principles which he maintained. He is careful to urge that he desires the King to enjoy all those rights which properly belonged to him, and protests that he does not in any way desire to diminish these; but on the other hand, the Church must be left in the enjoyment of her liberties. He acknowledges the place of the King as "defensor" of the Church, and as having the right to enjoy "subsidia" from the Church, but he has nothing to do with the ring and staff, that is with "investiture"; and he expresses his anxiety to have peace on the condition that kings and priests mutually recognise each other's rights.

On December 31, 1105, Henry IV was compelled by his son and the secular and ecclesiastical princes to resign the Kingdom and Empire; in the following year he repudiated his renunciation and found considerable support, but on the 7th of August he died. We have dealt with the relations of the Papacy and Empire down to the settlement of Worms in 1122 in the first part of this volume, and we need not therefore go over this again.

In the last chapter we have endeavoured to set out the main characteristics of the controversy which arose immediately out of the great conflict between Gregory VII and Henry IV. We have now to consider the further developments of this controversy in writings which are still closely related to that conflict, but also to the history of the years which followed Gregory's death, which we have just summarised. It is no doubt impossible to draw any sharp line between these writings and the earlier ones, but yet we think that there is some difference. The literature we have hitherto discussed belongs to the years 1076 to 1093, that with which we now deal belongs to the years from 1097 to 1125. No doubt in this period the conflict was still acute : there was no reconciliation between the Empire and the Papacy so long as Henry IV was alive; and even after his death in 1106 the conflict, after a few years of comparative tranquillity, broke out again. And yet we think it is true to say that there is a certain difference in the character of these works, not that necessarily the claims of either party are lower—that is just what we shall have to consider—but that the controversy is occupied not merely with the actual situation but also with general principles, and while the controversialists sometimes set forward the most extreme positions, there is yet also frequently traceable an attempt to estimate and recognise the significance of the contentions of the other party.

The first of the writings with which we deal is the 'Libellus contra Invasores et Symoniacos' of Cardinal Deusdedit, which belongs to a date not earlier than 1097. He had been a consistent and strenuous supporter of Gregory VII from the time when he is first mentioned in 1078. We have already referred to this work in relation to the "investiture" controversy, we now only deal with it as illustrating Deusdedit's position with regard to the nature of the temporal and spiritual authorities and their relation to each other.

In the Prologue, after setting out the main subjects of his treatise, he urges that he does not intend to belittle the royal authority, for it has its just place as much as the sacerdotal. The priest is to use the sword of the "Word", while the king wields the material sword: each has need of the other, and neither should interfere with the functions of the other. The words are noticeable, and especially the assertion that the Church only uses the one sword, and the frank recognition of the distinctive place of the Temporal power. In the collection of canons which he had prepared in 1087, Deusdedit had cited a number of authorities which asserted the divine origin of the secular authority, and its function as the minister of God's justice.

In the third part of the treatise, however, the position which Deusdedit takes up might seem scarcely consistent with this. He has been considering a question of great importance—that is, the exemption of the clergy from the jurisdiction of the secular courts. We have in another volume dealt with the canonical discussion of this question. We are here concerned with some observations which Deusdedit makes upon what he conceives to be a conflict between the ecclesiastical and the secular laws upon this subject. He maintains that in a case of conflict the secular laws must be rejected, and declares that in legislation the "sacerdotium" has a "primatus", for God gave laws to the kings through priests, and not to priests through kings; and he illustrates this from the cases of Moses and Aaron, and of the Apostles. The sacerdotal authority, he says, surpasses the royal authority, for it was created by God Himself, while the royal authority was made by man, with God's permission indeed, but not by His will, and he confirms this principle by citing the circumstances of the appointment of Saul. We have dealt with the last part of the passage in the third volume in relation to other phrases of the same kind, and we therefore do not discuss it again.

We must observe, however, that the whole passage raises a different matter—that is, the question whether in all cases of conflict between ecclesiastical and secular law the secular must always give way. This question we have discussed in another volume, so far, that is, as it is dealt with in the canonical literature, and we do not at present return to it in its general significance. What, however, are we to conclude as to the meaning of the position of Deusdedit? As we have just seen, Deusdedit clearly in this treatise maintains the distinctive place and position of each authority, the temporal as well as the spiritual, and in the 'Collectio Canonum' he had set out the authorities which declared the divine origin and authority of the Temporal power. Are we to think that in the last passage he intends to contradict these principles, and to maintain that the secular power had no divine character, and that the Spiritual power had some ultimate authority to override it, even within its own sphere, and with regard to its proper functions? This seems to us to be most improbable, and we should suggest rather that we have here a very good illustration of the need of the great caution which is required in interpreting isolated phrases of the medieval writers. Deusdedit is clearly concerned here as elsewhere to maintain the complete independence of the ecclesiastical authority and its legislation, and he asserts that it has relatively to the secular authority a certain, "primatus", but this is not at all the same thing as to say that the ecclesiastical law could override the secular within its own proper sphere.

In January 1103, Pope Paschal II wrote to the Count of Flanders urging him to attack the clergy of Liège, whom he treated as excommunicated, on account of their relations with Henry IV, and praised him for his vigorous action against Cambrai. At the instance of the clergy of Liège,

Sigebert, a monk of Gembloux, wrote a letter, in the name of the Church of Liège, protesting against the letter of the Pope, and addressed it to all men of good will.

Sigebert's letter does not for the most part represent any new principles, but it sets out the position of those who refused to renounce their allegiance to Henry IV with singular force, and it expresses not merely a judgment upon the theoretical points at issue, but a vivid sense of the actual results of the conflict. It is indeed this which gives its special significance to the work. Sigebert restates the doubt whether kings can be excommunicated; the matter is still, he maintains, *sub judice*, but he is certain that whether the king is excommunicated or not, the oath of allegiance to him is binding, and he complains bitterly that the Pope should treat the people of Liège as excommunicated persons for no other reason than that they adhere to their bishop, who was faithful to his oath of allegiance to Henry. He maintains that, however evil the king is, he must be obeyed; even if Henry were all that his enemies maintain, his subjects must not take arms against him, but must turn to God; and he urges that the rulers for whom St Paul bade men pray were not even Christians. The Pope should follow his example, and should pray for the king, however great a sinner he might be, that men might lead a quiet and peaceable life, and he ought not to raise up war against him, and thus prevent men from enjoying peace and quiet.

Again Sigebert suggests grave doubts whether Henry had been excommunicated for just reasons : he finds traces of unreasonable passion in the papal attitude to him, and he reminds the Pope of the warning of Gregory the Great, that he deprives himself of the power of binding and loosing who does this arbitrarily and without sufficient cause. An unjust sentence of excommunication may be annulled by God Himself. He bids Paschal remember by what evil means, from the time of Pope Silvester to that of Hildebrand, men had often reached the papal throne; and he reminds him that it had often been the Emperors who had had to bring the remedy, and to procure the condemnation and deposition of false Popes. The Pope ought to submit to reproof and correction with respect to grave and manifest evils, as Peter submitted to Paul; he who will not submit to reproof and correction is a false bishop. These considerations are forcibly stated, and it is important to observe that they are put forward by one who recognised Paschal II as Pope, as well as the supreme place and authority of the Roman See.

The most significant aspect, however, of his treatise is the eloquent protest against the policy of the Popes in appealing to force. He quotes the terms of the letter of Paschal II to the Count of Flanders, in which he had praised him for that he had carried out his command by his attack upon Cambrai, and had urged him to go on to attack the schismatic clergy of Liège, and all other supporters of Henry IV. Sigebert expresses his horror that the Pope should claim the responsibility for the devastation of Cambrai, for the slaughter of innocent and guilty alike; he could not have believed that such things had been done by the authority of the Apostolic See, if Paschal himself had not said it. He contrasts this with the conduct of Martin of Tours, who refused to communicate with Bishop Itachius because he had been a party to the execution of Priscillian for heresy. This reference to Martin of Tours, and his condemnation of the execution of heretics, is very interesting; it may perhaps be accounted for in part by the fact that Wazo, the Bishop of Liège, was said to have maintained the same view as Martin, and to have condemned the use of violence against heretics. We must not indeed assume that Sigebert would have drawn out all the conclusions which we may think to be implied in his contention; he was not probably intending to lay down a general principle, but is rather describing the actual impression made upon himself and others by the appearance of the Pope as the direct author of the slaughter of men and women. He returns to the matter in a later chapter, and asks whence did the Apostolic See derive the authority to draw the sword against its own subjects. David was not held worthy to build the Temple of God because he was a man of blood, and how can the High Priest enter the holy of holies to offer the blood of Christ for himself and the

people if his robe is stained with blood No Pope, from Gregory the Great until Hildebrand, had used any but the spiritual sword, or had taken the sword of war against the Emperor.

Many of Sigebert's arguments are not new, but we seem to feel in his letter a growing sense of the horror of the long conflict and its bloodshed and devastation.

It was about the same time as Sigebert addressed his letter to all men of good will that Hugh of Fleury dedicated a treatise upon the royal authority and the priestly dignity to Henry I of England. It does not seem possible to discover the precise causes which may have determined this dedication. England had no doubt been involved in the conflict over "investiture"; but while the treatise deals with this, it has more of the character of a formal political treatise than the works with which we have hitherto dealt.

The writer sets out the purpose of his treatise in the Prologue; it is intended, he says, to bring some remedy to the dangerous conflict with respect to the relation of the royal and priestly authorities, and to correct the error of those who set the two authorities against each other, and maintain that the royal authority was not instituted by God, but only by men—an opinion which, he says, vas widely diffused.

He sets out, therefore, with a formal repudiation of the phrases of Gregory VII's letter of 1080 to Hermann of Metz about the origin of secular authority, and argues that the conception expressed in them was wholly false; he proves this not only by the words of St Paul, "There is no power but of God, and the powers that be are ordained of God", but also by the analogy of the rule of man in the world and of the head over the members; and he maintains that God had created a hierarchy of authority both on earth and in heaven. There are two authorities, that is, the royal and the priestly, by which in this present life the Church is governed : they are both sacred, and must not be set against each other.

The most important aspect of the treatise is, however, to be found in its statement of the position of the two authorities relatively to each other, and the authority of each over the persons who hold the other. He sets out their relative positions at the outset under the terms of a comparison with the relation of the Father to the Son in the Godhead. The king, he says, in the body of his kingdom, would seem to bear the image of the Father, and the bishop that of Christ. What exactly Hugh may have understood by this comparison is not clear; it may be conjectured that it is a literary reminiscence of the phrases of Ambrosiaster in the fourth century, and of Cathulfus at the end of the eighth; as we shall see presently, it is parallel to some phrases used in the anonymous 'Tractatus Eboracenses'. The whole meaning of the phrase is not clear, but Hugh draws out his own conclusion from it with sufficient precision. All the bishops of a kindgom are subject to the king, as the Son is subject to the Father, not in nature but "ordine", that the whole kingdom may be brought back to one beginning; and he illustrates this from the position of Moses, who had the "image" of the king in the Hebrew nation, while Aaron had that of the priest. He had already stated this principle of the subjection of the priest to the king in his kingdom in the Prologue, and returns to it in a later chapter.

This is then one aspect of the relation of king and priest, but there is another side to this. In another place, while he protests that the bishop must not take up arms against his king, Hugh also says that the bishop is as greatly superior to the king in the dignity of his ministry as the divine offices are greater than merely secular affairs, and that therefore if a bishop should be found blameworthy, his case must be dealt with not in the secular court, but in a general synod. If the king has authority over the bishop, the bishop also has authority over the king. The king is subject to the discipline of religion, he must give ear to the admonition of the bishops; they have power to open and to close heaven to man, and therefore they may, if need arise, excommunicate even kings, and Hugh cites several cases of such excommunication. It is clear that he does not agree with those defenders of Henry IV who had doubted or denied the authority of the Pope to excommunicate

emperors or kings; he holds very clearly that the bishop or Pope has spiritual authority over all secular rulers, just as they have temporal authority over all bishops.

He does not, however, merely lay down in general terms the principle of the authority of the spiritual rulers over the temporal; he also makes it clear what were in his judgment the nature and the limitations of this authority. The bishop has spiritual authority over the king, but this authority may be abused, and the power of excommunication does not imply the power of absolving the king's subjects from their oath of allegiance—that is, the bishop has no power of deposing the king. It has sometimes happened that bishops have used their authority under the influence of passion rather than with a just judgment of the actual circumstances; and such abuse of excommunication only tends to bring the authority of the law into contempt. Some bishops have taken upon themselves to absolve the king's subjects from their oath of allegiance, but this is an absurdity and an act of contempt against God, by whom they have sworn. It is true that there may be wrongful oaths which must not be kept, but it is evident that Hugh does not reckon among them the oath of fidelity which a man has sworn to a ruler, even though he may be excommunicated.

If Hugh is clear that the authority of the bishop does not extend to the deposition of the king, he is also emphatic that he must not take up arms against him, however wicked and unjust he may be. It is the bishop's function to stand between the king and the people, to turn away the anger of kings and princes from their people, and to pray night and day for the welfare of both. The bishop then has a spiritual authority even over kings, but this extends only to spiritual matters, and can be enforced only by spiritual sentences. On the other hand, while, as we have seen, all bishops are subject to the king in his kingdom, they are not subject to the secular courts; but if they are charged with any offence, they must be brought before a "general synod".

In the second part of his treatise Hugh deals with the question of appointments to bishoprics, and he contends for what he conceives to be the reasonable place of the secular authority in these, but with this subject we have already dealt. Two matters which we have not yet mentioned are of importance. The first is his condemnation of the assertion that the Pope could not be reproved by any one, and he points out that St Peter was rebuked by St Paul when he fell into error. The second is his detailed treatment of the place of the Emperor in the appointment of the Pope, and especially in cases of disputed elections, and he appeals to the decree of Pope Nicholas II.

The position of Hugh of Fleury is interesting and important : he criticises the action and what he conceives to be the principles of Hildebrand with great freedom and force, but he is also clear in upholding the dignity of the sacerdotal office and its authority even over kings.

It is here that we may best consider the strange contentions of the author of the treatises which we know as the 'Tractatus Eboracenses'. It is indeed difficult to say what is the importance we are to attach to them, but it is reasonable to recognise that there are important and significant parallels between some of their contentions and some of the phrases of Hugh of Fleury. We have just seen that Hugh says that the king bears the image of the Father, and the bishop that of Christ, and that it is therefore right that the bishop should be subject to the king in his kingdom. As we have said, it does not seem possible to determine what precise significance Hugh attached to these phrases, and how far they may represent merely a literary reminiscence of the words of Cathulfus in the ninth century and of Ambrosiaster in the fourth. It is with these phrases that we must compare the treatment of the relative position and authority of the king and the bishop, as it is set out by the author of the fourth of the 'Tractatus Eboracenses'. It would seem clear that the treatise belongs to the time of the Investiture dispute between Anselm and the Kings of England.

The king, he maintains, and the priest are both anointed by God, but the priest represents the human nature of Christ, in which he is inferior to the Father, while the king represents Christ's divine nature, in which he is equal to the Father; the priest represents Christ as suffering death, and offering himself as a sacrifice to God the Father, the king represents Christ as about to be crowned with glory

and honour, and to reign for ever in his heavenly throne over all authorities and powers. The angel of the Annunciation said to Mary, "The Lord will give him the seat of his father David", not of his father Aaron, for God gave David authority even over priests. It is therefore just that the king should have power and authority even over the priest.

The author urges that Moses and Joshua and the five kings of Israel were in the same way superior to the priests, and he then restates the view that the royal power is greater than the priestly, for it represents Christ's divinity, which is greater than his humanity, and it is therefore right that the king should rule over the priest and institute him. The unction of the king is in one sense the same as that of the priest, in another sense it is greater, for the unction of the priest is after the example of that of Aaron, or of the apostles, while that of the king is after that of Jesus Christ, whom God anointed before the ages above his fellows. The king is therefore superior to the priest and rules over him, and the author quotes some passages from the letter of Gregory the Great which illustrate his deference and obedience to the emperor.

In other passages he claims for kings the power of the keys, though what exactly he meant by this is not very easy to say, and the chief authority in calling together the Councils of the Church, and the right of presiding at them. He maintains that the king is not to be thought of as a mere layman, for he is the Lord's Christ, and, in another place, that the king can remit sins and offer the bread and wine at the sacrifice of the mass, as indeed he does on the day of his consecration.

After all this it seems a somewhat small matter that he should claim that the king is entitled to invest the bishop with the pastoral staff, and indeed it is rather noticeable that he is careful to explain that in doing this he is not conferring upon the bishop his rank (*ordo*) or the "ius sacerdotii", but only the temporal possession and the guardianship of the Church, and the power of ruling the people of God.

These contentions are sufficiently startling in the eleventh or twelfth centuries, but in order to form a complete conception of the standpoint of the author, we must place alongside of these principles of the relation of king and bishop, the almost more remarkable treatment of the position and authority of the Papal See which we find in the third and fifth Tractates. It does not lie within the scope of this work to deal with the history of the spiritual authority of Rome, and we deal with the subject here only in order that we may be better able to judge of the whole significance of these treatises.

In the third Tractate the author is occupied, probably about 1096, with the dispute which had arisen with regard to the recognition by the Pope of some kind of primatial authority of the Archbishop of Lyons over the Archbishops of Rouen, Sens, and Tours. William, the Archbishop of Rouen, had been severely reproved for his neglect to recognise this authority, and for his disobedience to the Roman See. The author of the Tractate in reply to this develops an argument of a far-reaching kind. He says, in the first place, that the archbishop and other bishops owe to the Roman Pontiff the same obedience and no more than the other apostles did to Peter, for they are not only followers, but "vicars" of the apostles; in the second place, he urges that the archbishop was also the representative of Peter, that he holds that authority of binding and loosing which Christ gave to Peter, and that there should therefore be no question of superiority between the Archbishop of Rouen and the Roman Pontiff, and that neither could judge the other. No one can judge a bishop but God only. These contentions are sufficiently drastic in their character, but the author goes still further.

He discusses the question whether the Archbishop of Rouen could rightly be expected to recognise the authority of the Archbishop of Lyons, and contends that there was no justification for this. The supporters of Rome, he suggests, might say that he must obey the commands of Rome, for it had been decreed that the Roman Church should be the mother and lord of all Churches. He admits that this had been decreed by the Bishops of Rome and their followers, but, he maintains, this had not been done by Christ or his apostles. If any Church was the mother of other Churches, it was that

of Jerusalem. The truth was that Rome had been set over other Churches, not by the authority of Christ and his apostles, but by that of man, and this because of the glory and authority of the imperial city. The position of Rome rested not upon legitimate authority but upon usurpation, even though this had arisen from the necessity of avoiding divisions. Originally the Church had been governed by the common council of the presbyters : it was only the fear of division which had led to the rule that one of the presbyters should be set over the others, and have the care of the whole Church.

The fifth Tractate, which is attributed by Böhmer to the same period of the Investiture conflict in England as the fourth, renews the attack upon the Papacy in very strong language. The author contends that the Pope commanded much which Christ had not commanded, and he complains bitterly of the intolerable burden which the Pope imposed upon the bishops in compelling their frequent attendance at Rome. He complains that the bishops were compelled to sell the goods of their churches in order to satisfy the greed of the papal officials. He contends that if the Pope excommunicated bishops because they were not obedient to him in such matters as those mentioned above, the excommunication was void and of no effect. He condemns vehemently the action of the Pope in exempting many of the abbeys from episcopal jurisdiction, and maintains that such exemptions ought not to be recognised, for they are contrary to God's ordinance, and the Pope has no authority to change this. He denounces the attempt of the Popes to destroy the authority of the king in the rule of the Church; this contradicts the principle laid down by Pope Gelasius that the world, and by the world here is meant the Church, is governed by the two authorities, the priestly and the royal. By the royal authority in the Church he here clearly means the right of "investiture", and he maintains again that the king is no mere layman.

It is difficult to say what importance we are to attach to these very abnormal contentions, to determine how far they represent tendencies of thought common in some circles, or are merely individual opinions. The parallel to some of Hugh of Fleury's words is obvious, and the ultimate literary source of the conceptions may be the same; but while Hugh in using these phrases is also careful to guard against the possibility of misinterpretation, and to assert the superior dignity of the spiritual office, the author of these Tractates seems to be anxious to press his argument far beyond what was needed to maintain either the right of royal "investiture", or the divine authority of the Temporal power.

We have already considered in detail the position of Gregory of Catino as expressed in his treatise, 'Orthodoxa Defensio Imperialist', written probably in the year 1111, with regard to the impiety of revolt against the Temporal power, and the exercise of the right of "investiture" of bishops by the king or emperor. He uses, however, some important phrases of which we must here take account. In one place he says that it was God who had established in the Church princes and higher powers, for whom the Apostle bids us always to pray ; and we ought to think of the King as the head of the Church. It is not unseemly that the prelates of the Church should receive "investiture" with staff and ring from the Emperor, for if the prince is head of the Church he should not be excluded from the "creation" of the office or ministry of his members. The title of Head of the Church as applied to the secular ruler is strange and unusual, and it is difficult to know what precise significance Gregory attaches to it. It may possibly be connected with the stress which he lays upon the unction of kings and emperors, but Gregory does not himself make the connection.

Placidus of Nonantula, in his treatise, 'Liber de Honore Ecclesiae', probably written in 1112, is concerned primarily with the questions of "investiture" and of the sacred character of the property of the Church, and we have already considered his work at some length in relation to this matter. This work is, however, of great importance in relation to the matter we are now concerned with—that is, the principles of the relations of the temporal and spiritual authorities, for we find in it the first clear example of the interpretation of the "Donation of Constantine" in the sense in which it was later understood. As we have attempted to show, it is clear that in its original sense this was related to the

claim of the Roman See to succeed to the Byzantine authority in the Exarchate, and the other possessions which it still held in Italy in the latter part of the eighth century.

Placidus seems clearly to understand the "Donation" as meaning that Constantine bestowed upon Pope Silvester his whole authority in the West, and so far the position of Placidus seems to be quite clear, but beyond this he is not easy to interpret. He says that inasmuch as Constantine had rendered honour to the Apostle (Peter), and had left the western kingdom to the vicar of Peter, God granted him to hold the whole Roman kingdom; for Pope Silvester, although Constantine had granted it, followed the example of Christ, and would not suffer the crown of the kingdom to be placed upon his head, but rather desired Constantine in holding the kingdom to render his devoted service to the Church. What exactly Placidus may have meant is difficult to say. He may possibly mean simply that Silvester refused to accept the political authority over the West, but he may also, and more probably, mean that while refusing to exercise this in his own person, he desired Constantine to exercise it as the representative or servant of the Church. The latter is perhaps suggested by the context, for he seems to use the action of Pope Silvester as a precedent for the tenure of dukedoms and the other great temporalities by the Church. It is unfortunate that the subject is merely mentioned incidentally by Placidus, but we shall recur to it presently when dealing with Honorius of Augsburg.

We have in the earlier part of this volume traced the very significant development, in his successive treatises, of the attitude of Geoffrey, the Abbot of Vendôme, to the "investiture" question, and in one of these, written probably about the year 1119, there now stands a passage of considerable importance in relation to our present subject. The treatise belongs to the last years of the "investiture" controversy; and while Geoffrey still repudiated firmly the concession of the "investiture" with ring and staff, he was prepared to admit that the Emperor might invest the bishop with the temporalities of the diocese. In this passage Geoffrey declares that it is by the divine law that we are ruled by kings and emperors, and that it is by the same law that "we" owe them honour and reverence; and he seems clearly to mean the clergy as well as the laity. He goes on to urge the great mischiefs which arise when the "regnum" and the "sacerdotium" are in conflict with each other. Christ willed that both the spiritual and the material sword should be used for the defence of his Church. Finally, and this is the most significant thing, he urges the great danger of an unwise use of the power of excommunication; he urges that it is very doubtful whether it is wise to excommunicate any one who is supported by a multitude of men, lest greater scandal should arise than the good which is hoped for from the exercise of strict justice.

It is evident that Geoffrey had no doubt about the divine source of temporal authority, and his doubt about the wisdom of the unrestrained use of excommunication is very significant in one who was a determined supporter of the papal position.

The last treatise which we have to examine in this portion of our work is that entitled 'Summa Gloria', written by Honorius of Augsburg. The treatise was probably written not long after the Settlement of Worms, and from the standpoint of a resolute upholder of the papal tradition; but Honorius is not so much concerned with the circumstances of the conflict of the years from 1076 to 1122 as with an attempt to analyse and compare the origin and nature of the two great authorities. His position is rather strange, for his theories are in several points very extreme, while his practical conclusions are in some respects moderate and conciliatory.

He begins and concludes his treatise with an emphatic statement of the superior dignity of the "sacerdotium", and illustrates this in various ways. He takes Abel to be a type of the priestly office, Cain of the royal; Shem he identifies according to a patristic tradition with Melchizedek as the first true priest, while the Roman empire, he says, is descended from Japheth, and he finds similar types of the two authorities in Isaac and Ishmael, and in Jacob and Esau. As the peasant is subject to the deacon, the soldier to the priest, the prince to the bishop, so the king is subject to the Pope. He is met,

however, with the objection that the king is not a layman, for he is anointed with the oil of the priests; but he sets this contention contemptuously aside, and points out that on the admission of all men the king has no ecclesiastical office, but is evidently a layman who cannot perform any of the functions which belong to an ecclesiastic; and he makes the technical distinction that the king is anointed only with oil, while the priest is anointed with "chrism", and points out that the king is anointed not by another king, but by the priest.

Honorius is therefore clear that the priestly dignity is much greater than the royal, but he goes much further than this, and sets out a theory of the origin and nature of secular authority which was, as we think, entirely new, and even contradictory to the normal tradition. As we have frequently pointed out, it was the normal doctrine of the Fathers that the Temporal power had been instituted by God. Gelasius in the fifth century had maintained that Christ himself had created and separated the two powers which were to govern the world, and from the ninth century this had been modified into the doctrine that Christ had established the two powers in his Church. Honorius puts forward a wholly different view. He first urges that from the time of Moses to that of Samuel the Israelites were governed not by kings but by priests and prophets, that it was Samuel who created the kingship, that it was the priests and prophets who continued to elect and anoint the king, and that after the Exile it was again the priests who ruled over Israel. When Christ the true King and Priest came, he gave his Church laws, and he created the "sacerdotium", not the "regnum", to rule over his Church, and over the "sacerdotium" he set Peter, who left this authority to his successors. Thus from the time of Christ to that of Silvester the Church was ruled only by priests.

This is indeed a far-reaching and fundamental conception, and one which seems inconsistent with the traditional ecclesiastical theory, and the statement is followed by an application and interpretation of the "Donation of Constantine", to which, so far as we know, there is no earlier parallel. The time at last came, Honorius says, when God changed the time of persecution to the time of peace, and transformed the rebellious empire of the pagans into the kingdom of Christian men. Constantine was converted by Silvester, the prince of the priests of the Church, and placed the crown of the kingdom upon the head of the Roman Pontiff, and decreed that no one should thenceforth receive the Roman Empire without his consent. Silvester, however, recognised that those who rebelled against the priests could not be constrained by the sword of the Word of God alone, but only by the material sword, and joined the same Constantine to himself as a fellow-worker in the field of the Lord, and as a defender of the Church against the pagans, Jews, and heretics, granted to him the sword for the punishment of evildoers, and placed upon him the crown of the kingdom for the praise of the good. From this time, therefore, it became the custom that the Church should have kings and judges for secular judgment. It is only, however, secular judgments which belong to kings, and Constantine refused to take any part in the judgment of bishops. Thus as the soul is of greater dignity than the body, and the spiritual than the secular, the "sacerdotium" is of greater dignity than the "regnum", which it establishes and orders.

The position of Honorius is indeed novel and startling, such an interpretation of the "Donation of Constantine" had, as far as we know, never been put forward before. Placidus had, as we have seen, understood the "Donation" to mean that Constantine transferred the western part of the Empire to the Pope, and he may mean that Silvester granted it to Constantine to administer it as the servant of the Church; but Honorius interprets the "Donation" as signifying the complete surrender of all political authority to the Pope, and he seems to hold that from that time onwards all such authority was really held by the secular ruler from the "sacerdotium". This, however, is not all, for Honorius seems to mean that the action of Constantine was only a recognition of the normal divine order; he maintains that Christ had not created the two powers to rule the Church, but only the "sacerdotium", and it was to it that under the divine order all authority properly belonged. It would seem, therefore, that Honorius at least suggests the doctrine maintained by some later writers, that all authority,

temporal as well as spiritual, is vested in the Church and in its head, the Pope, and that all secular rulers hold an authority which is delegated to them by the Spiritual power. How far this ever became the normal doctrine of the Middle Ages we shall have to consider later, but it is certainly true that this is the first explicit affirmation of it. It may, indeed, be suggested that it had been put forward by Gregory VII, but though it may be maintained that it is implied in his claims, it is certainly not explicitly stated.

It is, perhaps, to this conception that we should relate Honorius's declaration that the Emperor should be elected by the Pope, with the consent of the princes and the approval of the people. In another place, indeed, he maintains that it is the bishops rather than the secular princes who were the real electors, but the main stress of Honorius's contention seems to be laid on the assertion that the authority of appointment lay with the Pope and the spiritual princes, and he concludes by urging that the "regnum" is lawfully subject to the "sacerdotium", inasmuch as it was the "sacerdotium" which established the "regnum".

In comparison with the far-reaching character of these conceptions it seems a comparatively trivial matter that Honorius also maintains that the election of the Pope belongs to the cardinals with the consent of the bishops and the clergy of the city of Rome, and the acclamation of the people, and that he omits all reference to the Imperial consent or approval, and that he maintains also that the bishop of each city is to be elected by the clergy of the diocese, with the acclamation of the people, and is to be invested with the ring and staff by the Pope.

We must now, however, observe that there is another aspect of the principles of Honorius with respect to the relations of the Spiritual and Temporal powers, not indeed formally inconsistent with that which we have just observed, but of considerable importance as modifying some conclusions which might be drawn from it.

He maintains emphatically that while the king as a layman must be obedient in divine matters to the "summus sacerdos", that is the Pope as head of the Church, so also the Pope and all the clergy are subject in secular matters to the king, and he maintains that this was true also in the older dispensation: the kings were appointed by the prophets and priests, and obeyed them in matters which belonged to the divine law, but the prophets and priests obeyed the kings in all secular matters.

In other passages he sets out the theory of the origin and nature of temporal authority with precision and in some detail. He follows the Stoic and Patristic tradition that God did not originally make man to be lord over his fellow-men, but that it came about through men's sin and irrational conduct that God set some in authority over others in order to constrain men by fear to live a true human life. The government of the Church in the world requires the two swords—the spiritual, which is in the hands of the "sacerdotium", and the material, which is in the hands of the "regnum", with which it punishes those who continue in evil. The Temporal power is thus an institution of God Himself, and must be obeyed in secular matters, not only by the people but by the clergy. The Christians of early times obeyed the Pagan emperors in secular matters, while they obeyed only God in spiritual, for it is not only good rulers who must be obeyed but also the evil. St Paul and St Peter taught plainly that the secular authority was ordained by God. Finally, it would seem that Honorius held that even if the king should rebel against the Roman See, or should fall into heresy or apostasy or schism, while the faithful must withdraw themselves from all communion with him, he must be patiently endured.

If we now try to sum up the general character of the principles stated and developed in the writings which we have examined in this chapter, we find that it is doubtful how far these writers had a completely reasoned conception of the whole subject. While, also, there are obvious and far-reaching differences between them, it is also evident that on some points there was a substantial agreement.

There was, in the first place, no doubt among them that the temporal authority was a divine institution as well as the spiritual. Deusdedit and Honorius are very careful to urge this, even though they point out that it had its origin in sin. When, therefore, Hugh of Fleury and Gregory of Catino urged this divine authority, and even when Hugh repudiated what he understood to be the meaning of the phrases of Hildebrand about the origin of secular government, they were not really maintaining a principle different from that which Deusdedit and Honorius would have admitted to be true.

Again, Deusdedit was, as we have seen, very anxious that it should be understood that he did not doubt that each authority had its proper sphere in which the other should not interfere; and Geoffrey and Honorius assert very emphatically that all the clergy, and Honorius specifically includes the Pope, are subject to the temporal authority in secular matters.

There is traceable also a tendency to approximation between them with regard to some of the practical questions raised by the great conflict. If Sigebert of Gembloux doubted whether a king could be excommunicated, and suggested that the excommunication of Henry IV had been unjust, Hugh of Fleury, though certainly a vigorous critic of the papal policy, was clear that the bishop could excommunicate the king; while Geoffrey, though a stout defender of the papal cause, doubted, not perhaps the lawfulness hut certainly the wisdom of excommunicating kings. And again, while Sigebert, Hugh of Fleury, and Gregory of Catino repudiated emphatically the assertion that the Pope could depose the king or absolve his subjects from their allegiance, Honorius seems to mean that while the faithful must withdraw themselves from communion with a heretical and schismatic king, his political authority must be patiently accepted.

It may therefore be said that we find in these writers a real agreement as to the divine origin of the Temporal power, and a tendency to approximation in their attitude to the practical questions of the time. We have endeavoured in the earlier part of this volume to trace the stages through which an agreement was finally reached on the "investiture" question, and it would seem to be true to say of some of the papalist writers that they were primarily occupied with the vindication of the spiritual freedom of the Church, and had no desire to urge that the Church or the Pope possessed any general supremacy over the Temporal power.

On the other hand, it may be said that in some of these writers we can trace a further development of the theory of the relations of the two powers. Hugh of Fleury asserted that the king bears the image of God the Father, and the bishops that of Christ, and that therefore all the bishops of the kingdom were rightly subject to the king, as Christ is subject to the Father, not in nature, but "ordine", that the "universitas regni" may be reduced "ad unum principium."

The author of the 'Tractatus Eboracenses', as we have seen, used parallel phrases, but pressed the matter much further, and seems to maintain that the royal authority is greater in its nature than the priestly, and that the king, who is not a mere layman, has a great authority even in ecclesiastical matters. Gregory of Catino said that the king was the head of the Church, and that therefore it was right that the bishops should receive "investiture" with ring and staff from the prince, for as he was the head of the Church, he should not be excluded from the "creation" of the office or ministry of his members. It is indeed not easy to interpret these phrases, but we shall probably not be far wrong if we interpret them as representing the reaction against the ecclesiastical claims. We must, however, observe that it was the same Hugh of Fleury who emphatically asserted that the bishop was as superior to the king in the dignity of his ministry as the "divine offices" were superior in their sanctity to secular matters, and that he was not liable to the judgment of the secular courts. Hugh and Sigebert, however, also pointed out how often it had been the emperors by whom the corrupt conditions of the Papacy had been reformed, and they refused to recognise that the Pope was above all human judgment, and urged that he should submit to reproof and correction.

If these writers may be taken as representing the most advanced aspect of the position of the defenders of the temporal authority, Placidus and Honorius represent a new development of the

papalist position. We have discussed their treatment and interpretation of the "Donation of Constantine," but important as this may be, it is of little importauce when compared with Honorius's theory of the creation of the secular authority by the Church, and of the subordination of the temporal authority to the spiritual. This position of Honorius is very interesting, and we shall have occasion to refer to it later; here we can only say that if it may have some relation to some of the claims of Hildebrand, and if it may be argued that it was implicitly contained in these claims, it must be clearly understood that there is no parallel to it in the literature which we have been considering in these two chapters.

CHAPTER IV.
THE DEVELOPMENT OF THE FEUDAL AUTHORITY OF THE PAPACY.

We must consider briefly another aspect of the policy of Gregory VII; this is what appears to be his persistent attempt to establish a claim on the part of the Papal See to feudal lordship over various countries and provinces. We cannot, indeed, say that this policy had no antecedents before the time of Gregory's pontificate; it is, indeed, obvious that some of the most important steps in the development of it were taken by his immediate predecessors; but it may be contended that Hildebrand had even then inspired this policy.

There is at least one important reference to the matter as early as the pontificate of Silvester II. This is contained in a letter in which it is stated that Stephen, King of Hungary, had given himself in allegiance to the Pope. The authenticity of the letter is, however, questioned by some critics, though it is defended by others. It is, however, clear that, even if the policy of establishing the feudal lordship of the Papacy over various States may be traced back to earlier times, it was with the immediate predecessors of Gregory VII that it became important. It would appear reasonable to say that the policy represents an attempt to organise a system which should secure the political independence of the Papal See in its relations both to the Empire and the city of Rome. We shall have occasion to see the important consequences of this policy in the history of the twelfth and thirteenth centuries.

The first and the most important development of this policy is to be found in the establishment of feudal relations between the Papal See and the Normans in Southern Italy. Cardinal Deusdedit has preserved in his 'Collectio Canonum' the promises of fidelity which Robert Guiscard took in the year 1059 to Pope Nicholas II. He styles himself Duke of Apulia and Calabria by the grace of God and of St Peter, and as about to become Duke of Sicily by their help; and in confirmation of this grant and in recognition of the fidelity which he owes, he promises an annual tribute to St Peter and Pope Nicholas and his successors. He promises that he will be faithful to the holy Roman Church and to Pope Nicholas, and that he would swear fidelity to no one except with the reservation of fidelity to the Roman Church. Deusdedit also gives the oath of fidelity which Richard, Prince of Capua, and Jordanus, Prince of Capua, took to Pope Alexander II.

It is significant of the development of this policy that Pope Alexander II wrote to William the Conqueror declaring that the kingdom of the English since the time of its conversion to Christ had been "sub apostolorum Principe manu et tutela", and had paid an annual sum to the Apostolic See, of which a part went to the Pope, and a part to the Church of St Mary, which was called "Schola Anglorum". The claim to feudal supremacy was, however, emphatically repudiated by William; he refused to do fealty on the ground that he had not promised to do this, and that his predecessors had never done it, while he promised that the money should be paid.

It is then clear that the policy of extending the feudal authority of the Papacy was well developed before the accession of Gregory VII to the papal throne, but it is also clear that during his pontificate he lost no opportunity of extending this. He was, in the first place, careful to maintain this relation with the Normans in South Italy. The oath of fidelity, which was made by Richard of Capua to Gregory VII in September 1073, contains very important provisions. Richard styles himself Prince of Capua by the grace of God and St Peter, and promises that he will be faithful to the holy Roman Church and to Gregory the "universal" Pope. He promises that he will help him and the Roman Church to acquire and defend the "regalia" and the possessions of St Peter against all men, and that he will help Gregory to hold in safety and honour the Roman Papacy. He will swear fidelity to the King, Henry, when he is admonished to do so by Gregory and his successors, but always saving his fidelity to the Roman Church. In the event of a vacancy in the papal throne, he will render his help

according to the admonition of the best cardinals and the Roman clergy and people in the election of a Pope. The form of oath taken by Robert Guiscard to Gregory VII in June 1080 is practically the same. It is noteworthy that in these oaths, while the Normans express themselves as willing to take the oath of fidelity to the German King, they do this subject to the approval of the Popes, and subject to the reservation of their fidelity to the Roman Church. These phrases are strictly parallel to those of an oath made to a lord, subject to the reservation of the obligation to the overlord. It may therefore be said that Gregory correctly describes the relations of the Normans to the Papal See when in a letter of 1076 he says that they desired to have St Peter as their only lord and emperor after God.

A similar claim to lordship in Spain is represented in letters written by Gregory VII in 1073 and 1077. The first was written in relation to projected attempts to recover parts of Spain from the Saracens, and Gregory claims that the Kingdom of Spain had from ancient times belonged to St Peter, and that it still, even though occupied by the pagans, belonged to no mortal man but to the Apostolic See; he has, therefore, granted to Count Evulus de Roceio, who desires to deliver this land from the pagans, that he shall hold any territory, from which he succeeds in driving them out, from St Peter. The letter of 1077 repeats the same claim that Spain belonged by the ancient constitutions to St Peter and the Roman Church.

Another claim which was urged with much vehemence by Gregory VII was that the Kingdom of Hungary belonged to the Roman See. In a letter of October 1074 to Solomon, King of Hungary, he urged in support of this claim, first, the alleged action of King Stephen in surrendering his kingdom with all its rights and powers to St Peter, and secondly, that the Emperor Henry III, after his victory over the King of Hungary, had sent the lance and crown to the shrine of St Peter, and had thus recognised that the authority belonged to him. He reproved Solomon severely for having accepted the kingdom as a fief from the King of the Germans, and threatened that he would lose it unless he recognised that his kingdom was a fief of the Apostolic See, not of the King of the Germans. In two letters of the following year Gregory supported Geusa in his claim to the Hungarian throne on the ground that Solomon had forfeited his right by receiving it as a fief from the German King. The action of Gregory here is the more noticeable in that it involved a conflict with the claims of the German King to feudal supremacy over Hungary.

In a letter of the year 1075 to Demetrius, King of the Russians, Gregory VII says that Demetrius's son had come to Rome and had urgently prayed that he might receive that kingdom by the grant of St Peter through the hands of the Pope. Gregory, understanding that this request was made with the consent of Demetrius, had assented to it, had conferred the kingdom upon his son in the name of St Peter, and promises that he will give him the support of the Holy See in all just matters. In another letter of the same year Gregory writes to Sweyn, King of the Danes, that the law of the Roman Pontiff reached farther than that of the Emperor, and that where Augustus reigned, Christ reigned. Sweyn had asked Pope Alexander II. for the "patrocinium" of St Peter, and Gregory desires to know whether this was still his wish. In a letter of 1077 to the Corsicans, he bids them know that their island belongs lawfully to no other authority than that of the Roman Church : those who refuse to recognise this are guilty of sacrilege; and he rejoices to learn that they desired to recognise the rights of St Peter, and is prepared to send them armed help. In a letter of 1079 to Wezelin, he warns him that he must not take up arms against him whom the apostolical authority had established as king in Dalmatia, and bids him know that whatever he may do against this king will be done against the Roman See. Deusdedit has preserved the oath of fidelity which Demetrius had taken to Gregory VII on receiving the Kingdom of Dalmatia. He acknowledges that he had been invested with the Kingdom by means of the banner, sword, sceptre, and crown, under the authority of the Pope, and promises obedience and fidelity in the strict terms of the feudal obligation, and the payment of a regular annual tribute. In one letter Gregory even claimed that Charles the Great had given Saxony to St Peter, and that the Saxons possessed documentary evidence of this. Finally,

Gregory's Register contains, under the year 1081, a declaration of Bertrand, Count of Provence, that he surrendered all his hereditary dignity to God, St Peter and St Paul, and to Gregory and his successors.

It is reasonable to compare this very highly developed policy of extending the feudal authority of the Roman See with the terms of Gregory VII's letter of 1081 to Altmann of Passau; and we may not unreasonably think that that letter represents a design to extend the feudal authority of the Papacy even over the German kingdom.

PART IV,
THE CHURCH AND THE EMPIRE FROM 1122 TO 1177

CHAPTER I.
FREDERICK I AND THE PAPACY.

The settlement of Worms secured peace between the Church and the Empire for more than thirty years, and when a new conflict arose the conditions and causes of the conflict were different. It is more difficult to say what was the nature of this peace; there are some who look upon this period as one in which the Papacy had triumphed over the Empire, but it is very doubtful if this view can be seriously defended. The truth would rather seem to be that men were heartily weary of the conflict, and that there was little desire either on the one side or the other to renew it. It is no doubt easy enough to argue that the agreement of Worms had not settled things finally, and it is indeed true that no complete or final settlement of the question of the appointment to bishoprics and abbeys had been reached ; but as a matter of fact the settlement as a whole was not seriously challenged, and the changes which came, came gradually and without serious conflict.

An excellent monograph of Bernheim has brought out very clearly the extent and also the limits of divergence in the interpretation and application of the terms of the settlement. It seems on the one hand to be clear that within a year of its conclusion a version of its terms was in existence which, considerably extended the authority of the Emperor—a version which gave him power, in cases of disputed elections, to decide the matter by his own judgment, without the advice and judgment of the metropolitan and the comprovincial bishops. In 1122 or 1123, after Worms, Henry V, in the case of a disputed election to the Abbey of St Gall, obtained a judgment from his court that in consequence of the dispute it was open to him to appoint whomsoever he wished. It would seem that this was the tradition referred to by Otto of Freising in the ‘Gesta Friderici’ in a passage which we shall deal with later, but it would not seem that either of Henry V’s immediate successors, Lothair III and Conrad III, made any attempt to assert such a right.

On the other hand, it would seem that some at least of those who procured the election of Lothair III as Emperor in 1125 desired to modify the terms of the settlement in favour of the Church. According to the author of a very important account of this election, it was agreed at Mainz that the election of a bishop should be free, and not constrained by the presence and fear of the prince, and that the Emperor should invest the bishop, freely elected and freely consecrated, with the “regalia” by the sceptre, while the bishop should take the oath “salvo quidem ordinis sui proposito”. This would seem to mean that it was agreed that the terms of Worms should be modified in two important particulars—first, that the election should not be conducted in the presence of the Emperor; and second, that the investiture with the temporalities should take place after consecration and not before.

Whether this statement can be taken as proving that an actual agreement was made upon this basis, and that Lothair was a party to it, is very doubtful; Bernheim, in another monograph, has made it clear that Lothair’s actual administration did not conform to any such agreement, but rather that he normally maintained the terms of the agreement of Worms.

If we can trust a statement in a life of St Bernard, Lothair, when he met Pope Innocent II at Liège in 1131, taking advantage, no doubt, of the disputed election to the Papacy, urged upon him the restoration of investiture as it had been exercised before; but St Bernard, the most powerful supporter of Innocent’s claim to the papal throne, was present, and by his influence contributed greatly to the papal refusal. The statement is confirmed by some other references. It is possible that it is in some connection with this incident that we should place the issue by Innocent II, after his

restoration to Borne and the consecration of Lothair as Emperor in June 1133, of the document which emphatically forbade bishops and abbots in the German kingdom to take possession of the "regalia" until they had received them from the Emperor. It would seem probable that this was issued by the Pope as some satisfaction to the imperial demand, and the matter was one of great importance, for it was just upon this distinction between the temporal and the spiritual authority of bishops or abbots that the agreement of Worms rested.

The position of Lothair's successor, Conrad III, has been carefully examined by Witte in a dissertation on the episcopal elections during his reign; and it would appear that Conrad was not inclined or able to insist upon a strict observance of the provisions of Worms. Sometimes, and especially in his own personal territories, he asserted them; but at other times, and in other parts of the Empire, he could not, or at any rate did not, enforce them. Frequently he was not present at elections, and the investiture with the temporalities followed instead of preceding the consecration; in one case the Pope seems to have claimed the right to determine a disputed election instead of leaving this to the King, with the counsel and judgment of the metropolitan and the bishops of the province.

On the whole, however, it is true to say that the fundamental principle of the settlement of Worms was fully recognised—that is, the distinction between the spiritual position of the bishop and his temporal lordships and possessions; and therefore, that while it was the part of the ecclesiastical authority to invest him with the former, it was for the temporal authority to grant the latter. And this settlement had for the time brought peace in the relations between the Empire and the Papacy.

We have now to consider the circumstances and the principles of the conflict, between Frederick Barbarossa and the Popes who were his contemporaries.

Frederick I was elected by the princes at Frankfurt in March 1152, and the ecclesiastical relations of his first years were tranquil. He did, indeed, maintain the rights given to the secular power by the agreement of Worms, and in one case at least he interpreted these in a manner which was not consistent with what seems to be the genuine text, but was probably founded upon that version which has been preserved in the 'Codex Udalrici'. Otto of Freising, in the 'Gesta Friderici', says that the tradition of the "Curia", that is, the royal court, was that in the case of a disputed election the king could appoint as bishop whomsoever he wished, with the counsel of his "optimates". It was apparently in virtue of this claim that Frederick, in 1152, procured the appointment of Weidmann, the Bishop of Zeitz, to the Archbishopric of Magdeburg. Pope Eugenius III, in a letter to the bishops of Germany, rejected the appointment, but not on the ground of the provisions of Worms, that the king as emperor could only decide upon such a point with the advice and judgment of the metropolitan and the comprovincial bishops, but on the ground that Frederick had overridden the rights of the electors.

On the other hand, Frederick showed himself desirous to meet the demands of the Papacy for his support. The relations between Frederick and the Popes at this time are best represented by the terms of the Treaty of Constance, which was concluded early in 1153. By this treaty Frederick bound himself to support the Pope against the Greeks, the Normans, and the rebels in Rome, while the Pope promised to crown him as Emperor, to support him against any who should attack the "justice and honour" of the kingdom, by excommunicating them, and to resist the Greeks.

In 1155 Frederick was crowned Emperor in Rome. In 1156, however, the papal policy seems to have undergone a change. At the time when the Treaty of Constance had been signed, the Popes were on bad terms with the Normans, and looked for support against them to Frederick, but in 1156 Hadrian IV came to terms with the Normans, and the new relation was embodied in the Treaty of Beneventum. The most important political provisions of this treaty are as follows : Hadrian recognised William and his son Roger and their heirs as Kings of Sicily, Dukes of Apulia, and Princes of Capua, together with Naples, Salerno, and Amalfi, and the territories belonging to them,

while they on their part swore fidelity to Pope Hadrian and his successors and the Roman Church, and did liege homage.

It was not, however, till 1157 that a serious dispute arose between Frederick and Hadrian IV, and then it was not about any actual question of policy, but about the use of a phrase by the Pope which seemed to imply that Frederick held the Empire as a fief from the Pope. The circumstances were as follows. Archbishop Eskil of Lund, in Sweden, on his return from Rome, had been seized and held to ransom by some turbulent persons in Burgundy. For some reason Frederick refused to take any active steps to procure his release or to punish the offenders, and Hadrian IV wrote to him in September to remonstrate with him. After urging upon him the duty of intervention, he reminded him of the affection and joy with which the Roman Church had received him, how it had conferred upon him the fulness of dignity and honour with the imperial crown, and that it would gladly have conferred upon him greater "beneficia".

This letter reached Frederick while he was holding a diet at Besançon, and according to the report of Otto of Freising, it caused the greatest indignation among the princes, because they understood the letter to imply that the German kings held the Empire and the Kingdom of Italy by the grant of the Popes. They were, according to Otto, much disturbed by the recollection that in the palace of the Lateran, under a portrait of the Emperor Lothair III, there was written an inscription in the following terms :—

"Rex venit ante foras, iurans prius urbis honores,
Post homo fit papae, sumit quo dante coronam

The tumult caused by the reading of Hadrian's letter was increased by the injudicious words which one of the papal legates was understood to have used : "From whom, then, has he the Empire, if not from the Pope?" and the legates might have been killed if Frederick had not intervened and sent them back to their lodgings, ordering them to depart on the following morning, and to return without delay to Borne.

In October Frederick issued a circular letter recounting the circumstances of the papal legation and the contents of Hadrian's letter. He complains that the head of the Church, who ought to represent the peace and charity of Christ, was becoming the cause of discord and the source of evil; and he declares that he received the Kingdom and Empire, by means of the election of the princes, from God alone, who had subjected the world to the rule of the two swords; and he charges any one who should maintain that he had received the imperial crown as a fief ("pro beneficio") from the Pope with the defiance of the doctrine of St Peter, who had bidden men to "fear God and honour the king".

The Pope in the meanwhile was much irritated at the treatment of his legates and at the measures which, as he alleged, Frederick had taken to prevent any one from Germany going to the Apostolic See, and wrote a letter to the German archbishops and bishops complaining of Frederick's conduct, and urging them to resist his actions and to persuade him to adopt a more reasonable policy. He admitted, it should be observed, that the trouble had arisen about the phrase which he had used "insigne videlicet coronae tibi beneficium contulimus"; but he did not, so far, offer any explanation of the phrase. The German bishops replied courteously and deferentially, but firmly, that the terms used in the first letter were the cause of all the trouble, and that they were so unusual and unprecedented, and of so sinister an ambiguity, that they could not defend nor approve them. They had, as the Pope desired, discussed the matter with the Emperor, and they report his reply. In this Frederick made it plain that, while he desired to exhibit all due reverence to the Pope, he would not tolerate any departure from legal and customary usage. He claimed the freedom of the imperial crown as being derived from the "beneficium divinum", and states in some detail the order of election and coronation. He denied that his behaviour to the cardinals had been dictated by contempt of the Pope, but he could not permit them to carry any further such documents as were an offence to

the Empire. He had not forbidden any one to come or go on reasonable business to or from Italy, but was determined to check those abuses by which the churches of the kingdom were burdened. And then, evidently with reference to the painting which has been already described, he says that that which had begun with a picture was now being carried out in a writing, and that it was now attempted to make this writing authoritative. This he would not tolerate, but would rather resign the crown than suffer such a degradation of the Empire. Such pictures must be destroyed, and such letters retracted if there was to be friendship between the "regnum" and the "sacerdotium."

The bishops add that they had heard from the Emperor what they evidently considered to be disquieting reports about a treaty with Roger and William of Sicily—referring, no doubt, to the Treaty of Beneventum, which, as we have seen, had been concluded between Hadrian IV and William I of Sicily in 1156; and they had heard also of other treaties.

In June 1158 papal envoys came to Frederick at Augsburg, bearing letters in which Hadrian IV was careful to explain away the offensive phrases which, he said, had been misunderstood. The word "beneficium" had, he declared, no such meaning in his letter as had been attributed to it. It did not mean a "fief", but only a benefit; and it was only the wilful malice of men who did not desire the peace of the Church and kingdom which had misinterpreted it. Frederick received the explanation in a friendly way, and the amicable relations with Rome were for the time restored.

It is not easy to arrive at a clear judgment about the significance of these circumstances. It is very difficult to understand why Hadrian should have wished to pick a quarrel with the Emperor, and why he should have chosen such a way of doing it. The only important argument for the view that he used the phrase intentionally lies in the fact that he did not offer any explanation of it in his letter to the German bishops. On the whole, it appears very doubtful whether Hadrian's phrase was intentionally used to signify his determination to treat the Emperor as a vassal of the Holy See; it seems more probable that it was used inadvertently. It is at any rate most, important to observe that the supposed claim was immediately and emphatically repudiated by the German bishops, and that the Pope himself was careful to explain it away.

In the year 1159 there was again a dispute between Frederick and Hadrian IV, shortly before the death of the latter. The Bishop of Bamberg, in a letter to the Archbishop of Salzburg, cited by Otto of Freising in the 'Gesta Friderici', reported that the Pope had sent two cardinals to Frederick, making certain very important demands, and laying down some very significant principles. The Emperor, he declared, must not send envoys to Rome without the knowledge of the Pope, as the magistracy of the city and all the "regalia" belonged to St Peter. The bishops in Italy were to take the oath of fidelity to the Emperor without doing homage, and were not to be required to receive the Imperial envoys in their palaces. He also demanded the restoration to the Roman Church of Tibur, Ferrara, Massa; the whole territory of the Countess Matilda, the whole territory from Aquapendente to Rome, the Duchy of Spoleto, and the islands of Sardinia and Corsica.

In his reply Frederick first pointed out that he could not answer on such important matters without the advice of the princes, but provisionally he replied as follows: He would not demand homage from the Italian bishops if they were willing to surrender the "regalia". He was willing to admit that his messengers need not be received in the bishop's palaces, provided these were built upon ground which belonged to the bishops, but if they were built upon the Emperor's land, they were properly the Emperor's palaces. As to the Pope's demand that he should not send envoys to Rome, as all magistracy there belonged to St Peter, this, he said, was a serious matter requiring grave consideration; for if the city of Rome were not under the authority of the Emperor, it would mean that he had only the appearance and the empty name of the Imperial power.

It was apparently about the same time that Hadrian asked for the renewal of the treaty made with Pope Eugenius III at Constance in 1153; but, as appears from a letter of Frederick to the Archbishop of Salzburg, Frederick refused, on the ground that Hadrian had violated the terms of this

treaty by the treaty which he had made with William of Sicily at Beneventum, in the year 1156. Frederick contended that it was a breach of the agreement of Constance that the Pope should have made peace with the King of Sicily without consulting him.

The questions thus raised were no doubt serious and far-reaching, and might have produced a serious situation; but other and graver questions arose.

It was in 1159 that Hadrian IV died, and his death was followed by a double election to the Papacy. Roland was elected as Alexander III, and Octavian as Victor IV. The situation is set out very clearly in one of the works of Gerhoh of Reichersberg. He was one of the most energetic of the reforming clergy in Germany, but for some time hesitated in his attitude to the rival claimants. He was clear that, as far as the election itself was concerned, Alexander had been legitimately and canonically elected by a majority of the cardinals; but, on the other hand, he very gravely and seriously reports the contention of the supporters of Victor that both Alexander and the cardinals who had elected him had been engaged in a conspiracy against the Emperor. It was alleged that before the death of Hadrian IV they had made an agreement with William, the King of Sicily, and the Milanese, and with other enemies of the Empire, that they had bound themselves by an oath that on the death of Hadrian, they would not elect any one to the Papacy who had not been associated with them in this conspiracy, and that they had been bribed by William and the Milanese to undertake that Frederick should be excommunicated and should not be absolved without their consent.

It was under these circumstances that Frederick put forward two important principles: that it was for a General Council of the Church to consider the claims of the two aspirants to the Papacy, and to decide which of them was the legitimate Pope; and that it was the duty of the Emperor to take the necessary steps to call together such a Council. Frederick's position is very fully and clearly expressed in his letter of invitation to the German bishops to attend the Council which he summoned to meet at Pavia to deal with the matter. He interprets the words of Christ referring to the two swords as being related to the Roman Church and the Roman Empire, by which the whole world was ordered in divine and human matters. There is one God, one Pope, one Emperor, and there ought to be one Church; but, grievous to relate, there seem to be two heads of the Roman Church. It is to avert the danger of such a division in the Church that the Roman Empire, which the divine providence has created as a remedy for such a dangerous mischief, must take action for the safety of all, to avert such evils from the Church and all mankind. He has therefore summoned a solemn and general assembly to meet at Pavia in the Octave of the Epiphany, and has invited the two who call themselves Roman Pontiffs, and all the bishops of the Empire, of France, England, Spain, and Hungary, that by their examination, in his presence, it might be declared which of the claimants should lawfully obtain the rule of the universal Church.

It is important to observe precisely the nature of the claims which Frederick set out. He maintained that it was the duty of the Emperor to deal with such a situation as that which had arisen, but he did not claim that he had himself authority to decide between the claimants. His function, as he represented it, was to call together a general assembly of the bishops of the Church of all countries, and it was for them to consider and decide upon the justice of the rival claims—only, this was to be done in his presence. To put this in other words, this meant that, in the case of disputed elections to the Papacy, it was for the Church as a whole to decide the rights of the case, while it was the function of the Emperor to set the machinery of the Church in motion.

With this we should compare the terms of the letter in which Frederick invited Henry II of England to send as many of his bishops and abbots as possible to the Council at Pavia, that by their judgment and that of the other ecclesiastical persons the unity of the Roman Church should be preserved. In his letter to Alexander III and his cardinals desiring their presence at the Council, the same positions were set out as in the letter to the German bishops, only they were stated with more precision. He claimed that it was his duty to protect (*patrocinari*) all the churches in his Empire, and

more especially to care for the Roman Church, whose "care and defence" had been specially entrusted to him by the divine providence; he expressed his grief at the dispute which had arisen as to the election, and said that it was to remedy this evil that he had commanded to be held (*indiximus celebrandum*) a general court and assembly at Pavia, to which he had called the archbishops, bishops, abbots, and other religious persons, in order that, all secular judgment being excluded, this great matter of the Church might be decided by the sentence only of the ecclesiastical persons in such a way that God might be honoured, that no one should deprive the Roman Church of her "integritas" and justice, and that the city of Rome might be at peace. He therefore, in the name of God and of the Catholic Church, commanded and enjoined upon him that he should attend the assembly to hear and receive the decision of the ecclesiastical persons. The principles set out are the same as those in the letter to the German bishops; but Frederick lays stress upon his special obligations of care and defence to the Roman Church, and he very emphatically repudiates the suspicion that the secular power claimed a right to share in the determination of the question at issue. He does, however, assume a very authoritative tone in summoning Alexander to attend the Council.

It is, however, necessary to observe that in another letter Frederick's position is not exactly the same. In this he begs the Archbishop of Salzburg not to pledge his support to either candidate without consulting him, lest there should arise division in the Empire, and he tells him that he had asked the Kings of France and England only to support that one of the claimants upon whom they should all three agree. He concludes by saying that he will not himself recognise any one as Pope who had not been elected by the unanimous consent of the faithful. Here Frederick's tone is somewhat different: he does, indeed, recognise the common judgment of the Church as being the authority by which the matter should be finally decided, but, at the same time, he speaks as though he and the Kings of France and England were entitled to exercise some authority with regard to the recognition of the rightful claimant. This may, however, be interpreted as referring only to the period before the judgment of the whole Church had been declared.

Alexander III did not hesitate to take up the challenge thus addressed to him, but at once firmly repudiated and condemned the action of the Emperor and the contention that an assembly of the Church could take cognisance of the matter. The tone of his statement was courteous, but his attitude was uncompromising.

He recognises that the Emperor was, in virtue of his position, the advocate and the special defender of the Roman Church, and he assures him that he honoured him above all princes; but he must honour God more, and he is astonished that the Emperor should refuse to the Roman Church that honour which belongs to it. He had learned, he says, from the Emperor's letter, that he had called together a Council of the ecclesiastics of the five kingdoms, but in doing this he had departed from the custom of his predecessors, and exceeded the bounds of his authority, since he had done it without the knowledge of the Roman Pontiff, and had summoned him to his presence as though he possessed authority over him; while Christ had given to St Peter, and through him to the holy Roman Church, this privilege, that it should consider and determine the causes of all churches, while it should never be subject to the judgment of any one, and this privilege must be maintained even at the risk of death. The canonical tradition and the authority of the holy Fathers, therefore, forbade him to attend the Emperor's court or to receive its judgment, and he would deserve the severest censure if he, by his ignorance or faint-heartedness, were to suffer the Church to be reduced to slavery.

When the Council met at Pavia early in 1160, Alexander III was therefore unrepresented, but the case of Victor was placed before it. His representative contended that he had been regularly "immantatus", and enthroned and acknowledged by the Roman clergy, while against Alexander he urged especially that he had been a party to an attempt to dismember the Empire, and that the conspirators had agreed with the King of Sicily and the Milanese, that in the event of the death of Hadrian IV they were to elect one of their number to the Papacy.

The decision of the Council has been preserved for us in two forms—in the encyclical issued by the Council itself, and in an encyclical letter of Frederick expressing his assent to its judgment. The encyclical of the Council declares first that the case had been legally and canonically examined by them, "remoto omni seculari indicio", and that it had been proved that Victor had been elected by the wiser part of the cardinals in the basilica of St Peter, on the petition of the people, and by the consent and desire of the Roman clergy. They contend that nine cardinals out of twenty had concurred in his election, but they do not deny that they were a minority. They lay great stress on the fact that he had been "immantatus" several days before Roland (Alexander III), they refer for the significance of this to a work which they call 'Liber de Ritu et Ordinatione Romanorum Pontificum', and allege that it had been considered important in the dispute about the election of Pope Innocent II. They urge that Roland had been invited to the Council, "remoto omni seculari indicio", but he and his cardinals had refused to recognise any inquiry or judgment on the part of the Church. They give an account also of the conspiracy of Roland and his cardinals. Finally, they declare that the Council had decided that the election of Victor, who had come to the Council, prepared himself to accept the judgment of the Church, should be confirmed and approved, and the election of Roland annulled. They are careful to add that it was only when all this had been done, without any secular interference, that the Emperor as the last, after all the bishops and clergy, on the advice and petition of the Council, received and approved the election of Victor, while after him the princes and an immense multitude of those who were present gave their assent.

The encyclical letter of Frederick urges Alexander's refusal to attend the Council at Pavia, but lays much stress upon the evidence of the conspiracy. The Council, he urges, was not a secular court, for it met and considered the matter without the presence of any lay person; but Alexander refused to submit to the inquiry by the Church, declaring that he had the right to judge all men, but would not be judged by any. The decision of the Council was based upon clear proof of the conspiracy, and on the ground that there was nothing against Victor except that he had been elected by a minority of the cardinals, and it therefore condemned Alexander, and confirmed the election of Victor. Frederick, following the judgment of the Church, gives his approval and proclaims Victor as father and ruler of the universal Church.

The letter of the Council lays most stress on the propriety and validity of Victor's election, and that of Frederick on the conspiracy against the Empire; but they agree in urging that the decision was that of the Church, not of the Temporal power, and that it was to the judgment of the Church that Alexander had refused to submit his case.

The conflict thus began in 1160 continued for seventeen years—that is, until the Peace of Venice in 1177—when Frederick was compelled to submit to the demands of the Lombard towns and to recognise Alexander III as the legitimate occupant of the Roman See. It is not necessary for our purpose here to deal with the history of these years—we shall return to the political principles represented in the demands of the Lombard towns in a later volume—we are here concerned with the questions at issue between the Temporal and the Spiritual powers.

CHAPTER II.
JOHN OF SALISBURY.

The 'Policraticus' of John of Salisbury was written between the years 1155 and 1159, during the Papacy of Hadrian IV, and belongs, therefore, to the period when there was already some friction between the Pope and the Emperor, but before the great European conflict of Alexander III and Frederick I, and the important but local dispute between Henry II and Thomas à Becket in England. It has therefore the advantage, as evidence for the trend of thought on the relations of the Temporal and Spiritual powers, that it was written at a time when men's passions were not roused by vehement conflict, but it has also the compensating disadvantage that in some respects it represents abstract and generalised theories whose real significance was not tested by the need of interpretation with reference to particular and practical questions. As we shall see, there are some very interesting points of relation between the theoretical position of John of Salisbury and of Honorius of Augsburg, and it would almost seem as though it was not till after the first great conflict was over that the speculative development of the principles underlying the practical issues of the time began to occupy men's minds.

John represents an advanced ecclesiastical position : he not only condemns severely all aggressions of the Temporal powers upon the Church, and repudiates indignantly the notion that the secular law was supreme over all others, but he very clearly maintains the superiority of the Spiritual power and its law over the Temporal. At the same time he criticises with great frankness the extortions of the ecclesiastical authorities, and condemns the ecclesiastical tyrant as severely as he does the secular. We must consider these positions in their order, for each is important.

In one passage he discusses the appointment of unsuitable persons to ecclesiastical offices, and represents the defenders of the absolute authority of the prince as maintaining that he was above all laws, and that to question the worthiness of any person whom he might have selected for office was to be guilty of something like sacrilege. They maintained, he says, that no law was equal to the secular, and urged the precedents of custom even against reason, and treated those who ventured to appeal to the divine law as enemies of the prince. John had evidently suffered indignantly under the tone and temper of some of the lawyers of the court, and he fortified himself by frequent citations from the Roman law and its provisions for the protection of the Church and its rights against aggression, and for the exemption of the clergy from the jurisdiction of the secular courts. His appeal to the Roman law is interesting, as reminding us of the fact that we have arrived at the period when the influence of the revived study of the Roman law was beginning to be important. We have already seen, in discussing his theory of the nature of political authority, that he was much influenced by his extensive acquaintance with the Roman jurisprudence. The civil law was indeed a double-edged weapon in the conflicts between the Temporal and Spiritual powers, but to John of Salisbury it appeared as a welcome instrument of defence.

John of Salisbury did not, however, content himself with condemning and repelling the aggression of the Temporal power upon the Spiritual, he very emphatically declared the superior dignity and authority of the latter. In one passage he says dogmatically that all the laws of the prince are idle and void if they do not conform to the character of the divine law and the discipline of the Church, and cites the Novels of Justinian as laying down that the Imperial laws must "imitate" the sacred canons. In another place he sets out a conception which is already familiar to us, and maintains that the prince is subject to God and to those who hold His place on earth, as the human body is ruled by the soul.

He does not, however, only set out these conceptions in general terms, but in one very important passage he expresses them under the terms of an exposition of the doctrine of the two

swords, and declares that it was from the Church that the prince received the material sword, for both swords belonged to the Church, but it uses the material sword by the hand of the prince. The prince is therefore the minister (or agent) of the "sacerdotium", and discharges that inferior part of the sacred offices which is unworthy to be exercised by the hands of the priest. This conception is parallel to, it may be derived from, some phrases of St Bernard in his treatise 'De Consideratione', and in one of his letters. In the first of these he urged upon Pope Eugenius III that both swords, the spiritual and the material, belonged to the Pope and the Church; the material sword was not, indeed, to be used by him, but was to be drawn at the bidding (*ad nutum*) of the priest and the command of the Emperor. In the second he declared that both swords belonged to St Peter, the one to be drawn at his bidding, the other by his hand.

This principle that the two swords belong to the Church is of great significance. There is, as far as we have observed, no exact parallel to these statements of John of Salisbury and St Bernard in the earlier literature of the Middle Ages. The nearest is to be found in that passage of the 'Summa Gloria' of Honorius of Augsburg which we have discussed in a previous chapter. Honorius maintained that Christ established only the "sacerdotium" to govern his Church, and not the "regnum", and that until the time of Silvester I and Constantine it was ruled only by the priests, and that Constantine bestowed upon Silvester the crown of the kingdom, and decreed that no one should receive the Empire without the consent of the Pope. Silvester, however, recognising that those who rebelled could only be controlled by the material sword, joined Constantine to himself as a helper, and bestowed upon him the material sword for the punishment of evildoers. How far the phrases of St Bernard and of John of Salisbury may have been related to those of Honorius it is difficult to say : they do not, like him, relate the principle, that both swords belong to the Church, to the "Donation of Constantine"; St Bernard, indeed, relates it directly to our Lord's saying to St Peter, bidding him put up his sword into its sheath. We might rather be inclined to think of these words as having some connection with those of Peter Damian when he speaks of St Peter as holding the laws of both kingdoms, which we have considered earlier. There does not seem, however, any sufficient ground for suggesting any such relation.

What importance are we to attach to these statements of St Bernard and of John of Salisbury? In the case of St Bernard the contexts suggest that it would be unwise to build upon them the conclusion that they have any definite general significance. In the 'De Consideratione' he is urging upon Pope Eugenius that the disorder and obstinacy of the Roman people would justify him not only in using the spiritual sword, but also in causing the material sword to be used against them at his command and that of the Emperor. In his letter he is urging upon the Pope that he should cause the material sword to be drawn in a crusade for the defence of the Eastern Church. The statement that both swords belong to the Church is no doubt explicit, but it would be very unsafe to argue that St Bernard intended to set forward a definite thesis of the relation of the Temporal power to the Spiritual.

The case is very different with John of Salisbury. The context of his words is the discussion of the difference between the tyrant and the true prince, and the fundamental principle which he sets out is that the prince governs according to law, while the tyrant sets himself above it. It is in this connection that the passage which we are considering occurs, and in this chapter and the following John discusses the relation of the prince to the law of God and the Church. He begins with the words we have cited, and goes on briefly to describe the humility of Constantine at the Council of Nice, how he refused to preside, and would not sit even among the presbyters, and received its decisions as proceeding from the Divine Majesty. He exhorted indeed the members of the Council to charity and peace, but declared that it was unlawful for him as a man who was subject to the judgment of the priests to examine the causes of those who could be judged by God alone. John also cites the excommunication of Theodosius, and speaks of him as having been suspended by St Ambrose from

the use of the "regalia", and the "insignia" of empire; and, he concludes, that he who blesses is greater than he who is blessed, and that he who has the authority to confer an office is greater than he upon whom it is conferred, and that he who can lawfully confer an office can also lawfully take it away. Did not Samuel, he says, on account of Saul's disobedience depose him and place the son of Jesse on the throne?

In a passage in the writings of Hugh of St Victor, we find a parallel to these phrases of John of Salisbury. Hugh of St Victor speaks of the Spiritual power as instituting the Temporal power and as judging it.

It would seem to be correct to say that in the work of John of Salisbury, and in that of Honorius of Augsburg, we have the first definite statement of the conception that ultimately all authority, secular as well as ecclesiastical, belongs to the Spiritual power, while the phrases of St Bernard and of Hugh of St Victor would seem, as far as they go, to be related to the same conception. It may reasonably be contended that this represents a theoretical development of the actual position taken up by Gregory VII in his conflict with Henry IV. How far there may be any relation between this development and the letter of Hadrian IV to the Emperor Frederick Barbarossa, which, as we have seen, caused so great a commotion, it is impossible to say. It is, however, clear that if Hadrian's words had been intended to express any such principle, it was not only at once and violently repudiated in Germany, but was expressly disclaimed by Hadrian IV.

There is, however, another aspect of John of Salisbury's attitude to the contemporary problems which deserves attention. If he condemns with severity the abuses, and what he considers to be the unjustifiable pretensions of the secular authorities, he is hardly less frank in his criticisms of the abuses of the ecclesiastical order. He has thrown the main aspects of these into the form of a conversation between himself and Pope Hadrian IV, which he says took place at Beneventum. In the course of the conversation Hadrian asked him what men were thinking about the Pope and the Roman Church. John replied that many men complained that the Roman See, which was the mother of all churches, behaved like a stepmother rather than a mother. The Roman clergy, like the scribes and Pharisees, laid heavy burdens on men's shoulders, which they did not touch with their own fingers. They were greedy and avaricious, they sold justice instead of administering it freely; the Pope himself had become intolerably burdensome—while the churches and altars were falling into ruin he built himself palaces, and was clothed in purple and gold; the judgment of God could not fail to overtake the rulers of the Church.

When Hadrian asked him to say what he thought himself, he replied that he was in a strait between the danger of adulation and of treasonable licence; but he sheltered himself behind a statement of Cardinal Guido Dens, made in the presence of Pope Eugenius, that there was in the Roman Church a leaven of avarice, which was the root of all evils. John was careful to say that among the Roman clergy there were men of the highest integrity, but he emphatically expresses the opinion that the complaints of men were not unjust. He besought the Pope to place in the offices of the Roman Church men who were humble and despised vainglory and money, and ho asked why the Pope should himself demand gifts and payments from those who were his sons; he suggested that he did this in order to be able to secure the fidelity of the Roman people, but this he urged was no justification, for justice was not a thing that should be sold for a price.

Pope Hadrian laughed, and complimented him on the freedom with which he had spoken, begged him always to tell him of any complaints of which he might hear, and replied to his statement by relating Menenius Agrippa's story of the stomach and the other parts of the body, and John professed himself as satisfied. It is noticeable that he returns to the last subject in a later book, and attributes the difficulties of the Roman See to the necessity of satisfying the greed of the Roman people.

In other places he denounces with great severity the exactions of the bishops and archdeacons and the other officials, and not less those of the papal legates, whose conduct he describes as being such that it might be thought that Satan had gone out from the face of the Lord to scourge the Church. It is even more significant that in another passage he bids the priests not to be indignant, if he says that there were tyrants also among them. Ironically, it would seem, he says that he is not referring to the legates of the Roman Church, for it could not be judged by men, and it was incredible that the legates should do what was forbidden by the Roman law to the governors of provinces and the proconsuls. Who could believe that the Fathers of the Church, the judges and lights of the world, loved gifts, while they preached poverty, and acted in such a manner that they were a terror to all men, and were beloved by none. If the secular tyrant was under the divine and human law rightly destroyed, who could think that the tyrant in the priesthood was to be loved and reverenced?

CHAPTER III.
GERHOH OF REICHERSBERG.

The most important writer, whose work serves to illustrate the contemporary judgment upon the questions raised by the renewed conflict between the Temporal and Spiritual powers, is Gerhoh of Reichersberg.

He was born in 1093 or 1094, and became Provost of the Collegiate Church of Reichersberg in 1132, and was one of the most eminent literary representatives of the reforming party among the German clergy, being especially concerned during the whole of his life with the question of the strict observance of their Rule by the canons of the cathedral and collegiate churches. He was a determined supporter of the papal cause during the last stages of the "investiture" controversy, and took an active part in all the Church affairs of the period which followed this down to the time of his death in 1169.

His literary work, so far as we are here concerned with it, falls into two groups. The earlier, that is the treatises written mainly before the outbreak of the conflict between Frederick Barbarossa and Alexander III, are interesting especially as illustrating the attitude of German Churchmen of his type to the Settlement of Worms, and its effect upon the position of the German bishops, and also his grave concern with regard to the secularising effect of the feudal jurisdictions and feudal obligations of the bishops as holding the "regalia". The later group of treatises were written after the beginning of the conflict, and are mainly concerned with questions arising out of this.

These writings are peculiarly important as illustrating the judgment of a man who, though he was a strict and severe reformer, was no mere partisan, but rather endeavoured to hold what he was convinced was a fair and just balance between the conflicting claims of the Temporal and Spiritual powers—a man who was a determined upholder of the freedom of the Church, but also condemned unsparingly all invasion by the Church of what he conceived to be the rights and independence of the Empire. It is indeed very noticeable that even in his last work, 'De Quarta Vigilia Noctis', written when he was a fugitive from Reichersberg, on account of his fidelity to the cause of Alexander III, he still gravely and seriously insists upon the principle that each power should recognise and respect the rights of the other.

It is in relation to the first aspect of the principles of Gerhoh that we may most conveniently notice the position of Arnold of Brescia. It is not within the scope of this work to deal with the whole significance of his principles and actions, for they have relation to many aspects of medieval society. We must content ourselves with the observation of what we may reasonably judge to have been his views upon the question of the tenure by the Church of secular property and power. And, even with regard to this, we have to be very cautious, for of writings by himself, if indeed there were such, nothing has survived, and the reports of his opinions proceed from quarters in the main hostile, and are by no means always consistent with each other.

The writers of the time give brief accounts of his opinions. Otto of Freising says that he was a violent critic of the bishops, an enemy of the monks, a flatterer only of the laity; and that he maintained that clergy holding property, bishops the "regalia", and monks possessions, could not be saved : that all these things belonged to the prince, and should by him be granted only to the laity. The 'Historia Pontifical' is not so precise in its indications, but represents him as teaching that the Church of the cardinals was not the Church of God, and that he repudiated the Pope, because the cardinals and the Pope were proud, vicious, and violent men.

The author of the 'Gesta di Federico' says that Arnold accused almost all the clergy of the time of being guilty of simony, and taught that the people should neither confess to them nor receive the sacraments from them, and attacked the Papacy for its avarice and the corruption of its courts. The author of the poem called "Ligurinus" reports that Arnold maintained that the clergy should receive the first-fruits and the freewill offerings of the people, and the tithes, but condemned the tenure of

estates by the monks, and of the "fiscalia iura" by the pontiffs, and taught that all existing property was subject to the prince, and should be granted to the laity.

We may gather from all this that Arnold attacked the secularisation of the clergy through their tenure of secular forms of property, and desired that the secular authority should reclaim these. His position so far would seem to be much the same as that of Paschal II and Gerhoh. He went, however, further, and maintained apparently that so far as the Church was thus secularised it was not the Church at all, and that the faithful should withdraw themselves from its communion; his position was not unlike that of some of the severer reformers in the eleventh century, but went beyond the authority of the Church.

It is for this that he is censured by Gerhoh, and Gerhoh approves of the condemnation of his doctrine, while he was gravely concerned that the Roman Church had involved itself in responsibility for his death; he is evidently sceptical with regard to its attempt to evade this.

The relation of Arnold to the attempt of the people of the city of Rome to establish a government independent of the Popes we shall have to consider in the next volume in connection with the development of civic and municipal liberties; while the claim of the citizens of Rome to control the election of the Emperor has little significance in the history of mediaeval political theory. It is worthwhile to notice, however, that in a letter by a certain Wezel to Frederick Barbarossa, in which these claims are set out, the "Donation of Constantine" is contemptuously referred to as an obvious fabrication, just as Otto III in 1001 had spoken of it.

Gerhoh's earlier treatises are important, as we have just said, first as illustrating his attitude to the Settlement of Worms and its effect upon the Church, but they are also very interesting in their relation to the question raised by Paschal II's proposal to surrender the "regalia" if the emperor would surrender his claim to "investiture". In the first treatise with which we are concerned, written between 1126 and 1132, he expresses his grave concern with the conditions under which the "regalia" were granted and held. He is seriously disturbed that bishops, abbots, and abbesses after their election should have to go to the royal court to receive the "regalia" and to do homage or fealty for them. He repeats the same complaint in another treatise, written in the year 1142-43. He admits, indeed, that there was a papal command that the bishops should do "iustitia" to the king, but he maintains that this did not mean that they were to do homage and swear fidelity. The importance of the matter is not really confined to the question of doing homage, it is clear that what concerns Gerhoh most is the nature of the obligations in which the tenure of the "regalia" involved the bishops, and especially the rendering of feudal military service, and he contends vehemently in the treatise first cited that it is wholly unlawful for the bishops to use the revenues of the Church in maintaining soldiers. This leads him to a discussion of the nature of the property of the Church, and of the purposes which it was to serve : one part was to maintain the clergy, the second to build and repair the churches, the third to support widows and others who were in need, and the fourth was to go to the bishop to be spent upon the needs of himself and his household, and on the strangers and wayfarers to whom his doors should always be open. He distinguishes three forms of Church property—tithes, estates, and "regales aut publicas functiones". He is clear that the first and second cannot be taken from the Church without sacrilege and injustice, but as to the third he says that the Church is not greatly concerned to defend their possession, it would indeed be better that the Church should lack them, rather than that it should be involved in secular affairs.

Here is a significant conception which may perhaps help to throw some light on the motives which may have lain behind Paschal II's proposal to surrender the "regalia". Gerhoh evidently made a very sharp distinction between those forms of property which were rightly and inalienably possessed by the Church, and those which were at best of doubtful advantage, might involve the Church in affairs alien to its proper functions, and with which it might dispense. He does not indeed dogmatically maintain that they should be given up, but he goes very near to this. These duchies,

countships, &c., belong to the world, while tithes and other freewill offerings belong to God; and while he does not wish to offend those who maintained that it would be sacrilege to take them away from the Church when they have once been given to it, he affirms that these royal and military functions cannot be administered by the bishops without a certain apostasy from their order.

The temper which is illustrated in this treatise is interesting and important, for it shows that there was in the minds of some at least a feeling that it might have been better for the Church had the proposal of Paschal II taken effect. Gerhoh continued for many years to be gravely occupied with the matter, though it would appear that his judgment fluctuated to some extent from time to time.

The treatise written in 1142-43, which we have already cited, is in a large measure occupied with the same subject. He begins by remarking that he had been attacked as an enemy both of bishops and of kings, because he had maintained that men should render to God what was God's, and to Caesar what was Caesar's, for neither were content to remain within their own limits; but kings usurped the rights of bishops, and the bishops the "regalia", which belonged to the king. He denounces with great energy those bishops who conducted campaigns and spent the substance of the Church on military operations; and he contends that the Church is reduced to serve the world when the bishops do homage and take the oath of fealty to the king. It would seem, however, that he was not at this time prepared to maintain that the "regalia" should be surrendered, but that they should be wisely administered by the bishops. He gives an account of the negotiations between Paschal II and Henry V, and reports that Paschal had been induced to offer to surrender the "regalia", but he mentions this without signifying any approval, and also reports what he understands to have been a retractation of the offer.

He also in this treatise makes an important statement with regard to the provisions of the settlement of Worms, and the actual conditions of his own time. He relates that the provisions of the settlement that the German bishops were to be elected in the presence of the king, and to receive the "regalia" "per sceptrum" had been heard at the Council of the Lateran with doubt and indignation, and he expresses his joy that the first provision had fallen into disuse, and his hope that the evil custom of homage and oath might be abolished. The treatise concludes with that repudiation of the interpretation of the Worms agreement, as imposing homage and the oath of fealty on the bishops, which we have already cited.

In another treatise, entitled 'De Novitatibus huis Temporis', written in 1155-56, he appears as having moved still further from his original judgment. It had been disputed, he says, whether the "regalia" might be taken away from the Church, and he seems to contend that this should not be done. He admits that this tenure implied obligations which the bishop must discharge, and that it was therefore legitimate that the bishop should take the oath of fidelity to the king, "salvo sui ordinis officio", and that if the bishop violated this oath he might lawfully be deprived both of his spiritual and temporal dignity by his spiritual judge, and by the authority from whom he held the "regalia". From another passage in the same treatise it is clear that he at this time admitted that among these obligations was included the military service of the knights, to whom the bishops had enfeoffed the lands which they held as "regalia". He only desires that they should not create new fiefs, and especially that they should not make such a use of tithes and freewill offerings.

The change in Gerhoh's attitude, as represented in these two treatises, is clear, but from an examination of his next important treatise it becomes evident that his mind was still greatly troubled about the whole matter. In the treatise 'De Investigatione Antichristi', written in 1161-62, he gives another detailed account of the negotiations between Henry V and Paschal II for the surrender of the "regalia" if the emperor would surrender the "investiture". He seems to represent the suggestion as coming from Henry V, but as being made in bad faith, for he knew that the German and Gallican bishops would not consent to it. Paschal accepted the proposal, but it was at once indignantly repudiated by the bishops. It is very noteworthy that Gerhoh, in giving an account of what followed,

represents Henry's object in seizing Paschal as being to extort either the recognition of the imperial right to "investiture", or the cession of the "regalia", and he represents Paschal as having conceded the latter point. He represents Henry V as continuing, after Paschal II's death, to maintain the same position—namely, that either the Church should surrender the "regalia", or the emperor should retain the right of appointing the bishops.

Gerhoh puts together an interesting summary of the arguments which were used or, as he says, might have been used on either side. The ecclesiastical party argued that it was right and proper that the Church should enjoy the wealth and dignity conferred by the "regalia"; the imperial party recognised that tithes and freewill offerings rightly belonged to the Church, and involved no obligation of service to the emperor, but contended that the case of the "regalia" was quite different. If the Church was to hold these, the bishops must render to the emperor homage and service, and if it was not lawful for the clergy to take part in secular and military matters, the remedy was obvious—namely, that they should surrender the "regalia" which involved them in such obligations. If the bishops said that they could render these services to the emperor, and also carry out their spiritual duties, the imperialists contended that it was then right that the emperor should have the first place in their appointment, for it was not reasonable that any one should be made a prince of the kingdom except by the emperor with the advice of the other princes. The emperor then was determined not to grant the Church the right of free election, and the bishops were equally determined not to surrender the "regalia," but were ready to discharge their customary services to the emperor.

Gerhoh says that it was not for him to judge the actions of the bishops, and to determine how far the homage and oath of fidelity to the king involved them in those secular cares which St Paul condemns; they may indeed, he says, even though they are thus hampered, find some leisure for prayer and study, and thus in spite of their obligations may be almost free. God will judge how far the possession of the "regalia" helps or hinders the Church. May He at last give his Church that liberty which beseems it.

A little further on in the same treatise Gerhoh comes back again to the subject under somewhat different terms. The possession of the "regalia", he evidently felt, involved a grave danger of confusion between the functions of the Temporal and Spiritual powers, and he emphatically asserts the distinction between them, under the terms of the two swords. The Lord himself in the Gospel had distinguished the two powers; when in answer to his disciples, who said, "Behold there are here two swords", he replied, "It is enough". But now, Gerhoh says, we have a third power which is compounded of both; and he finds a telling illustration of this in the fact that at times not only the Cross, which was the emblem of the episcopal office and of Christian humility, was borne before the bishop, but also the standard of a duke, which the king had conferred upon him as the symbol of authority to punish criminals. This seems to Gerhoh monstrous and irrational; the Jewish priesthood was indeed permitted to use the temporal sword, but Christian priests are not allowed to do this. If, he says, it was urged that the pious liberality of kings had endowed the bishops with the revenues of duchies or other similar offices, and had given them the authority of the administration of justice which belonged to these, and that it was therefore right that the symbols of this authority should be carried before the bishops, he would reply that, while he praised the kings for their liberality, it would have been in his judgment better that they should have kept for themselves the authority of administering justice, while they bestowed upon the bishops the revenues. He contrasts what he conceived to be the wise arrangement in Rome with the deplorable custom in the kingdoms of the "Franks". In Rome, he says, the prefect of the city received from the Pope his authority for dealing with civil cases, but his criminal jurisdiction from the emperor, while in these kingdoms the bishops appointed their representatives (*vicarias potestates*), who administered both civil and criminal jurisdiction, and thus made themselves responsible for the shedding of blood, a thing unlawful for the clergy. There were some, he continues, who argued that this was after all the same thing as was

done when the priests appointed kings, but he repudiates this conception with great energy, and in terms which are very significant. Bishops, he says, do not create or appoint kings, but only bestow upon them their blessing, and place the crown upon the heads of those who have been created by the election of the princes and the peoples, or succeed by hereditary right. Kings are not created by the priestly benediction, but, according to the divine ordinance, are created by human election and acclamation.

Gerhoh indeed repudiates what he represents as the doctrine of Arnold of Brescia, that a Church which had thus involved itself in secular matters had ceased to be the Church of God, though he was evidently gravely concerned about the share of the Roman Church in the execution of Arnold which he strongly condemns. He concludes the discussion of the subject by saying that he does not condemn the possession of the "regalia" by the prelates of the Church, if they used them lawfully and modestly; but when the clergy or bishops abandon their proper work, and immerse themselves in secular affairs, when they use the temporal sword to avenge themselves upon those whom they consider to be their enemies, when they use the tithes and oblations of the faithful to arm themselves with chariots and horses, it is as though they set up the abomination of desolation in the sacred place, for such actions belong not to the likeness of Christ, but to that of antichrist.

We have dealt with the question of Gerhoh's attitude to the tenure of the "regalia" by the bishops at some length, for it throws a good deal of light on the significance of Paschal's proposal to surrender them. It is clear that there were at least some among the eminent members of the reforming party who felt that the tenure of these political authorities did involve the Church in great difficulties, did tend to secularise it, and to divert the bishops and clergy from their proper functions. Gerhoh was evidently greatly troubled and perplexed : in his earlier days he had evidently been inclined to think that the "regalia" might with advantage be surrendered, in his later writings he seems to think on the whole that they should be retained; but he felt acutely the dangers which resulted from them—the danger of the secularisation of the Church, and, as we have just seen, the danger of a confusion between the functions proper respectively to the Spiritual and the Temporal powers. He had been a convinced and zealous defender of the papal position in the "investiture" controversy, of the principle of the independence of the Spiritual power, but he was clear about the intrinsic distinction between the two powers : we have seen how sharply he distinguishes between the "Two Swords."

We have thus arrived at a point where we find a natural transition to the second important aspect of Gerhoh's position, that which is concerned with the relation of the Temporal and Spiritual powers. His conceptions on this matter were developed mainly with reference to the violent conflict between Frederick Barbarossa and the Papacy which began with the election of Pope Alexander III. Before entering upon this we must, however, briefly notice some observations of Gerhoh in an earlier treatise. In his commentary on Psalm LXIV, which is attributed to the year 1151, he affirms that the Popes had both excommunicated and deposed certain kings or princes on account of their incapacity or wickedness, and had created others in their place, that they might with the sword attack those who were enemies of the Church and kingdom; but he warns the officers of the Church that they must be careful lest they should make themselves responsible for the death of their enemies. He denounces those bishops who confounded in their own persons the dignities of the episcopal office and of the count, and made wars, and caused the slaughter even of innocent persons, and he expresses his earnest longing that spiritual matters should be dealt with by spiritual persons, and secular by secular, and that the proper limits of each authority should be maintained. Gerhoh clearly does not intend to condemn the excommunication and deposition of kings or princes who were enemies of the Church; a little further on he clearly states that in his judgment this was justifiable and right. He even suggests a principle which found a very important development in the claim of Innocent III to intervene in the international relations of various countries, with which we shall deal in the next volume. He suggests that both in the internal disputes of any one country, and in quarrels

between different countries, it is right that the Church should declare which was the just cause, and should support the defenders of this with its ministrations; and he mentions with approbation the fact that when recently the King of Hungary had meditated making war upon the Greeks, he had first held a council with his bishops, and when they declared that it was Hungary which had broken the treaty of peace, he desisted from his purpose. He urges that if the bishops of the Church were to decide upon the justice or injustice of the disputes which produced wars, and especially if their judgment was confirmed by the Pope, no king would be able to resist, for the Pope is set over the kingdoms, and has power to set up and to put down.

It seems to be clear that at that time Gerhoh was prepared to accept the general principles of what we may call the Hildebrandine position with regard to the authority of the Popes in deposing impious and excommunicated rulers : he does not indeed directly mention Hildebrand or Henry IV, but the reference to them seems fairly evident, and certainly the assertion of the principle of the papal authority to act in such cases is clear. We must, however, be careful to notice that Gerhoh does not conceive of this as contrary to his principle of the distinction between the functions of the two powers. A little further on in the same work he again insists that the clergy must keep themselves clear of all criminal judgments, and must confine themselves to their office of teaching the secular authorities what is right and just, and he sums up his position by quoting, as from the letter of Pope Nicholas I to the Emperor Michael, the words of Pope Gelasius, in which Christ is said to have separated the two powers and given to each its own function. In order, however, to arrive at a more complete judgment of Gerhoh's position we must turn to the treatises written after the outbreak of the new conflict.

The treatise 'De Investigatione Antichristi', from which we have already made many citations, was, as we said, written in 1161-62, about two years after the disputed Papal election, and Gerhoh suggests that this calamity was in part a judgment of God upon the Church. In other schisms, he says, it was easy to decide which was the Catholic Church, but in this case it was not easy for any but those who were prudent and sincere lovers of the truth to come to a decision. He gives a detailed account of the actual election, and concludes that it was so far clear that the case of Alexander was the better one, but he then goes on to relate how the adversaries of Alexander raised against him that charge which we have already mentioned—namely, that Alexander and the Cardinals of his party had during the lifetime of Hadrian IV entered into a conspiracy with the King of Sicily and the Milanese against the emperor, and had bound themselves by an oath that they would not elect any one to the Papacy who was not a member of the conspiracy, and that they had been bribed by the Sicilians and Milanese to promise that they would excommunicate Frederick, and would not absolve him without their counsel. They also, he relates, urged the difference between the conduct of Victor and that of Alexander, the former appearing at Pavia and submitting his claim to the Council, while Alexander haughtily refused to do this.

Gerhoh was, it would seem, much moved by these considerations, and as it appeared to him the judgment of the Church was so much divided that he found it difficult to arrive at any conclusion. The supporters of Alexander urged that the apostolic sees of Antioch and Jerusalem acknowledged him, but the supporters of Victor urged that the judgment of other Churches must also be considered, especially as these Oriental sees were but little informed. Gerhoh was evidently much perplexed with regard to the action of Alexander in refusing to vindicate his position to the Council at Pavia. The Lord himself, he urges, had condescended to show himself to his disciples when they doubted his resurrection, and St Peter submitted to be rebuked by St Paul. He had been inclining to decide for Victor when ho had received news of a Council held at Toulouse attended by one hundred bishops, the Kings of France, England, and Spain, and the envoys of Victor, Alexander, and the Emperor, and that the Council had decided for Alexander and had excommunicated Victor. He was not, however, convinced, for the Council had apparently not considered the charge of conspiracy, and he felt that

this was the most serious question, and that the truth or falsehood of the charge could only be determined by a General Council.

Gerhoh's mind was mainly occupied with the two questions, whether the charge of conspiracy was true, and whether it was right that Alexander III should refuse to submit the charges against him to a General Council. He is unsparing in his condemnation of the conspiracy against the emperor, if the charge were true, and he does not see his way out of the difficulty except by the judgment of a General Council. He examines at some length the question whether and under what term the Pope might clear himself of the charge brought against him. He points out that St Paul conferred with the Apostles at Jerusalem lest he should cause scandal by differing in any respect from their doctrine; and he relates how Pope Marcellus, who had sacrificed to idols, while the Fathers recognised that he could not be judged by any one, yet because he could not clear himself before the Church, passed against himself the sentence of deposition and excommunication; and how Pope Leo III, publicly and in the presence of Charlemagne and the people, cleared himself of the charges made against him. Gerhoh, indeed, accepts the principle that no one could judge the Pope; he does not, however, admit that this principle applied to the circumstances of a disputed election : in that case he thinks that the claimants should present themselves to the brethren and set out their claims so that the Church of God might resist the evil and accept the good. He reaffirms his horror at the conspiracy which, on the evidence of Victor and of two of the cardinals who supported him, and had themselves been parties to it, had been formed against the emperor, and demands that those who were accused should clear themselves of it, and break off their alliance with the enemies of the Empire, especially as the emperor was prepared to do justice with regard to all matters of which they complained. Gerhoh concludes the chapter, as he had begun it, by urging that the only remedy for these troubles would be the summoning of a General Council, which might decide between the claimants, and might restore peace between the "sacerdotium" and the "imperium".

It is very noteworthy that Gerhoh was so deeply stirred by the whole situation that he continues his treatise with a violent denunciation of the whole policy of the papal Court (*Romani*). He accuses them above all of pride and covetousness, and contemptuously suggests that they may ultimately abolish all separate bishoprics, and bring all parts of the Church under the immediate government of Rome; that they will interfere in the political relations of rulers and subjects, and excommunicate those who do not obey them, and that they will do all this for money. He attributes the existing conflict and schism to the avarice of the Romans, who had been corrupted by the gold of the Sicilian King and the Milanese, and he ascribes the continued resistance of Milan to the imperial authority to the support of the Romans. He was indeed conscious that he might be censured for allowing his zeal to carry him too far, but contended that he was not directing his arguments against any one personally, but was only anxious to point out the dangerous consequences which might flow from these evils, for there was a real danger, if these scandals were neglected, of such a departure from the obedience of the Roman Church as had been made by the Greeks.

Once again he restates the arguments for and against the legitimacy of Alexander's election, and says that actually the Church was divided into three parts, one accepting Alexander, the other Victor, while a third neither accepted nor rejected either, but hoped for such a more complete and adequate consideration of the circumstances as could only be obtained ia a General Council summoned with the consent of the kings. He felt himself unable to come to any decision, but inclined to the third party.

The treatise concludes with a very emphatic condemnation of the tendency, which he attributes to the Papal party, to claim a political authority over the emperor. When they represented in pictures and letters that the emperor owed homage to the Pope—referring no doubt to the angry correspondence of Hadrian IV and Frederick Barbarossa, with which we have already dealt,—when they interposed between the emperor and those who had rebelled against him, they made the Pope

lord over the Emperors, and reduced the emperor to the position of a vassal. This was really to destroy the power which had been created by God, to resist God's ordinance, and to confound the nature of the two swords. Each power must be content with its own place and function. The emperor or king must not assume to himself that which belongs to the priest, and the bishops must render to Cscsar that which is Caesar's, and if they wish to hold the "regalia" they must render to the king a just and suitable honour. Once again he urges that it is not proper that the bishop should do homage : the king should be satisfied that the bishop should swear fidelity, and that he would defend the crown, "saving his office".

The treatise throws a great deal of light upon the state of opinion in Germany, both with regard to the actual controversy of the moment about the election to the Papacy, and also with respect to the state of mind of religious men about the relations of the two powers. For it is noticeable that it is the very depth of his religious feeling which makes Gerhoh alarmed lest the Church should be involved in secular matters. He represented the tradition of the necessity of freedom for the Church, he had no doubt about the justice and the necessity of the struggle against lay "investiture", but, as he felt it, the problem of the day was not so much how the Church was to be protected against the aggression of the secular power, but rather how it should free itself from the entanglement in secular matters in which its own success had tended to involve it.

All this is again brought out very clearly in some of his later works. It was in 1166-67 that he addressed a little treatise to the Cardinals of the Roman Church. The conditions had indeed greatly changed since he wrote the 'De Investigatione Antichristi'. The Antipope Victor had died, and Paschal had been elected to succeed him. His election was described in an encyclical letter of the German princes of May 1165, as having been made by the bishops and Cardinals of the Roman Church, in the presence of the bishops of Lombardy and Tuscany, the Prefect and many nobles of Rome, and as having been recognised by the Church and princes of the Empire. Gerhoh, however, was clear and emphatic in his repudiation of him, alleging that no Cardinal-Bishop had taken part in his consecration, and he now definitely recognised Alexander III as the legitimate Pope, but he also urged the great difficulty which was caused to his supporters by the fact that the charge of conspiracy with the King of Sicily and the Milanese had not been disproved, and by the assumption on the part of some of the supporters of Alexander that the action of Hadrian IV could not be condemned. He argued that Alexander and his supporters should recognise that while it was true that the Pope and his actions were not subject to any human judgment, this applied only to his spiritual character and office, but not to his relations to secular matters : with regard to these his actions were open to amendment, and he brought forward a number of illustrations to show that the Popes themselves had recognised this, and had cleared themselves of charges related to such matters; he included the purgation of Leo IV. If, therefore, it was complained that the Pope and Cardinals had committed some action which troubled the kingdom and divided the Church, this should either be denied or proved to have been just. If it should prove that the Pope had really done wrong, this could be changed and amended—there were numerous examples of this having been done—and he cites a number of instances, including St Peter, Boniface II, Paschal II, and Calixtus II. He suggests that it was possible that the alleged agreement with the King of Sicily, about which there had been so much trouble, had been made by Pope Hadrian IV under constraint, and he begs the Cardinals publicly to prove that it had never been made, or to justify it, or to amend it.

Gerhoh warned the Pope and the Cardinals that their continued silence might cause the quarrel to grow to such a point that the "regnum" and "sacerdotium" would destroy each other, and he reminds them of the words of Gelasius (he quotes them as from the letter of Pope Nicholas I to the Emperor Michael), in which it was laid down that it was Christ himself who had allotted their distinctive functions to the Temporal and Spiritual powers. If this principle, he says, had been remembered, the present conflict would not have arisen between the two powers, which must both

continue until Christ himself should come to His final victory. He therefore besought the Cardinals, if indeed they desired to unite the divided members of the Church, to make it known that they did not, as was alleged, desire to destroy the kingdom.

In another passage he urged that the temporal rulers, if they should desire to rule unjustly, should be instructed but not destroyed; and he reported that in frequent conversations the emperor had made it plain to him that he did not desire to go beyond his just rights, that he desired to support the Pope if he were willing to admit these, but that he was determined with all his power to resist any one who attempted to interfere with them, being confident that no one could be a true successor of Peter who attempted in the name of the Papacy to be lord not only of the clergy, but also of the kingdom. Gerhoh, as he says, had hoped that these troubles might have been settled by a General Council or by private negotiations, and the Emperor had been advised by his counsellors to agree to this, but the counsellors of the Pope had advised him against these proposals. He therefore suggests that the best course would be that the Pope should deal with the charges which had been brought against him in a letter addressed to the principal men of the Church and kingdom.

The last work of Gerhoh, 'De Quarta Vigilia Noctis', was written in 1167, two years before his death. He had, for his fidelity to Alexander III, been driven from Reichersberg, and the work is a very interesting and even moving expression of the temper of a man who, while true to his conviction of the injustice and iniquity of the interference of the emperor in the affairs of the Church, was yet also a sincere and candid critic of the faults of the Church, and of what seemed to him to be the dangerous tendencies of the Papal party, of a man who was devoted in his obedience to Rome, but also a loyal subject of the Empire. In his old age, as he says, he found himself driven from his "nest", and exposed to the enemies who thirsted for his destruction and devastated his habitation, and all this because he was faithful to the Pope, and would not recognise the pretenders, Victor and Paschal. And yet he retained that sincere and impartial judgment which is reflected in his whole work, and maintains that the lamentable characteristic of this fourth and last watch of the night was not so much the distress of the Church and the aggression of the Temporal power as the growth of avarice in the Church.

He is indeed very direct and unsparing in his censure of the Church for this great fault. He defends firmly the lawful position of the Pope and Cardinals, but he charges the Church with extortion and corruption. Payment was demanded for its judgments, even when they were just, and sometimes they were unjust and obtained by bribes. He laments over the fact that since the outbreak of the conflict between Gregory VII and Henry IV the Popes had been compelled to obtain the support of the Roman people by the payment of large sums of money, and had been forced to raise these in every quarter in order to satisfy the avarice of the Romans. He censures also very gravely the arrogance and greed of some of the Cardinals.

He had no hesitation in maintaining the propriety of the action of the Pope in urging the Catholics to fight against the schismatics, and he relates how the judgment of God had recently fallen upon the emperor and his army, when they had come to Rome with the schismatic antipope Paschal, and many of them had been struck down and slain with the pestilence. On the other hand, he very solemnly warns the Pope against claiming a secular authority to which he had no right. He bids the Pope beware lest he should pretend to have the right to grant temporal dignities as though they were fiefs, and while he admits that the Donation of Constantine might seem to have granted to him the right to administer secular affairs in the city of Rome, he urges that the emperors had ruled both in Rome and in the world.

He censures with great severity the desire to compel the emperor to render to the Pope such signs of honour as might be dishonourable to himself. He admits that Constantine had in his humility once acted as "strator" to Pope Silvester, but Silvester had never called him his "marshal", nor represented him as such in a picture; and no emperor since had been called by such a name. On the

contrary, the Roman Pontiffs and emperors had mutually honoured and aided each other, and he expresses his astonishment that the Romans should now venture to set up such a picture, and he bids them hearken to St Peter, who said, "Fear God; honour the king". Gerhoh, it is evident, had not forgotten the scandal which had arisen over the phrases and circumstances of Hadrian IV's letter to Frederick, and was determined to make it clear that he and the loyal subjects of the Roman See in Germany were not prepared to tolerate any attempt on the part of the Pope to claim a secular authority which did not belong to him. On the other hand, he warned the emperor not to claim a power which was not his, and to pretend to a right to make and unmake bishops, which was wholly alien to him.

He sums up the principles of the immediate source of the authority, both of the Temporal and the Spiritual powers, in a short but pregnant passage. As Adam, he says, was formed by God from the dust of the earth, and then God breathed into him the spirit of life, and thus set him over all living creatures, so the emperor or king was to be created by the people or the army; and, when the princes or the best of them had recognised his rule, he was to receive as it were the spirit of life by the priestly benediction. Thus also the Pope or bishop was first, by the election of the clergy and by consecration "in spiritu promovendus", and then "tamquam formandus in corpore" was, with the assent of the chief men, to be honoured by the emperor or king, and to hold the "regalia" by his "conniventia".

There are phrases in the passage which may suggest some ambiguities, but its general tenor makes it clear that, while Gerhoh recognised an important place as belonging to the Pope or clergy in the "benediction" of the temporal ruler, and a place of importance as belonging to the secular authority with relation to the bishop's tenure of the "regalia", he yet firmly maintained that it was neither the emperor nor the king who made the Pope or bishop, nor the bishop or Pope who made the emperor or king, but that in each case their authority was drawn from those who had the right of electing them.

If only each would be content with his own power, and cease to claim that which belonged to the other, there might even in the fourth watch of the night be a true peace; and Gerhoh quotes some verses of a poem written, as some think, in 1091 :—

"Querit apostolicus regem depellere regno ;
Rex furit e contra papatum tollere papae.
Si foret in medio, qui litem rumpere posset
Sic, ut rex regnum, papatum papa teneat,
Inter utrumque malum fierit discretio magna".

But who, he exclaims, can end this dispute unless the Lord Jesus comes into the ship of Peter and subdues the tempest of avarice, of avarice which is the last Antichrist?

He concludes the treatise with the prayer that the Lord would come to his Church, which in this fourth watch was in the greatest danger, and would subdue those false priests who were trading and plundering in his house, and those princes who were playing the tyrant under the pretence of religion—that the Lord would come and save the world and the Church by making peace between the "regnum" and the "sacerdotium".

CHAPTER IV.
CONCLUSION.

We have endeavoured in this volume to set out the development of the theory of the relation of the Temporal and Spiritual powers from the beginning of the tenth century till the latter part of the twelfth. We have brought this study to a close before the accession of Innocent III, because we think that his actions and principles will be better discussed in immediate relation to the circumstances and theories of the thirteenth century, with which we hope to deal in the next volume. We have endeavoured to set out both the actions and theories as objectively as possible, to allow them so far as possible to speak for themselves ; and if we now attempt to draw some general conclusions, we hope that these will be clearly distinguished from our statement of the facts.

We would venture to urge as a preliminary, that if any trustworthy conclusions are to be reached we must be careful to put the history of these centuries into connection with the whole history of the relations of the ecclesiastical and secular authorities in the West from the time of the conversion of Constantine. Nothing but confusion can arise, and indeed much confusion has arisen, from the attempt to isolate the great conflicts of the eleventh and twelve centuries. And especially is it necessary to take careful account of the complex character of the relations of the two authorities in the ninth century, if we are to understand the later conflict.

The truth is that the most distinctive element in the traditional political theory of the Middle Ages lay in the theory of a dualism in the structure of human society, that dualism of the spiritual and the temporal aspects of life, which was clearly expressed in the words of St Peter to the Jewish authorities, “We must obey God rather than men” (Acts v. 29). It is no doubt possible that there may have been a momentary hesitation when the Empire became Christian, but in the West at least, if there was any hesitation, it was only momentary, and the normal principle was apprehended and expressed, especially by St Ambrose in the fourth century and by Gelasius I in the fifth—that is, the principle that human society is governed by two powers, not by one, by the Temporal and the Spiritual, and that these are embodied in two authorities, the secular and the ecclesiastical, two authorities which are each divine in their origin, and are, each within its own sphere, independent of the other. This principle is clearly and emphatically restated in the ninth century, and was always present to the minds of men in the eleventh and twelfth.

That this was substantially a new principle in the Western world is not doubtful. We would, however, venture to suggest that the movement of thought and feeling, both in countries of the Hellenic and Roman civilisations, and among the Jews in the centuries immediately preceding the Christian era, deserves a more full and precise treatment than it has yet received. The importance of the new conception hardly requires any explanation, the importance that is of the conception that life on its spiritual side is not subject to the temporal authority, but independent of it. It is one aspect, and not the least important, of a new development of the significance of individual personality, of a new conception of liberty.

If, however, the conception was significant and its consequences far-reaching, the attempt to carry it out in the practical organisation of human society was, and is to this day, immensely difficult. It is easy to see, or to think that we sec, the distinction between the spiritual and the temporal, when we think of them in general terms or in abstraction from the concrete realities of life; but it is a very different thing when we endeavour to apply the distinction to these. We have endeavoured in the first volume to illustrate some aspects of this from the circumstances of the ninth century, and the practical difficulties were greatly increased in the course of the tenth and eleventh centuries by the feudalisation of the position of the bishops and abbots, and their growing political importance; but, apart from this, the question of the relative authority of the two powers presented immense

difficulties, and the Middle Ages arrived at no final solution of them, nor, for that matter, have we achieved this today.

The subject which we have been considering in this volume is the question how far, in the eleventh and twelfth centuries, the dualistic conception was tending to be replaced by a theory of the unity of authority, of the supremacy of one power over the other. If we are to attempt to arrive at some conclusion we must be careful to distinguish three aspects of the question : first, how far in actual fact one power interfered with or exercised authority over the other; second, how far there was developed a theory or principle of this; and third, how far what may have happened, or the theories which men formed, had any real importance in the actual character of mediaeval political life and thought.

The first question is in our view of very great importance, for it seems to us clear that, whatever theoretical judgments may have been asserted in the period which we are considering, they were not for the most part the results of abstract speculation, or the expression of systematic thinking, but rather arose out of certain practical difficulties and demands. And the first thing that must be observed is that behind all the actions and theories with which we have dealt there lay that great movement of religious reform which grew up in the later part of the tenth century, the revolt against the degraded conditions of the Church and the Papacy, the movement of which the Cluniac reform was one expression, and of which for a time Cluny was the centre. It is clear that the great authority which the emperors, from Otto I to Henry III, exercised over the Papacy and the ecclesiastical organisation, was due in the first place to the fact that the whole system of the Church was disorganised and degraded, and in the second place to the political importance of the great ecclesiastical officers. It is no doubt impossible to distinguish clearly between the influence of political ambitions and of religious principles as determining the action of Otto I with regard to the Papacy, but it is true to say that the authority exercised by him and his immediate successors was justified by its results. And this is even more obviously true of the action of Henry III.

It is evident that so long as the imperial action coincided with and represented the reforming spirit, many of the most eminent and most zealous of the reforming Churchmen took little offence. This is, we think, clearly evident from the attitude of men like Peter Damian and Cardinal Humbert, though there were some who even then doubted or denied the propriety of the imperial action—men like Thietmar of Merseburg and Wazo of Liège, and the author if the tract ‘De Ordinando Pontifice’,—but they seem to have been exceptions. The justification of the action of the secular authority in the tenth and eleventh centuries rested then not so much upon theory as on the practical conditions, and it must be observed that the action of Frederick Barbarossa with respect to the disputed election of Alexander III was formally justified by similar considerations—that is, upon the contention that if the order of the ecclesiastical system was imperilled by its own officers, it was the duty of the head of the Temporal power to intervene, not to determine ecclesiastical matters by his own authority, but to set the proper ecclesiastical machinery in movement.

The authority claimed by kings and emperors in the appointment of bishops and abbots, while it may have been partly justified by similar conditions, was actually the result of the political position of the greater clergy, under the condition of that feudal system which had grown up in the tenth century; and, as it proved, it was impossible to set it aside entirely. Until the death of Henry III the reforming party, while asserting the rights of the electors, did not on the whole dispute the propriety of an important place in appointment belonging to the political head of the community.

If, then, it is the truth that the exercise of authority in ecclesiastical matters by the secular power had its reasonable justification in the actual circumstances of these centuries, it is also true that the revolt against this arose out of and was justified by new conditions, and these new conditions are on the whole clear. With the death of Henry HI. the Empire ceased to represent the movement of reform, and indeed soon appeared to be the very centre of degradation, and it was this which brought

about the conflict against lay "investiture", that is, appointment by the secular authority. It was thus that the conflict presented itself to the reforming party as a conflict for the freedom of the Church. It is no doubt true that other considerations and other ambitions may have entered into it, but it seems to us quite unreasonable to suggest that the demand for freedom was unreal: freedom to the reforming Churchmen had become the necessary condition of reform. It is this which gives a real significance to the first serious attempt to find a solution—that is, the revolutionary proposal of Paschal H. to surrender the "regalia" that is the political position and powers of the greater clergy. And when it proved impossible to persuade Churchmen to accept so radical a proposal, it became evident that the only possible solution lay in compromise, and that is the real nature of the settlement of Worms in 1122.

If we now look at the other side of the question, and ask how, and how far the ecclesiastical power came to claim and to exercise authority over the secular, it would seem that we are again dealing with objective facts and their results. It was the failure of the reforming spirit in the imperial authority which led to the demand for liberty, and it was the judgment of Gregory VII that the secular authority in the Empire and also in France was not only the enemy of reform but also the real centre of corruption, and especially of simony, which moved him to attack not merely ecclesiastical offenders, but the secular authorities themselves. No doubt this was a new policy, for here as in all history the originative or creative force of individual personality played an important or even determining part, but the policy itself was intelligible and relevant to the actual circumstances. It was no doubt, if not an entirely new thing, yet in that time an almost revolutionary action to excommunicate the king or emperor, but the action represented after all both the fundamental principles of ecclesiastical authority, and the actual circumstances of the time. The action was reasonable, but it involved consequences which went far beyond itself, for in the judgment of Gregory the right to excommunicate involved the right to depose.

There is no reason to think that in claiming the right to depose a king who had forfeited his place as a member of the Christian Church Gregory intended to assert any theoretical authority over the Temporal power in temporal matters; but in and through Gregory's action the Spiritual power was in fact claiming a vast and indeterminate authority over the Temporal; and while the Popes between Gregory VII and Innocent III, at any rate after the death of Henry IV, made no very serious attempt to assert it, the fact remained that the authority had been claimed and the claim had not been surrendered.

We have arrived at the point where we must clearly turn to our second question, the question how far in these times there did grow up a theory of the supremacy of the one power over the other. If we are to avoid falling into confusion we must here be careful to make some distinctions. It might be asserted that one power was superior in intrinsic dignity and importance to the other; or it might be meant that the nature of one power was so much superior to the other, that, if any question arose between them, the judgment of the superior authority must prevail; or it might be meant that one of the two powers was the source of the authority of the other, and continued in principle to possess a superior authority over it even in its own sphere.

Of these conceptions the first would have been generally admitted. It would generally have been assumed by medieval thinkers that the matters with which the spiritual authority was concerned were of greater significance than those which belonged to the temporal, and that the dignity of the ecclesiastical office was greater than that of the secular. This is the position represented by Hugh of Fleury, and in spite of some of the phrases used by writers like Gregory of Catino and the author of the York Tractates, would hardly have been disputed.

The second raises a much more difficult question, for the general assumption of the Middle Ages was that each authority had its separate sphere, and in principle the case could not arise. It is of course true that all secular as well as all ecclesiastical authority was thought of as being subject to the

law of God and the law of nature, and that all laws, ecclesiastical or secular, contrary to these were null and void. But the law of God and nature must not be confused with the law of the Church, with ecclesiastical law. We have dealt with this matter at some length in the second volume of this work, and we there showed that there is little evidence that it was maintained that the ecclesiastical authority had a final judgment in cases of conflict between these laws.

The truth is no doubt that it is very difficult for us to interpret the medieval temper: we are still in a large measure under the influence of a conception of sovereignty as representing some absolute and even arbitrary authority in the State or the Church which was unknown to the Middle Ages. The only sovereignty they recognised was that of the law, and even that was subject to the law of God or nature. To them the question of a collision between the two systems of law was very different from what it is to us. A collision could only properly speaking occur if one authority intruded into the sphere of the other.

What are we then to say with regard to the third conception ? It is in truth clear from the literature which we have examined, that if there was in the eleventh and twelfth centuries any theory of the supremacy of the Spiritual over the Temporal power in its own sphere, it can only be found in the claims set out in some of Gregory VII's letters, or in Honorius of Augsburg and John of Salisbury, and possibly in the canonist Rufinus, for in no other of those writers whom we have examined can it be clearly found. We must therefore in the first place ask, Is a theory of this kind implied in Gregory VII's writings? On the whole we think not.

These claims were indeed in practice almost revolutionary ; but we must, if we are to understand them, ask what they were in principle, and we think that the principle is sufficiently clear. Gregory claimed the same spiritual jurisdiction over kings and emperors as over any other laymen : for due cause he had the right to excommunicate them, that is, to cut them off from the society of the faithful. And he drew from this the conclusion that he had the right, for due spiritual cause, and for this alone, to declare them deposed as well as excommunicated, to pronounce the oaths of allegiance which had been taken to them null and void. It is true that he nowhere really discusses the rationale of this, and does little more than cite some doubtful precedents, but it would seem to be reasonable to think that in his view the position of an excommunicated ruler of a Christian society was an impossible one.

This is not the same theory as a claim that the Spiritual power, as represented by the Pope, had a supreme authority in temporal matters. Indeed it appears to us plain that his conduct from 1076 to 1080 is clear evidence that he made no such claim and held no such theory. For him the position of Henry and of Rudolph, once Henry had been absolved at Canossa, was a matter to be decided by the Gorman people. If he proposed that he or his representative should take part in the decision, it was because he had been invited to do so. We do not mean that Gregory VII had quite such a clear view of the circumstances as that which we have tried to put into words, but we think that something of this kind is implied in his conduct. The action and the words of Gregory undoubtedly implied a theory, but it was the theory that the spiritual authority was as complete with regard to spiritual matters, over those who held temporal authority, as over all other men, and that excommunication rendered them incapable of holding authority; it was not the theory that temporal authority was derived from the spiritual, or was subject to it in temporal matters.

It is not till we come to Honorius of Augsburg that we find anything of this kind. Here at last we do find something of it. Here at last we seem to find a theory which was formally inconsistent with the Gelasian principle, with the dualistic theory. For he seems to assert that the ecclesiastical authority was the true and only representative of Christ, and that the authority of the secular power was derived from it. It is true that this conception is confused to a certain extent by his reference to the Donation of Constantine. Honorius and Placidus of Nonantula are the first writers of whom we can say with any confidence that they interpreted the Donation as meaning that Constantine handed

over to the Pope the whole imperial authority in the West; later in the century the same interpretation was set out by the canonist Pancapalea, and Honorius even seems to interpret it as meaning that Constantine surrendered his whole authority in all parts of the empire. This conception was, however, not really quite consistent with Honorius's more revolutionary conception, that intrinsically all political as well as ecclesiastical authority belonged to the Spiritual power, and that the secular ruler derived his authority from it.

John of Salisbury seems to imply a similar theory, for he maintains that the two swords both belong to the Spiritual power, and that it is from it that the prince receives his sword, that the prince is the "minister" or servant of the "sacerdotium", and administers that part of the "sacred offices" which are unworthy to be discharged by the priest. This statement of John is, however, isolated in his work, and it must remain a little uncertain whether he really intended to assert all that it might imply.

The similar phrases of Bernard, which may have been in John of Salisbury's mind, are so incidental and casual that we cannot interpret them as meaning that he held this view, and the phrases of Hugh of St Victor are too vague to enable us to form any judgment. There is, as far as we know, only one other writer of the twelfth century whose treatment of the relation of the two powers may seem to tend in this direction, and that is the canonist Rufinus in his work on Gratian's 'Decretum'. We have discussed the passage at length in our second volume, and we can only say again that while he seems to interpret the phrase in Gratian's 'Decretum', "clavigero (i.e., Petro), terreni simul et celestis imperii iura commisit", as meaning that in some sense the Pope had authority in secular matters as well as spiritual, his words also suggest that he did not understand this to mean much more than that it was for the Pope to confirm the election of emperor, and to correct him and other secular rulers if they misused their authority.

These contentions of Honorius, of John of Salisbury, and of Rufinus are important, for they seem to mark the first appearance of a new theory, a theory which, in contradiction to the traditional view of the Church, would have reduced the conception of authority in the Church to one. In the next volume we shall have to consider the history and significance of this conception in the thirteenth century. There is no evidence that it had been put forward by any writer in the tenth or eleventh centuries; in the twelfth it appears in Honorius, perhaps in John of Salisbury and Rufinus, but, it should be carefully observed, in them alone.

It may possibly be suggested that we should connect with this the curious episode of the letter of Hadrian IV to Frederick Barbarossa, in which he was suspected of having intended to imply that the Empire was a fief of the Papacy, and the emperor the vassal of the Pope. If we are to think that Hadrian IV meant to assert this, it would no doubt be significant of the papal policy; but it must be remembered that Hadrian explicitly withdrew such a claim, or rather emphatically repudiated such a construction of his words. And, in any case, a claim to feudal superiority would have been a totally different thing from a claim to the intrinsic supremacy of the Spiritual over the Temporal power.

The theory therefore that the authority of the Temporal power was derived from and subject to the Spiritual, so far as it existed in the twelfth century, was a merely private opinion set out by one or perhaps three important writers; it must not be represented as having any official authority in the Church, and as being generally or widely held. It received no sanction from any Council or from any Pope.

We must finally ask how far the actions and theories which we have been considering had any really important place in the actual public life of the eleventh and twelfth centuries. In endeavouring to answer this question, we must distinguish rather sharply between the significance of the principles and actions of Gregory VII and that of the theories of those twelfth-century writers which we have just been considering.

The action of Gregory VII contributed to produce a storm which raged at least till the death of Henry IV, and the principle that the Popes had authority not only to excommunicate but also to

depose the secular ruler for spiritual offences continued to be held by the Popes for many centuries. That, however, is not the same as to say that the power of deposition was generally recognised; the power of excommunication was probably not seriously questioned, but the power of deposition was another matter, and it was emphatically denied by many, even in the time of Henry IV. The truth is that, except when there was discontent and revolt against a king or emperor for other reasons, it generally had little significance. We shall have to consider the matter much more fully in the next volume, when we deal with the thirteenth century. As far as the twelfth century is concerned the matter had little importance.

The theories of Honorius, of John of Salisbury, and of Rufinus, as far as the twelfth century was concerned, were merely the theories of individuals, and had no relation to the actual facts and conditions of life; they did not themselves draw any practical conclusions from them, and there is no reason to think that they had any important place even in the thought of the time. It was indeed just at this time that in the hands of the great administrators of England and of France the powers and authority of the State were being organised and extended, and it is absurd to think that the great kings and ministers would have recognised that they held an authority delegated to them by the Pope. The truth is that the difficulty of distinguishing clearly the precise border-line of the authority of the two powers was great, but the distinction was still generally held, and assumed as part of the divine order.

The principle of the relation between the two authorities as it was generally accepted throughout the time of which we are speaking is nowhere better expressed than in the words of the canonist Stephen of Tournai, writing in the latter part of the twelfth century. In the one commonwealth and under the one king there are two peoples, two modes of life, two authorities, and a twofold jurisdiction. The commonwealth is the Church; the two peoples are the two orders in the Church—that is, the clergy and the laity; the two modes of life are the spiritual and the carnal; the two authorities are the priesthood and the kingship; the twofold jurisdiction is the divine law and the human. Give to each its due, and all things will be brought into agreement.

BOOK V.

THE POLITICAL THEORY OF THE THIRTEENTH CENTURY

PREFACE TO BOOK V.

It is now a little more than thirty-five years since we began this work, and this volume represents more or less what we then thought to produce, but we had not gone very far before we recognised that in order to understand the real character of the political theory of the Middle Ages it was necessary to go back for many centuries, especially to the Roman Jurists of the second century, and to the Christian Fathers, and even to make some examination of the political conceptions of the post-Aristotelian philosophy, from which both Jurists and Fathers derived some of their most important principles. We have in previous volumes therefore endeavoured to set out something of the history of mediaeval political theory, and to give their due weight to the various traditions out of which it arose, and by which it was influenced in varying degrees. In this volume we have endeavoured to set out the culmination of this long process of development in the thirteenth century.

We hope to publish another volume dealing with the movements of political thought from the fourteenth to the sixteenth centuries—that is, during the period of the Renaissance—and to inquire what if any new conceptions of importance took their rise during these centuries, and thus to see more clearly how far modem political conceptions are continuous with those of the Middle Ages.

The materials embodied in this volume have been already in part put before the public, though not in a written form, in the Lowell Lectures at Boston in 1922, and in the Birkbeck Lectures in Ecclesiastical History delivered in Trinity College, Cambridge, from 1925 to 1927; and one chapter (Part II., Chapter V.) has been published in his ‘Revue de l’histoire du droit’ by the kindness of Professor Fournier. We desire to express our sincere thanks to him, as well as to Professor Le Bras of Strassburg, who most kindly translated this chapter into French.

It would be impossible to enumerate all the eminent jurists and historians to whose critical and historical work we are greatly indebted, but we should wish to express, as we did in our first volume, our debt to the most learned of English mediaeval scholars, Mr R. W. Poole, whose ‘Illustrations of Mediaeval Thought’ gave us the first impulse to the work. And for this volume we desire especially to record our great obligations to the admirable work of Dr Richard Scholz, ‘Die Publizistik zur Zeit Philipps des Schonen und Bonifaz VIII,’ without which it would have been difficult to deal with precision with the literature of that most important and critical period.

R. W. CARLYLE.

A. J. CARLYLE.

PART I
POLITICAL PRINCIPLES.

CHAPTER I.
INTRODUCTION.

We have endeavoured in previous volumes to discuss the origin and to trace the development of what seem to us the most characteristic political conceptions of the Middle Ages, and we have seen that the history which we have been considering is the history of ideas and principles very living and very closely related to the actual experience of Western Europe. We have traced their origin to the post-Aristotelian philosophy, especially as represented in the works of the Christian Fathers and in the Roman Law books, and to the principles involved in the institutions of the new political societies which were built up upon the ruins of the Roman Empire in the West. We have considered how far these traditions had been affected by the development of Feudalism, by the revived study of the Roman Law in the twelfth century, and by the parallel development of the systematic treatment of Canon Law. In this volume we have to consider the full development of these conceptions in the thirteenth century, and their embodiment in the system of the representation of the community which in England we call the Parliament. For it is from the Middle Ages that the modern world has inherited the representative system, and this system was the natural development of the fundamental political conception of mediaeval society—that is, that the community is the source of all political authority.

We are indeed confronted with a certain difficulty when we endeavour to trace the history of civilisation. There is a sense in which it is true to say that the civilisation of the Middle Ages culminated in the thirteenth century, and that this civilisation is different from the modern. In economic conditions and structure, in scientific and philosophic thought, in some aspects of art, in some intellectual forms of religion, there are certainly great and significant differences between the mediaeval and the modem world. It may be said that in all these various aspects, the civilisation of the Middle Ages found its most complete expression in the thirteenth century, and that, with its close, it began to show evident signs of decay, and that it was only very slowly and gradually that the new system of the modern world emerged.

All this is in a measure true, and yet it is also doubtful whether it is more than a half-truth, and, like all half-truths, at least as misleading as it is illuminating. We cannot here deal with the general question, we must confine ourselves to the political aspect of civilisation. And here the conception of the existence of some profound gulf between the mediaeval and the modem is a mistake; the history of political principles and even institutions was continuous. The Renaissance may or may not represent a really new beginning in philosophy and science, it did not do so in political ideas and forms.

It is no doubt true that there is one apparent contradiction to this continuity, and that is, that the conception of the union of Temporal and Spiritual power in one authority has disappeared. We have in this volume to deal with the final development of this conception, and we shall consider what was its real character. We would, however, venture to say at once and emphatically what we think is evident from the previous volumes of this work, that even so far as this conception was really important in the Middle Ages—and how far and in what sense it was so we shall have to consider—it had little or no relation to the actual character and development of political ideas in general. We venture to say that it will become clear to any one who considers the actual character and sources of the political ideas of the Middle Ages that they were wholly independent of this conception; that the principles of the supremacy of law, and of the community as the source of authority, were substantially unaffected by the question of the relations of the political and religious authorities.

We do not mean to undervalue the significance of the relation of the Temporal and Spiritual powers, nor do we mean to suggest that the great conflicts of the Middle Ages have not left behind them a principle of the greatest and most enduring importance—that is, the principle of the independence of the spiritual life from the control of the political authority of society. We do not undervalue this, for, indeed, we think that it is just here that we find the most profound of the differences which separate the ancient world from the mediaeval and modern. And yet it remains true that this conflict did not in any intrinsic way affect the development of the general political ideas of the Middle Ages, and it is with these that we are concerned.

In this volume we have to consider the full development of the political theories whose origins we have endeavoured to trace in the earlier volumes, and their relation to the various political experiments of the thirteenth century, and especially to the system of the representation of the community. We shall now also find ourselves in a position to consider the revival of the Aristotelian political ideas, especially in the works of St Thomas Aquinas, and to ask how far this influence was of real importance. In the next volume we shall have to consider how far it was permanent.

CHAPTER II.
CONVENTION AND NATURE.

The political theory of the Middle Ages is formally separated from that of Aristotle and Plato, and from that of the nineteenth century, by one great presupposition—that is, that the institutions of civilised society are founded upon "convention", not upon "nature". Not, indeed, that this distinction is only mediaeval, for it continued to dominate European thought until the latter part of the eighteenth century. It is, indeed, only with Montesquieu, Rousseau's 'Contrat Social', and Burke, that the characteristically modern return to the Aristotelian and Platonic mode of thought was established. No detailed discussion of this is necessary, for it is obvious that the conceptions of Hooker, of Hobbes, and of Locke, are all in their different ways founded upon the distinction between "nature" and convention.

The normal political theory of the Middle Ages was not Aristotelian, but was derived from the post-Aristotelian philosophy mainly through the Roman Law and the Christian Fathers. It was not till the thirteenth century that mediaeval thinkers became acquainted with the Aristotelian political theory. In this chapter we shall consider the effects of this discovery in the attempt made by St Thomas Aquinas to restate some fundamental conceptions of political theory in the terms of Aristotle.

The post-Aristotelian political thinkers regard "nature" as primarily expressing the original or primitive condition of the world and of human life, a condition of innocence and felicity, out of which men passed owing to the appearance of vice or sin in man.

The Stoics, at least as represented by Posidonius in Seneca's account, looked back to a golden age in which men were uncorrupt in nature, lofty of soul, and but newly sprung from the gods, and in which they lived together in peace and happiness, requiring no coercive government, and seeking for no individual property. Out of this happy and innocent life they passed, because evil appeared in the world. They became ambitious, and were possessed by the lust of authority; they became avaricious, and would not be satisfied with the common enjoyment of the good things of the world.

This conception of the difference between the natural state and the conventional is implied in the treatment of "Natural Law" in the Roman jurisprudence both of the second century and of the sixth, and, indeed, it is in some of the phrases which belong to these that the conception is most dramatically embodied. As far as the natural law is concerned, all men are equal, by natural law all men should be born free, says Ulpian; slavery, says Florentinus, is contrary to nature. The treatment of the subject of "nature" in the Roman Jurists is not indeed free from ambiguities, and in our first volume we have endeavoured to disentangle these, but the general conclusion is clear.

When, therefore, we find the same conceptions in the Christian Fathers, there is no doubt as to their source. They were not specifically Christian ideas, but they fitted without difficulty into the Pauline interpretation of the story of the original innocence of man and his fall. And these were the conceptions of all the Fathers from St Irenaeus in the second century and St Augustine in the fifth to St Gregory the Great in the sixth. They all present one and the same view of the original conditions of human life, and of the origin of the institutions of political society. Government, says Irenaeus, was made necessary because men departed from God, and hated their fellow-men and fell into confusion and disorder of every kind. God, said St Augustine, made the rational man to be the master of other animals, not of his fellow-men, and the lust of power of man over his fellows, who are his equals, is an intolerable arrogance of the soul. St Gregory the Great bade men who arc placed in authority to consider not their power and rank, but the equality of their nature, for man was by nature set over the irrational animals, not over his fellow-men. All this represents, not the desire to depreciate the dignity or importance of the political order, as some writers have tended to think, not

being fully aware of the post-Aristotelian theory of society, but only the assertion of the artificial or conventional character of organised society and its institutions, as contrasted with the happy anarchy of the primitive world.

It is true that we should be glad if we could see more clearly how these curiously unhistorical and infelicitous interpretations of human institutions should have replaced the sane and penetrating conceptions of Aristotle, and his apprehension that the social and political order was not the result of vice, but rather the method of the progress of man towards the attainment of his true nature. Unfortunately, the philosophic literature of the last centuries of the pre-Christian era has perished, or survives only in fragments, and we cannot do more than conjecture the causes which lay behind this change.

It is, however, reasonable to say that one explanation of the change was that, with all its merits, the Aristotelian theory of society did not take account, or at least did not take sufficient account, of some aspects of human nature which were apprehended during the centuries between Aristotle and the Christian era, and that also a certain undue conservatism of thought in Aristotle brought about an intelligible reaction. Aristotle's conception of political society as the necessary condition of human life and progress, and of the political order as founded upon the conception of a moral justice, were profound and permanent. But he failed to understand the complementary truth of the equal and free personality of men; and he accepted the actually existing inequality of the Greek and the Barbarian as though it were a final reality, instead of what it proved itself to be, merely a phase in the historical process.

It was not unreasonable when Aristotle recognised the gulf which lay between the Greek with his highly developed intellectual and political civilisation, and the crude barbarism of the Oriental world as he knew it; but a few generations of the Hellenistic civilisation were enough to show that he had taken the existing fact to be a perpetual and necessary truth. And in the same way, in his profound apprehension of the meaning of the social and political order of human life, he failed to take sufficient account of the fact that though, in his own phrase, the State is prior to the individual, the State exists for the individual, and not the individual for the State. The truth is that it was the apprehension of the equality of human personality which for the time being seemed to undermine the whole Aristotelian conception of society, and provoked a reaction in which, for the time, men could only think of the actual world as representing the result of some primaeval catastrophe. For the equality of human personality was not a speculation but an observation of fact; it was Aristotle's attempt to distinguish between the natural master and the natural slave which proved itself to be a merely speculative theory. The Greeks went out into the world, and though a mere handful of men, the crazy empires of the East crumbled into dust before them ; but as they settled down among the conquered peoples, they found them capable of learning all they had to teach. And presently a greater empire than the Macedonian found itself first puzzled and then conquered by an assertion of the independence of personality which refused to submit even to the majestic authority of Rome. The words attributed to the Apostles, "whether it be right in the sight of God to hearken unto you rather than unto God, judge ye", represented an immense change in the relation of the individual personality to society. We do not mean that this movement was peculiar to Christianity : the claim that man is amenable through his own reason and conscience to some greater authority than that of the State had been expressed many centuries before with a profound and moving eloquence in the 'Antigone' and Sophocles v as only anticipating the movement of thought and feeling of which the philosophical conception of the equal individual personality is the form.

It was perhaps no great wonder that in the first clash of the yet unsolved antinomy of the freedom of the individual and the authority of society, men should have found the explanation in the poetic tradition of that catastrophe by which, as they thought, the innocent liberty of the primaeval world, in which men were good and happy, had been lost, and a harsher and sterner order had been

required to preserve at least some relics of the gracious past. For this is also the meaning of that law of nature of which philosophers and jurists and Christian Fathers spoke ; it expressed principles which might not be wholly realised, but which should at least limit and direct and control the authority of human society, while the positive law and order of society embodied the disciplinary measures which the faults and vices of human nature, as it actually is, required.

Such, at any rate, was the theory of the nature of the institutions of society which the Middle Ages inherited from the post-Aristotelian philosophy through the Roman Law and the Fathers, and we have endeavoured in previous volumes to show how these conceptions were expressed both in the legal and general literature of those ages. It is not necessary to add much by way of illustrating the continuance of the same conceptions in the thirteenth century. We have in the second and third volumes of this work illustrated this from the works of the Civil and Canon Lawyers, and even from the Feudal Jurists, and here, therefore, we only cite one or two further examples.

The first occurs, in that oddly irrelevant and rhetorical manner which is characteristic of the Fathers and of most of the mediaeval writers, in the introduction to a Constitution of the Emperor Frederic II of the year 1239, in which he appointed his son Henry Vicar-General of Tuscany. The Constitution represents Justice as establishing the authority of princes in order to restrain the insolence of transgressors, for men would gladly have avoided the yoke of lordship, and would never have surrendered that liberty which they had received from nature if it had not been that the license of wicked men was actually inflicting grave injuries on the human race, and this compelled nature to submit to justice and liberty to obey judgment. The rotundity of the phrases is sufficiently absurd, though it is characteristic of the Bologna Jurists when they were in a rhetorical mood, but they represent the contrast between the natural and the conventional conditions of human life.

The other example which we cite is even more significant, for it is to be found in the works of Albert the Great, the teacher of St Thomas Aquinas, and with him we are on the verge of the recovery of the Aristotelian political theory. In his ‘Summa Theologica’ he cites the contention that the subjection of man to man is either actually slavery or has something of its character, and was established on account of sin, as is evident from the curse of Noah upon Canaan. For Gregory the Great had said that nature brought forth all men equal, and therefore that pride which leads a man to desire to be set over his fellow-men is contrary to nature.

As we have said, it is needless to multiply examples of what had been for many centuries the accepted tradition, that the institution of coercive government was regarded as a convention, which did not arise from nature, but was due to the appearance of evil in the world. The pre-Thomist writers of the thirteenth century did not, as far as we have observed, add anything material to the tradition.

It is not our part in this work to deal with the history of the recovery of the Aristotelian writings; the subject has been discussed in various works. And we are not here concerned with the far-reaching effects of this in the development of the general philosophic system of the Middle Ages. That is again a large and important subject, with a literature of its own. It is enough for our purpose to observe that St Thomas Aquinas was in possession of the whole range of the work of Aristotle, including the Politics and the Ethics, and that he not only studied him carefully, but that his own work on politics represents the results of this study.

It was with St Thomas that the Stoic and Legal and Patristic traditions, which had hitherto dominated the more abstract aspects of the Political Theory of the Middle Ages, began to be crossed by a new influence. In the traditional theory the great institutions of human society, coercive government, slavery, and property, are the results of the vicious desires and impulses of men, not of the original character of their true nature; but they were also the means by which these vicious impulses might be restrained or limited. In the terms of the Christian Fathers, they were at the same time the results of sin, and the divine remedies for sin.

St Thomas does not in all respects directly and categorically contradict these conceptions, but under the influence of Aristotle he does very carefully and clearly set out a conception of human society and its institutions which is fundamentally different. In order, however, that we may properly appreciate his position, we must consider separately his treatment of government, of property, and of slavery. We begin by considering the terms in which he describes human nature in its relation to government. If man could live alone, he says in his treatise, 'De Regimine Principum', he would require no ruler, he would be king over himself under God, directing his actions by that reason which God has given to him. But this is not possible, for it is natural to man to be a social and political animal. He is driven to society by his own weakness in physical powers as compared with other animals ; but in place of these, nature has given him reason and the power of speech, by which he can communicate with other men. Man must therefore live in society with other men, and by the use of his reason render and receive mutual help; and this society must be a political society, for without some system of rule it could not hold together.

In the 'Summa Theologica' he sets out the same principles, but with rather more precision, and in contrast with the older view. He was confronted with the dogmatic statement of St Augustine, to which we have often referred, that in the state of innocence man was not under the lordship of man. He meets this by pointing out that the word "dominium" may be taken in two senses, as signifying the lordship of a man over his slave, or as the rule exercised by one man over other free men. In the first sense he admits that there would have been no lordship of man over man in the state of innocence, but in the second sense the rule of man over man would have been lawful even in that state. And, he goes on to say, this would have been so for two reasons : first, because man is naturally a social animal, but social life is impossible unless there is some authority to direct it to the common good; and secondly, because it would have been "inconveniens" if any one man excelled the others in knowledge and justice, that this superiority should not be used for the benefit of the others.

The correspondence between St Thomas' conception of the relation of man to political society and that of Aristotle requires no discussion. The relation of these two passages to the first chapters of the first book of Aristotle's Politics is evident, and it is also evident that the principles which St Thomas was setting out were really contradictory to the Stoic and Patristic tradition which till this time dominated the Middle Ages. To St Thomas the State, or Political Society, was a natural, not a conventional institution.

As we have already said, the question of the permanence of this recovery of Aristotelianism is one which we shall have occasion to consider in the next volume. It is enough for us to observe that the immense influence of St Thomas had almost immediate effect, and we shall find the best illustration of this in the work of Egidius Colonna in the latter years of the thirteenth century.

Egidius' treatise, 'De Regimine Principum', is obviously and explicitly related to the Aristotelian Politics, to which he constantly refers, and it was directly or indirectly from St Thomas that he had learned to know Aristotle. He gives an account of the reasons why the State (civitas) was created which is founded immediately upon the "Politics"—namely, that men might live and have enough, and that they might live well and virtuously. He asks why, if this is so, if man is naturally political (civilis), there are some who do not live thus, and he answers, some because they are too poor (meaning by this, presumably, a pastoral or hunting people), some because they are vicious and criminal, and some because they seek a more perfect life of contemplation. And it is in this sense that he interprets Aristotle's saying that he who is unable to live in society, or who has no need because he is sufficient in himself, must be either a beast or a god. In the following chapter he explains the statement that the State is natural, first, by contending that it is the proper development of the family and the village, and secondly, by an appeal to Aristotle's principle that the nature of a thing lies in its end or perfection.

We can then trace very clearly the development in the latter part of the thirteenth century of a new conception in political theory, and can recognise in St Thomas Aquinas and Egidius Colonna the effect of the recovery of the Aristotelian philosophy and its conception of the State, not as a conventional institution arising out of the vicious or sinful condition of human nature, but rather as the natural expression and embodiment of the moral as well as the physical characteristics of human nature. In order, however, to complete our appreciation of the nature of this change, we must consider how far we find the same principles in the treatment of the other great institutions of society, and especially of property and slavery.

We have in previous volumes set out the principles of the Fathers and the Canon Lawyers with regard to these, and have seen that to them it was clear that private property did not belong to the primitive order, but arose from the vicious and greedy appetites of men.

It is interesting to observe that these were still the principles of Aquinas' great Franciscan predecessor in systematic theology, Alexander of Hales, who seems to be unaffected, at least in this matter, by the Aristotelian influence; but, as we shall see, both he and some of the Canonists of the middle of the thirteenth century were drawn by their study of the Roman Law to another interpretation of the "natural law". In one passage he discusses carefully the meaning of natural law, and asks whether it can be changed. He cites St Isidore of Seville as saying that by the natural law all property is common, and says that if now a man may lawfully possess a thing as his own, it would appear that the Lex Naturale is mutable. He replies to this that when it is said that by natural law all things are common, this refers to the condition of man before he sinned, but when man had sinned private property became lawful by natural law. In another part of the same discussion he maintains that the natural law prescribes some things as of obligation, some things as good, and some as equitable. It is of obligation that in case of necessity all things are common. It is good that in the state of nature, when all things were well ordered, all things should have been common, but that in a corrupt state some things should be the property of particular persons, otherwise the wicked would take all and the good would be in want. It is equitable that some things should never be appropriated, while others which belong to no one should belong to the person who "occupies" them.

Alexander of Hales very clearly represents the patristic and normal mediaeval view that private property did not belong to the primitive condition of innocence, but was the result of sin. It is to the influence of some phrases of the Roman Law and to the recognition by some of the Bologna Civilians like Azo that the term " jus naturale " could be used in different senses, that we may trace Alexander's conception that in one sense private property may be related to natural law. His assertion that in the case of necessity all things are common is related to the theory of the Fathers and of the Canonists, and we shall return to the subject when we deal presently with the theory of property in St Thomas Aquinas.

When we turn from Alexander of Hales to the Canonists of the middle of the thirteenth century, we find the same combination of the influence of the Patristic tradition and of the Roman Law. Innocent IV, in his 'Apparatus', or Commentary on the Decretals, discusses the origin and rationale of private property in terms which are related to both traditions. The earth, he says, is the Lord's; He is the creator of all things, and in the beginning of the world these were the common property of all men. It was by the custom of our first ancestors that private property arose; but this was good, not evil, for things which are common property are apt to be neglected, and the common ownership of things tends to discord. Men were therefore permitted to take by occupation that which belonged to no one but to God. The great Canonist whom we know as Hostiensis defines carefully the nature of possession, and says that it is natural—that is, it was created by the "natural law of nations", not by the primeval law which belonged to all animals.

It is clear that these writers did not look upon private property as strictly primitive, but that it was created by human custom. If they sometimes call it "natural", this is due to the ambiguity of

some of the phrases of the Roman Law and the Bologna Civilians. They still represent the Patristic and Stoic conception of property as, properly speaking, a conventional and not a natural institution.

When we now turn to the treatment of private property by St Thomas Aquinas, we find ourselves in a very different atmosphere. He was, indeed, confronted at the outset with the dogmatic statements of the Fathers, and especially of St Ambrose, that nature had given all things to men in common, that God meant the world to be the common possession of all men and to produce its fruits for all, and that avarice produced the rights of possession. He puts the question with characteristic fairness and precision in the 'Summa Theological'. It is contended, he says, that it is not lawful for a man to possess anything as his own, for everything which is contrary to natural law is unlawful, and according to natural law all things are common, and he refers to St Basil, St Ambrose, and Gratian's Decretum as representing this view. He replies by making a distinction in the relations of men to things as property; the first consists in the power of acquiring and distributing things, and this is lawful, for it tends to efficiency and to the tranquillity of society; the second is their use, and as far as this is concerned men should hold them in common.

In the detailed answers, which in his method follow the general one, he replies to the contention that by natural law all things are common, and says that this does not mean that the natural law prescribed that all things are to be in common, and nothing is to be held as an individual possession, but that it is not the natural law which establishes the separation of possessions, but human agreement, and this belongs to positive law. Private property is therefore not contrary to natural law, but is added to natural law by human reason.

It is true that in this passage St Thomas does not refer directly to Aristotle, but it is fairly clear that his arguments are in large measure founded upon the discussion of the subject in 'Politics', including the important distinction between the right of acquisition and the right of use. The principles laid down by St Thomas in this passage may be further illustrated from two other places in the ' Summa.' In the seventh article of the same "question", he discusses more fully the significance of the principle that, as far as the use of things is concerned, the common right of property continues. He considers the question whether it is lawful to steal in case of necessity, and cites the ' Decretals ' as imposing a penance of three weeks upon the man who commits theft from hunger, and St Augustine as saying that it was not lawful to steal in order to give alms. St Thomas dogmatically asserts the contrary, and maintains that in a case of necessity all things are common, and that in such a case it is not sinful to take another man's property. He justifies this by a detailed argument. The institution of human law cannot abrogate the natural or Divine law, and according to the natural order which was instituted by the Divine providence, the inferior things were to serve men's needs, and therefore the division or appropriation of things which was instituted by human law may not hinder their use for this purpose, and, therefore, if any man possesses a superfluity of things, the natural law requires that this should be used for the maintenance of the poor. The administration of this help is normally left to the discretion of the owner of superfluous property; but if there is evident and urgent need, and there is no other means of help, then a man may openly or secretly take another man's property for his need, and this has not properly the character of theft; and, he adds, in a case of the same need, it is lawful to take another man's property to help one's neighbour who is in want.

In a very important section of the 'Summa', to which we shall return later, where he deals in detail with the whole conception of natural law, he recognises very frankly the weight of the tradition that by natural law all things are common. He quotes the famous passage from the 'Etymologies' of St Isidore of Seville, in which, as the Middle Ages understood it, this doctrine is set out, but he replies to it by the contention that while natural law did not create private property, this was established by human reason, because it was useful to human life, and thus natural law was not changed but only added to.

The position of St Thomas with regard to the institution of private property represents an attempt to harmonise the principles of the Fathers with those of Aristotle. He is not prepared, in face of the patristic authority, to maintain that it is "natural" in the proper sense of the word, but he refuses to admit that it is a consequence of sin. It is a "conventional" institution, but an institution created by human reason, for the advantage of human life. But also, it is limited by the principle of the natural law that material things were intended by God to meet the needs of men, and therefore he understands the right of private property to be the right to acquire and to control the destination of material things, but not an unlimited right to use them for one's own convenience.

We turn to the theory of slavery. We have seen that the Canonists and Civilians were agreed that slavery was not an institution of the natural law, and the Canonists held that it was a consequence of sin. Innocent IV. thus merely restated the traditional doctrine when he said that the lordship over men as property belongs to the law of nations or the civil law, for by the law of nature all men are free. Hostiensis, indeed, describes slavery as created by the divine law, confirmed by the law of nations, and approved by the Canon Law; but he probably does not mean by this more than that it was a divine punishment and remedy for sin, the doctrine both of the Fathers and the Canonists.

St Thomas endeavoured to bring together the tradition which he inherited from the Stoics and the Fathers with what he had learned from Aristotle. In one place he maintains that in the state of innocence there was government, but no slavery. It is of the essence of slavery that while the free man is "causa sui", the slave "ordinatur ad alium", and is used by the master for his own advantage, and this could not have existed in the state of innocence. In another place, however, he deals with the question in more detail, and explains the nature of slavery under different terms. St Thomas in this place is discussing directly the relation of the jus gentium to the jus naturale (we shall return to this subject later), and his reference to slavery is incidental to this discussion. He first states his reasons why it might be contended that the "jus gentium" is the same as the "jus naturale", and the second of these reasons is that while Aristotle says that slavery is natural, for some men are naturally slaves, St Isidore says that slavery belongs to the jus gentium ; the jus gentium, therefore, is the same as the jus naturale. Against this he cites St Isidore as distinguishing between natural law, civil law, and the law of nations. He endeavours to solve this opposition by arguing that jus may be said to be natural in two different senses, in the absolute sense, or in relation to its consequences. The jus gentium represents that which man's natural reason declares with regard to the consequences of jus. Slavery, therefore, belongs to the jus gentium, and is natural, not in the absolute sense, but because it is useful for the slave to be controlled by the wiser man, and for the wiser man to be helped by the slave.

In another passage, to which we have already referred, he contends that slavery, like private property, was not indeed instituted by nature, but was created by man's reason for the convenience of human life, and represents not a contradiction of the natural law, but an addition to it.

It is not very easy to arrive at a confident judgment with regard to the whole of St Thomas' position as regards slavery. For while in some places he seems to follow Aristotle in his judgment that slavery rests upon the ground that there are men for whom it is better to be slaves than to be free, and that slavery is therefore an institution of human reason, in others he seems to speak of it as an institution which could not have existed in the natural or primitive state of innocence.

We may perhaps suggest that he meant that in the state of innocence there would have been no such difference in human nature as to justify the relation of master and slave, but that, as these differences exist in the actual conditions of human nature, the relation has become natural and justifiable. Slavery would thus be an institution not belonging to the natural condition of human nature, but rational, and in the secondary sense natural in the actual corrupt and sinful conditions. His treatment of slavery seems, therefore, to differ from his treatment of government and property, for these are not the results of sin, while slavery is.

The followers of St Thomas Aquinas, Ptolemy of Lucca and Egidius Colonna, seem to accept the Aristotelian conception of slavery without any apparent qualification. Ptolemy of Lucca, in that part of the 'De Regimine Principum' which is generally attributed to him, says that some men are, through a defect of nature, wanting in reason, and such persons should be set to work "per modum servile", because they have not got the use of reason. This may be called naturally just, as Aristotle says in the first book of the Politics. Egidius Colonna in the same way assumes without question that there are men who are naturally slaves, for they are deficient in intelligence, and cannot rule themselves.

We have said enough to illustrate the nature and the extent of the influence of the recovery of the Aristotelian Politics on St Thomas Aquinas and some other writers of the end of the century in modifying the traditional Stoic and Patristic principles, which had up till this time formed the framework of mediaeval political theory. We shall presently have occasion to consider how far this affected the less formal aspects of their theory, and we shall then be in a better position to judge how far the influence of Aristotle was really and not merely formally important.

CHAPTER III.
THE DIVINE NATURE AND THE MORAL FUNCTION OF THE STATE.

We have endeavoured in previous volumes to set out clearly the post-Aristotelian and mediaeval conceptions of the conventional nature of the great institutions of human society as being the results of human vice and sin; and that these were conceived of as being divinely appointed remedies for sin. It is from this standpoint alone that we can understand the mediaeval conception of the nature and principles of the State and its authority.

We have dealt with the subject in detail, as it is presented by the Canonists and Civilians, in the second volume, and in the general and controversial literature of the eleventh, twelfth and thirteenth centuries in the second and third. We hope that we have said enough to show that the judgment of the Middle Ages was clear and continuous, that while the coercive political authority of man over his fellow-men was made necessary by sin, it was appointed by God as a remedy for sin. The State was a divine institution, whose purpose and function it w as to maintain righteousness or justice.

In the second part of this volume we shall return to the question of the relations of the two powers, the Spiritual and the Temporal, but we hope that it is evident from previous volumes that, whatever opinion might be held about this relation, there was no real difference as to the principle that the authority of the Temporal Power was a divine authority. Whatever confused ideas St Augustine may have had in setting out the distinction between the Civitas Dei and the Civitas Terrena, even if he meant to suggest (and we do not think that he meant to do this) that the Civitas Terrena was not a divine institution, the confusion, if it existed in his mind, began and ended with himself, and it is an inexcusable blunder to overlook this fact. If Gregory VII had for a moment inclined to think—and we have given reason to think it was only for a moment—that the independence and authority of the Spiritual Power would be best vindicated by denying the divine nature and authority of the State, it is clear that he had substantially no followers in the eleventh and twelfth centuries.

In this chapter we propose to give a short account of what the writers of the thirteenth century say upon this matter, and especially we shall endeavour to summarise the careful statements of St Thomas Aquinas; but it must be frankly confessed that there is little if anything of substantial importance to be added to what has been said in earlier volumes.

We would begin by drawing attention to a writer whose most famous work forms one of the series of encyclopaedic dictionaries of the Middle Ages. For the ‘Speculum’ of Vincent of Beauvais belongs to the same series of works as St Isidore of Seville’s ‘Etymologies’ in the seventh century, and Rabanus Maurus’ ‘De Universo’ in the ninth; the fashion of encyclopaedias is not peculiar to the eighteenth or the nineteenth century. Vincent of Beauvais’ work belongs to the middle of the thirteenth century. It has naturally little, if any, independent or personal value, but it is interesting as summing up much of the general knowledge and many of the conceptions of his time—that is, just before the development of the Aristotelian influence on political theory.

Among other matters he deals with the nature of the State. Among the first passages which he cites on this is Cicero’s definition of the “Populus” as “Coetus humani multitudinis, juris consensu, et concordi communione sociatus”; he takes this from St Isidore’s ‘Etymologies’. He is aware of St Augustine’s criticism of this, but though Vincent mentions this it does not seem to affect his judgment, for he goes on, in terms which would seem to be related to those of John of Salisbury, to describe the proper character of the prince as that of one who seeks to promote “aequitas”. A little later he cites from Gratian’s ‘Decretum’ the famous passage in which Pope Gelasius I had laid down the fundamental mediaeval principle that it was Christ Himself who separated the two powers, the Spiritual and the Temporal, and that it was Christ Himself who allotted to each its supreme functions.

And he cites a passage from Hugh of St Victor, in which he speaks of the Church, the holy "Universitas" of the faithful, the body of Christ, as being divided into two orders (*ordines*), the laity and the clergy, and each of these is to be animated by justice. All these phrases represent the commonplaces of mediaeval political theory, but they serve to bring out its normal principle, that the State is of divine origin, and that its end or purpose is a moral end—the maintenance of justice.

If these phrases represent the normal opinion of the Middle Ages, we may ask first how far they correspond with the opinions of the extreme Papalist writers of the thirteenth century. We may take a few examples. The first is from one of the most extreme of all Papalist writers, Ptolemy of Lucca, the continuator of St Thomas' 'De Regimine Principum', with whose theory of the relation of the Temporal and Spiritual powers we shall deal later. He is clear and emphatic in maintaining that all temporal authority comes from God, who is the first ruler, and this is evident in the nature of the end or purpose for which the State exists—that is, the life of virtue, and the attainment of eternal felicity—that is, the vision of God.

With these words we may compare those of Egidius Colonna, who, in one of his writings at least, represents the standpoint of the most extreme supporters of Boniface VIII in his conflict with Philip the Fair of France. In his treatise, 'De Begimine Principum', the King is the minister of God and the ruler of the multitude, and God requires Kings and Princes to rule the people with prudence and justice. In another place he contends that the King must be a man of such justice and equity that he can direct the laws.

We may also observe the words of an anonymous writer, certainly one of the most determined and extreme of all the supporters of Boniface VIII, of whom we shall have more to say later. He has the courage to try to explain away the significance of the Gelasian principle of the division of the two powers; but even in doing so he does not venture to suggest that the Temporal power does not come from Christ, but only that both powers belong to the Pope, while the exercise of the Temporal Power belongs to the Prince.

If, then, it is clear that even the most extreme Papalist writers recognised that the Temporal as well as the Spiritual Power came from God, it might seem almost unnecessary to illustrate this principle from the general literature of the time, and yet this is so important an aspect of the political ideas of the Middle Ages that it is worth while to illustrate it a little further. There is an interesting little treatise, 'De Regimine Civitatum', by a certain Civilian, John of Viterbo, written, as would seem probable, not earlier than 1261, to which also we shall have occasion to return. It is interesting to observe the emphatic terms in which he sets out the divine nature of political as well as of ecclesiastical authority. Two great gifts, he says, God has bestowed upon man—these are the "sacerdotium and the imperium"; they have, indeed, different functions, but they proceed from the same source. Their functions are different, and this is indicated by the two swords which were brought to the Lord. It is not less important that, while the author is clear that the authority is good, for it comes from God, the exercise of that authority may be evil. The function of the authority is to promote justice, and the abuse of it has no divine authority.

It would be superfluous to deal with the emphatic repetition of the Gelasian doctrine that the Temporal as well as the Spiritual Power was ordained by Christ in such a eulogist of the Empire as Jordan of Osnabrück, or its frequent assertion in the Imperial Constitutions. It is, however, worth while to notice one or two other of the statements that the purpose and the test of legitimate authority is justice.

There is a very interesting commentary on the statutes and constitution of the kingdom of Naples, to which we shall refer again, by Andreas de Isernia, a jurist of the school of Naples of the thirteenth century. He holds a high conception of the legislative power of the King of Naples, but he is clear that any law which is lacking in "ratio" or in justice is no law at all. The prince is appointed to do justice and judgment, and is not to be called a king when he departs from justice. In another

place he applies this principle to the case of a king who intends to seize and ill-treat his vassal contrary to justice; the vassal in such a case is not disobedient if he refuses to obey the king's summons, for in such action the king is no king, and he will lose his rights over his vassal, just as the vassal would lose his fief if he did not render justice to his lord.

In one of the most important treatises which belong to the conflict between Boniface VIII and Philip the Fair, John of Paris develops the principle of the moral purpose of the State still further. He argues that the contention that the royal authority only deals with material things is false, for the function of this authority is to set forward the common good—that is, not merely the common good in general, but that good which consists in the life which is according to virtue. This is what Aristotle meant when he said that the aim of the legislator is to make men good and to lead them to virtue.

We cannot here pursue John of Paris' arguments further—we shall return to them later,—but it is interesting to observe that the Aristotelian influence only served to bring out and to strengthen the traditional mediaeval doctrine that the function and justification of political authority was its moral end.

St Thomas Aquinas does not add anything material to these principles, but he sets them out with characteristic precision and force. He is equally emphatic in asserting the divine nature of political authority, and the moral end or purpose for which this exists. In one place in the 'Summa Theologica' he discusses the question whether Christian men are bound to obey the secular authorities. He mentions various arguments which might be alleged to prove the contrary, but answers them first by citing some words of the Apostolic writings bidding men to obey princes and kings for God's sake, and then by urging that the "order" of justice and of human affairs required that the inferior should obey the superior, and that the faith of Jesus Christ did not suspend the "order of justice" or the necessity of obedience. He adds, however, and it is very significant, that this obedience is only due so far as justice requires it, and that subjects are not bound to obey an unjust or usurped authority, or an authority which commands unjust things.

In another place he discusses the nature of sedition, and the question whether it is a mortal sin. He concludes that it is so, and in this case the reason which he gives is not theological but philosophical. He quotes from St Augustine Cicero's well-known definition of the "populus", and says that it is therefore clear that sedition is opposed to justice and the common good, and is a grave mortal sin, for the common good is greater than the private good. Again, however, in the same "Article" he adds that a revolt against a tyrannical and unjust authority has not the nature of sedition, for such an authority is not directed to the common good, but only to the convenience of the ruler.

In a passage in his treatise, 'De Regimine Principum', St Thomas goes even further, and while he maintains that human life has an end even beyond the life of virtue, that is the fruition of the divine; and while it is the function of the priest to teach men the way to his true felicity, it belongs to the king's duty to order human life in such a way that men may attain to this true felicity. The true aim of the king should be so to order things that his subjects may live the good life, and the good life is the life according to virtue.

It is important to observe that these principles of the legitimate nature and moral end of the State are not limited to Christian States, but were represented by the most authoritative writers of the thirteenth century as extending to all States, even those of the unbelievers. Innocent IV, in his 'Commentary on the Decretals', sets out this principle with great directness. Lordships, possessions, and jurisdictions are lawful and blameless among the unbelievers, for these were created not only for the faithful, but for all rational creatures, as it is said, God makes the sun to rise upon the evil and upon the good, and therefore neither the Pope nor other Christian men have any right to destroy the governments of the unbelievers.

St Thomas Aquinas maintains the same doctrine, and even admits that an actually existing authority of unbelievers over Christian people is legitimate, though it may be abolished by the

authority of the Church. Dominion and political superiority were created by human law, but the divine law, which is of grace, does not destroy the human law, which arises from natural reason, and therefore the distinction between believers and unbelievers does not of itself destroy the authority of unbelievers over the believer.

It is therefore clear that in the judgment of all the writers on political theory in the thirteenth century there is no doubt whatever that the end and purpose of the State is a moral one—that is, the maintenance of justice, or, in the terms derived from Aristotle, the setting forward of the life according to virtue, and that the authority of the State is limited by its end—that is, by justice, and that it is derived from God Himself.

CHAPTER IV.
THE NATURE OF LAW.

We have in the last chapter endeavoured to set out our confident judgment that to the Middle Ages it was clear that the nature and purpose of the State was a moral one, that it came from God, and that its function was to maintain and set forward justice. This may at first sight seem a conception which, however important, is somewhat abstract, and therefore, in order to appreciate its full significance, we must go on to observe that both to the thinkers and to the practical men of the Middle Ages justice had a definite and concrete embodiment in the law.

We shall have occasion presently to consider the beginnings of the theory of what is called sovereignty, but it is impossible to understand the political ideas of the people of the Middle Ages at all, if we do not begin by understanding that to them there was only one supreme authority in the State, and that was not the ruler, whether king or emperor, but only the law. Behind the law of the State there was, indeed, a more august law still, the law of nature or of God, to which the law of the State was subordinate. But within the State, and subject always to this higher authority, the law was supreme.

We may, indeed, say that it was the characteristic defect of mediaeval civilisation that it was, if anything, too legal; but as the men of that time saw it, it was the majestic fabric of the law which stood between them and anarchy, the anarchy of mere disorder, or the anarchy of a capricious tyranny. To them liberty, true liberty, was not something contrary to law, but rather was to be found in law itself. We have in previous volumes endeavoured to set out something of all this, and we have seen that in this matter there was no difference between the political writers of the ninth century and of the eleventh and twelfth, between Feudalists and Civilians; but we may here recall a few of their most significant sayings. Let the king, says Bracton, recognise in the law that same authority which the law gives to him, for there is no king where mere will rules and not the law. The Lord or the Lady is only Lord of law (or right), they have no authority to do wrong; such is the doctrine of the Assizes of the kingdom of Jerusalem. The Bologna Civilians are only expressing the same judgment in more general terms when Azo says of justice that it is the mind or will of God which is in all things right and just, and when the author of the ‘ Prague Fragment ’ says that the law flows from justice as a stream from its source.

Before, however, we deal with the questions related to these principles, we must in this chapter consider the systematic treatment of the nature of law in its largest sense by St Thomas Aquinas, so far, that is, as it is related to our subject.

There are two very important sections of the ‘Summa Theologica’ in which he considers this : in the first he considers it in relation to reason, in the second he deals with it in relation to justice. He begins his discussion by considering the relation of law to reason, and maintains that the proper character of law is to command and to forbid; but to command belongs to reason, therefore law is a thing related to reason. It is reason which directs things to their end.

Having thus set out the general nature of law, he goes on to discuss it under four terms—the eternal law, the natural law, the divine law, and human law. St Thomas deals first with the eternal law. It is manifest, he says, that the whole universe is governed by the divine reason, and therefore this “ratio gubernationis” has the character of law; the end of the divine government is God Himself, and His law is not other than Himself.

The natural law is different from but related to this. All things which are subject to the divine providence are indeed controlled by the eternal law, but the rational creature is subject to the divine providence in a more excellent way, for it partakes in the work of providence, it “provides” for itself and others, and this participation of the rational creature in the eternal law is called natural law. The

light of natural reason, by which we discern what is good and what is evil, belongs to the natural law; it is nothing else than the impression of the divine light in us. The natural law is, therefore, the participation of the rational creature in the eternal law. St Thomas was indeed aware of the fact that the term natural law had been and might be used in more than one sense, but his own conception is perfectly clear.

In order, however, to understand the full significance of this conception, we must observe another distinction of great importance, which St Thomas makes in another place—that is, the distinction between natural law and positive law, a distinction which applies both to human and divine law. Men can, by a common agreement, establish a law as just, in matters otherwise indifferent, so long as it is not contrary to natural justice, and this is positive law; and there is a positive divine law as well as a natural.

The term Divine law is used by St Thomas to describe that twofold law of God which is revealed in the Old and New Testaments. It was needed for various reasons, because the final end of man is beyond human reason, because of the uncertainty of men's judgments, because human law can only deal with the external actions of men, because human law cannot prohibit or punish all evil actions, lest it should do more harm than good. The divine law does not indeed contradict or annul the natural law, but it was added that men might participate in the "eternal law" in a higher manner.

Human law is described by St Thomas in another article of the same question under the terms of its relation to reason. Law is a command of the practical reason, for the human reason must draw out and apply to particular circumstances the general precepts of the natural law. St Thomas, however, also points out that this general conception of the nature of human law requires a further analysis. The term human law includes two different kinds of law, the "ius gentium" and the "ius civile". The first is derived from the natural law, as conclusions are derived from premisses, and forms that body of laws without which men could not live together. The second is derived from the natural law, "per modum particular determinationis", and is that which any State establishes as being suitable to its own conditions.

Law, then, in all its forms is the expression of reason, but it is also, in the judgment of St Thomas, the expression of justice, and we must briefly consider this. He accepts the definition of justice, given by Ulpian in the 'Digest', "Justitia est constans et perpetua voluntas jus suum cuique tribuendi" ('Dig.,'I. 10) if it is properly understood. In a later "Quaestio" indeed, he discusses the various parts or aspects of justice, and accepts the Aristotelian distinction between "distributive" and "commutative" justice. It does not, however, appear that in St Thomas' judgment this interferes with the general truth of Ulpian's definition.

The whole system of law, and here St Thomas uses the word "jus", is so called, according to St Isidore, because it is just (justum), and the just and "jus" are the "objectum" of justice, and St Thomas gives his considered and emphatic assent.

He therefore goes on to describe "judicium", which is the action of the judge, as being the definition or determination of that which is just or lawful, and this belongs to justice; this is what Aristotle meant when he said that men go to the judge as to a living justice. Perhaps the most emphatic assertion by St Thomas of the relation between law and justice may be found in another "Article" of the same "Question", where he asks whether the judgment of the judge must always be in accordance with the law. He decides that while normally this must be so, this will only hold if the law is just. Laws which are contrary to the natural law are unjust, and have no force. It may even happen that laws which are in themselves right may not be adequate to certain cases, and would, in such cases, be contrary to the natural law. In such circumstances men must not judge according to the letter of the law, but must recur to that equity which

St Thomas' conception of the nature of law is, then, founded upon two principles, that it is the expression of reason, and that its purpose is justice. It is interesting to compare his conception with

that of the mediaeval Jurists, with which we have dealt especially in the second and third volumes of this work. His treatment represents a very important development of the significance of the rational element in law, while it also brings out very emphatically the fundamental mediaeval conception of its moral or ethical nature.

CHAPTER V.
THE SOURCE OF THE LAW OF THE STATE
I.

We have so far considered the mediaeval conceptions of the nature of law as representing the principles of reason and justice, or, to put it into the other terms of that time, human law as limited and controlled by the law of nature. We must now consider the more immediate source of the law of the State, the authority from which it proceeded, and upon which it rested. In this chapter and the following, we shall endeavour to set out what we venture to think were the normal mediaeval conceptions upon the subject, and to trace the beginnings of another mode of thought.

We have in previous volumes set out what appears to us the first and in some sense the most fundamental aspect of the mediaeval conception of the nature and source of the law of the State—that is, that it was custom. We have seen that this was the conception of the feudal jurists, and that this was also the first principle of the Canon Law. We shall have presently to deal with the question of the relation of the Civilians of Bologna and the revived study of the Roman law to the question of the source of law ; but for the moment it is enough to observe that the Civilians also were clear that custom had once been its souree. The principle is admirably expressed by Beaumanoir for France, when he says that all pleas are determined by custom, and by Bracton for England, when he asserts that England is governed by unwritten law and custom. It is no doubt true that Bracton thought that this 'was peculiar to England—a curiously inaccurate judgment, probably due to an impression that the other European countries lived under Roman law. What is thus affirmed for their own countries by Beaumanoir and Bracton became a sweeping and all-including generalisation in Gratian, when he opened his ‘Decretum’ with the famous words, founded upon Isidore of Seville, “The race of mankind is ruled by two things, by natural law and by custom”.

We venture to urge that it is quite impossible to understand the political structure of mediaeval society and the nature of mediaeval government unless we begin by taking account of this conception. We are so much and so naturally, if not very intelligently, influenced by the belief in the existence of a conscious sovereign authority, of which law is the expression, that we find it difficult to understand the state of mind of those ages when the conception of the sovereign, in the modern sense of the word, hardly existed.

The first question to which we must here address ourselves is how far this conception of law, as proceeding from or controlled by custom, was maintained in the thirteenth century by writers with whom we have not yet dealt, or in countries whose laws we have not yet examined.

And first, we may observe the careful and yet confident mode in which St Thomas Aquinas sets out the principle of the authority of custom. In a discussion of the question whether law can be changed, he considers the question whether custom has the force of law. He cites various objections which could be alleged, and then states his own conclusion. He first cites the famous words of St Augustine that the custom of the people of God and the institutions of men’s ancestors are to be accepted as law, and then proceeds to say that law is the expression of the reason and will of the legislator, but these are declared as plainly by men’s actions as by their words, and therefore the frequently repeated actions of men which constitute custom can change or establish or interpret law.

He goes on to contend that, as human laws may not cover all cases, it may be right sometimes to take action which is outside of the law, and when such cases are multiplied owing to some change in men, custom shows that the law is no longer useful. And he even adds that, while normally, if the conditions remain the same, the law founded upon these conditions will prevail over custom, there

may be cases where the law is useless, simply because it is contrary to the custom of the country, for this is one of the conditions of law—it is difficult to change the custom of the multitude.

It is clear that while St Thomas recognises other forms of law besides the custom of the people, he does substantially represent the conception of custom as a main source of law. It is, however, clear that St Thomas Aquinas implies that there were other forms of law besides custom, and we shall presently deal with these. The important point of the passages which we have just considered is that, whatever other forms of law there might be, he was clear that custom lay behind them, and was still paramount over them.

This is also the position of some other very important writers of the later thirteenth century. Vincent of Beauvais, in his 'Speculum', cites the significant words of Gratian, in which he laid down the principle that even when laws were instituted by a competent authority, they needed to be confirmed by the custom of those who were concerned. Albert the Great seems also to refer to the same doctrine when he says that the edict of the Prince which is maintained by custom has the force of written law. What is, however, much more significant is the treatment of the authority of custom by the most important Canonist, and the most authoritative Civilian of the second half of the century.

Hostiensis, in his 'Commentary on the Decretals', describes the nature and the authority of custom, and clearly accepts the judgment of Gregory IX that custom if it is "rationabilis et legitime prescripta", prevails over other forms of positive law. Odofridus, in his 'Commentary on the Digest', draws attention to the divergence between this judgment of Gregory and the passage in the 'Code', in which Constantine had apparently maintained that custom could not over-ride law. Odofridus says that there had been much controversy over this question, and cites the opinion of Placentinus that, while in earlier times the Roman people could make law and its custom could abrogate it, nowadays it was only the Emperor who could make law, and therefore the custom of the people could no longer annul it. Odofridus himself, however, emphatically repudiated the opinion of Placentinus, and maintained that the Roman people could still make lawr, and that, therefore, its custom could still annul it. Odofridus was, as it is thought, a pupil of Azo, and represented the tradition of his master.

The opinions of these writers are interesting and important, but, after all, they are of little importance as compared with the clear and dogmatic statements of the great feudal lawyers like Bracton and Beaumanoir on the principles of the system of law which they had to interpret and administer in the latter part of the thirteenth century. We may add that the same judgment as to the legal authority of custom is clearly laid down in the great law book of Castile, which we know as the 'Siete Partidas' of Alfonso X. There are, it says, only three things which can hinder the force of law : the first is "uso", the second is "costumbre", and the third is "fuero". We shall, however, presently return to the conception of law in Spain, and treat it in detail.

Enough, we think, has been said to make it clear that the first and, as we think, the fundamental principle of the Middle Ages was that the law was the expression, not so much of the deliberate and conscious will of any person or persons who possessed legislative authority, but rather of the habits and usages of the community. It is not our part here to endeavour to trace the whole significance of this conception, but we may be allowed to point out that this does not mean that law as custom was something unintelligible or irrational. It does not require any great consideration to enable us to understand that the custom of a community was determined by the conditions or environment under which it lived, and by the moral ideas such as they were, and however they arose, which possessed the community. We may be allowed to point out that this is true not only of the customary law of a primitive community, but in the long run of all systems of law.

It is also important to remember that this customary law was not really unchangeable and fixed. On the contrary, it is evident that at least in what we call progressive countries it was continually changing with the change of circumstances or ideas. It is probably, on the other hand, reasonable to think that this unconscious movement was not always sufficient to accommodate itself

to such a development of civilisation as took place in the centuries from the eleventh to the thirteenth.

However this may he, it is clear that in the twelfth and thirteenth centuries we can trace the appearance and development of another method of conceiving of the source of law—that is, the beginning of the conception that law is the expression of the will of some conscious legislative authority. We have arrived, that is, at the beginnings, for the modem world, of the conception of sovereignty—that is, that there exists in every independent society some power of making and unmaking laws.

We have, a few pages hack, referred to the statement of Bracton that England was governed by custom and not by written law; hut the same passage which contains these words contains also words which express a different conception of the nature of the authority on which law is founded. Other countries, he says, are governed by written laws, England by unwritten law and custom ; hut these English laws may properly he called "leges", for that has the force of law which has been justly determined and approved with the counsel and consent of the great men, the approval of the whole commonwealth, and the authority of the King. Such laws, he adds in another place, when they have been approved by the consent of those who are concerned (utantium) and have been confirmed by the oath of the King, cannot be changed or annulled without the counsel and consent of those by whose counsel or consent they were promulgated.

Here we have a clear statement of the conception that there is a definite legislative authority which enacts and promulgates laws. What was, then, the nature of this authority ? We have in the third volume set out our conclusion that the feudal and national jurists of the twelfth and thirteenth centuries clearly held that the legislative authority resided not in any one person, but belonged to the whole community, acting through all its parts, the King, the great men, and the whole body of the people; and in the first volume we have endeavoured to show that this principle was already firmly established in the ninth century.

The words of Bracton which we have just quoted are only one expression of a general principle. Lest, however, it should be thought that this was only an abstract or speculative principle of the jurists, we will briefly examine the legislative forms of the twelfth and thirteenth centuries in the various European countries, and we shall see that nowhere in the constitutional methods of the great European countries is there any sign that the legislative power belonged to the king alone, but always that the king acted with the advice and consent of the great men, and behind them we see from time to time the whole community. We must bear in mind that it is impossible in the Middle Ages to draw a sharp line between what we should call legislative and administrative action.

If we go through the constitutions of the Empire, we shall find that they are issued not by the emperors alone, but with the advice and consent of the princes. This is obvious even of the great Frederick II. He renewed in 1213 the promises made by Otho IV to Innocent III with respect to the territories claimed by the Papacy, and did this with the counsel and consent of the princes of the Empire. It is with the same counsel that in 1226 he annulled the communal privileges of the citizens of Cambrai. He proclaimed the ban against various Lombard towns in the same year with the deliberation and judgment of the princes and other chief men of the Roman Empire.

The most noticeable phrase is, however, that which is prefixed to the constitution of 1235, which created an important new official, the "Justitiarius", who was to act in judicial matters during the absence of the emperor. Frederick begins by saying that ancient custom and unwritten law had not provided for some important matters which concerned the tranquillity of the empire, and therefore it was that with the counsel and assent of the princes and other faithful men of the empire assembled in a solemn council (curia) held at Mainz he had promulgated certain constitutions.

It would seem that there is implied a contrast between the tradition and the custom of the empire, and the new constitution, which is issued by the emperor not alone, but with the authority of the Council of the Empire.

If we turn from the Empire to the kingdom of France, we find that the same principle is illustrated in the "Ordonnances" of the twelfth and thirteenth centuries. It is important to observe this, because there has been a tendency in some works on French history to speak of the mediaeval French king as exercising some isolated legislative authority. This view is not consistent with the fact that the formulas of legislation which we find in the ordinances are of almost exactly the same nature as those which we find in the other European countries at that time, and which, as we have shown in our first volume, were already used in the ninth century.

Louis the Fat in 1118 issued a regulation about the privileges of the serfs of St Maur des Fossés with the common counsel and assent of the bishops and great men. Philip Augustus in 1209 issued an ordinance concerning feudal tenures, but the formula of legislation is one which hardly distinguishes between the royal authority and that of the great princes and barons. In one ordinance of St Louis of 1246 we have a careful statement of procedure. He first called together at Orleans the barons and magnates of that province, and learned from them the custom of the province, and then, with their counsel and assent, commanded it to be firmly observed in the future.

It is true that in the reign of Philip III we find in a number of cases, in place of the formula of the counsel and assent of the barons, the phrase "in Parliamento" or "in pleno Parliaments", while in other cases we find such phrases as "ordinatum fuit per Dominum regem et ejus consilium". In the reign of Philip IV we find an ordinance issued "par la cour de nostre seigneur le Rey", and another "in Parliamento". In the first case these formulas are apparently taken to be equivalent.

In other cases, however, in the reign of Philip IV, we have the traditional form, including the reference to the barons and the prelates. This is especially noticeable in the demand for the surrender of at least half of the silver plate belonging to the clergy and laity of the kingdom in August 1302, and in the general ordinance for the levy of money for the war in Flanders in the same year. The most significant of all these phrases, however, are those of the letter of 1303 to the Bishop of Paris, which communicates the ordinance made for the levy of soldiers for the war in Flanders. The ordinance was made with the deliberation and counsel of those prelates and barons who could be got together; but Philip obviously is aware that all the prelates and barons of the kingdom ought to have been summoned to consider this, and makes the excuse that time had not permitted it.

It would seem clear that, while it may be right to make some distinction between the authority of the king in the royal domain and that which he exercised in France as a whole, the formulas of legislation show that there was no substantial distinction between the constitutional principles of legislation as they obtained in France and in other countries. The counsel and consent of the great men of the kingdom is no doubt what Beaumanoir meant when he said that the king had the right and authority to make "establissemens" for the whole kingdom for a reasonable cause, for the common good, and "par grant conseil".

It is hardly necessary to argue that the same principles were recognised in England. The question has been handled with characteristic caution and detail by Stubbs, and we cite, merely as illustrations of the principle, the formulas of legislation used by Edward I. in the Statutes of Westminster of 1275 and the Statute De Religiosis of 1279. The truth is that the process of legislation, as we see it in England, corresponds precisely with the description of it by Bracton which we have cited.

It is important, however, to observe that the same conceptions of the nature of law and legislation are represented in the Spanish law-books and constitutional documents of the twelfth and thirteenth centuries. We have not hitherto dealt with these, but their evidence as to mediaeval political principles is abundant and significant. We have thought it well to discuss them in some

detail, both on account of their intrinsic importance, and also because there has been some tendency, even in recent and accomplished historians, to speak as though the Spanish kings at least in Castile claimed and exercised a legislative authority of a kind different from that which, as we have seen, obtained in the other countries of Western Europe.

The cause of this misunderstanding, as far as it exists, may possibly be found partly at least in the fact that Alfonso X of Castile sometimes uses language which might seem to imply that he claimed to be a sole and absolute legislator. In one significant passage of the 'Especulo' he sets out the grounds on which he claims to possess the legislative authority. These are : first, that if other emperors and kings who are elected to their office possess this power, much more should he, who held his kingdom by hereditary right; second, because the kings of Spain had this authority before him; and third, because he could prove his right by the Roman law, by Church law, and by the ancient Gothic laws of Spain.

That this does not mean that Alfonso claimed that he had an absolute or sole power in making laws will appear if we look a little further. In the 'Siete Partidas' he states very emphatically that laws must not be abrogated without the great deliberation of all the good men of the country, and in the following chapter he explains that if there should arise occasion for further legislation, the king is to be advised by wise and understanding men. These principles correspond with the words which Alfonso used in the introduction to the 'Especulo'. He says that this collection of laws was made with the counsel and consent of the archbishops and bishops, the "Ricos Omes", the men most learned in the law, and others of the court and the kingdom. When, therefore, we find Alfonso maintaining that no one can make laws except the emperor or the king, or other persons by his command, and that all laws made without his command are not laws at all,2 we must not understand this as meaning that the king was the sole legislator, but only that he was an indispensable party to legislation, and that no laws could be made without his consent.

The truth is that, when we carry our examination a little further, we shall recognise that the general principles of legislation and of the nature of law were substantially the same in Castile as those which obtained in other Western countries in the Middle Ages.

As we have seen, the first and fundamental mediaeval principle of law was the authority of custom. The 'Siete Partidas' belongs to that time when the conception of a deliberate legislative process was becoming important, at least in theory; but it is evident that the conception of the legal effects of custom was still strong in the mind of the author. In an early passage he asserts that "uso", "costumbre", and "fuero" have naturally the character of law (derecho), and that they can hinder the law (*i.e.*, the written law).

The author distinguishes these terms with some care. "Uso", he says, arises from those things which men do or say for a long time and without any hindrance. "Costumbre" is described as that which a people does for ten or twenty years, with the knowledge and consent of the lord of the land, and the judgments of men competent to judge. "Fuero" arises from "uso" and "costumbre", but it differs from them, for it is related to all matters which belong to law and justice, and it is to be made with the counsel of good and prudent men, with the will of the lord, and the approval of those who are subject to it.

It is after Alfonso has thus dealt with law as custom that he goes on to deal with written law (ley), and he deals with this as a thing which arises out of customary law. The written law is, indeed, in his judgment more honourable and better than the customary law. It can only be made by wise and understanding men, and only by the greatest and most honourable lords, like emperors and kings, and the fact that it is written prevents it from being forgotten. Even here, however, it must be observed that Alfonso admits that custom can annul the "laws". It is clear that in Castile, as in the other European countries, even when the conception of the deliberate and conscious process of legislation became important, and when the written law was thought of as superior in some respects to custom,

law was still conceived of as arising from custom, and it was still recognised that custom might modify and abrogate law.

We must, however, examine a little further the principles of legislation in Castile and Leon. Alfonso, as we have just seen, recognises that laws are to be made with the advice of wise and understanding men; it might be suggested that this is not quite the same thing as the normal legislative method of other Western countries in the Middle Ages. We must, therefore, examine the proceedings of the Cortes of Leon and Castile, and of those less completely organised assemblies which preceded them. It will then become evident that these Assemblies, as far as they can be traced back, exercised a legislative or quan-legislative authority.

The Bishops, Abbots, and Optimates of what they term the kingdom of Spain met at Leon in 1020 A.D., and in the presence and at the command of the king, Alfonso and his wife made certain decrees which, as they said, were to be firmly established for future times. King Ferdinand held a council at Coyanza in 1050 with the Bishops and Abbots and Optimates of his kingdom, and there issued his decrees.

We have an explicit declaration of the legislative authority of these councils in a clause of the proceedings of that Council of Leon, probably of the year 1188, in which there is a reference to the presence of elected representatives of the cities. (We shall return to this matter in a later chapter.) The king, Alfonso IX, promised that he would not make war or peace or issue a decree (placitum) without the counsel of the bishops, nobles, and good men by whose counsel he recognised that he ought to be ruled.

We find the same King Alfonso IX at a council held at Leon in 1208, which was attended by the bishops, the chief men, and the barons of the whole kingdom, and the representatives of the cities, issuing a law, after much deliberation and with the consent of all.

Finally, we find the same principles of legislation expressed by Alfonso X himself, in issuing the decrees of a council held at Valladolid in 1258 for Castile as well as Leon. He relates how he had taken counsel with the archbishops, the bishops, the "ricos ommes", and the good men of the cities of Castile, Estremadura, and Leon about many things which had been done to the hurt of himself and all his country, and that they had agreed to put an end to these. To that which they had established he gave his authority, that it should be received and kept throughout all his kingdoms. It is not necessary to carry the matter further, for it is evident that we have here the normal procedure in legislative or quasi-legislative action. The same or similar formulas are used and the same principles expressed in the proceedings of the Cortez of Valladolid of 1295 and 1299, of Burgos in 1301, of Palencia in 1313, and of Burgos in 1315.

It appears to us to be evident that the Spanish conception of the nature and source of law was in its most important aspects the same as that of the other countries of Western Europe.

It is then, we think, clear that the normal tradition of the thirteenth century was characteristically represented by the words of Bracton which we have cited. The emperor or king had his place in legislation, but it was not an isolated place, nor had he any arbitrary or unlimited authority. When circumstances called for anything more than the enunciation or restatement of custom, the ruler acted with the counsel and consent of the great men, lay and ecclesiastical, and behind them we see more or less distinctly the whole community, for, as must be remembered, the custom of the community was the ultimate source of law

CHAPTER VI.
THE SOURCE OF THE LAW OF THE STATE
II.

We have in the last chapter seen that the normal conception of the Middle Ages was that law is the custom or the declared will of the whole community, and that this continued to be predominant in the thirteenth century.

It is, however, true that it is in the twelfth and thirteenth centuries that we find the appearance and the first development of another conception of law—that is, the conception that the prince, whether emperor or king, is the sole source of law; and there is no doubt that we have here the beginnings of a political idea which became of high importance in that change in the political civilisation of continental Europe which accompanied the Renaissance.

There can be no doubt as to the literary source of this conception; it was the study of the Roman law as revived first in Bologna, and then throughout Europe. We have in a previous volume considered in detail the most important aspects of the political conceptions of the great Civilians of Bologna, and we must refer our readers to this for a detailed discussion of the matter.

We must, however, remind them that the theories of the Bologna jurists about the sources of political and legislative authority had two aspects. They all accepted from the Roman law the principle that the emperor had the power of making law, and they all held that this authority was derived from the Roman people, who had conferred upon him their own legislative power. They differed on the question whether the Roman people had so alienated their authority to the emperor that they retained no power of legislation, and could not reclaim it, or whether this grant of authority was subject to the controlling power of their own custom, and could be resumed by them. It is, however, true that in either form the conception that the ruler exercised in his own person the legislative authority of the community was wholly new to the Middle Ages, and in this chapter we must consider the question how far this new conception assumed an important place in the political theory of the time. That it had little practical importance we think we have made clear in the last chapter.

We begin, therefore, by considering the evidence of some of the jurists of the thirteenth century, apart from those with whom we dealt in the second volume. The most important of these Civilians was Odofridus, but two others, Boncompagni and John of Viterbo, are worth noticing. Boncompagni's work, 'Rhetorica Novissima', as it appears, was produced in 1235, and in it he uses some words which are significant of his conceptions of the relation between the emperor and the law. In one place he suggests a form of words with which the emperor might be addressed. "Most serene emperor, who keepest all natural and civil laws in the shrine of thy heart", and in another place he describes the greatness of the jus civile, and refers to the words of Theodosius and Valentinian that, though the prince is "legibus absolutus", he acknowledges that he is bound by the laws. John of Viterbo, whose work is probably later, in the course of an important discussion of the nature and relations of the spiritual and temporal powers, to which we shall recur, says that God subjected the laws to the emperor, and gave him as a living law to men. These phrases are rhetorical and not very important, but they are interesting as expressing in very high terms the principle that the emperor was the source of law. Much more important, however, are the emphatic words of Odofridus, who died, according to Savigny, in the year 1265, which we cited in the last chapter, especially as bearing on the continuing legal authority of the custom of the Roman people; but his words have a much larger significance than this. He not only maintains that it was the Roman people from whom the emperor received his legislative authority, but he vehemently contradicts the opinion of Placentinus, that the emperor alone had now the power of making laws. He maintains that, on the contrary, the

Roman people could still make laws, and he audaciously interprets the assertion of Justinian that in his time only the emperor could make laws as excluding not the people, but only other individual persons, and adds that, when it was said that the people transferred its "imperium legis condere" to the prince, he understood this to mean that it granted its authority to him, but did not abdicate its own power. Odofridus, it would seem, looks upon the prince as one to whom the legislative power may be entrusted, but he refuses altogether to recognise him as the sole legislator. It is clear that Odofridus continued the tradition of Azo and Hugolinus, and that, while they accepted the tradition of the Roman law, that the prince had been invested by the people with legislative authority, they also represented the normal mediaeval principle that the community continued to be the source of law.

It is interesting to observe that the same principle is maintained by the most important contemporary jurist of the kingdom of Naples, Andrew of Isemia, in his work on the Constitutions of the kingdom of Naples. He was evidently a pupil of the Bologna Civilians, but was also familiar with the principles of the feudal jurists. In one place, where he is commenting on the legal doctrine that it was by a "lex regia" that the people had transferred its authority to the king, he maintains that the legislative authority was inherent in the royal office, so that, if today a free people were to set up a king, he would "eo ipso" possess the authority of making laws, and that the same thing would hold if the king were created by some person who had authority to do this, as the Pope had in the case of Sicily. But he also suggests that a people who had transferred their authority to a king might revoke this for a reasonable cause, as, for instance, if the king should become a tyrant and abuse his power, or if he should prove unfit for kingship.

We turn from the jurists to the general political literature. And first we must examine the position of Aquinas. It is not easy to define his position in precise terms, for while his treatment is characteristically lucid up to a certain point, he, curiously enough, omits to deal explicitly with some important questions concerning the source of the legislative power.

We have in an earlier chapter discussed the terms of Aquinas' distinction between Natural and Positive Law, and we have seen that he says that Positive Law arises from a common agreement. In another clause of the same article he explains that an agreement might be either private or public, and a public agreement is either that to which the whole people agrees, or that which is ordained by the prince who has the care of the people, and bears its person (qui curam populi habet et ejus personam gerit), and this is Positive Law. The statement is significant of the nature of law, but it does not explain how the prince comes to have the care of the people and to bear its person.

In another passage he indicates, indeed, very plainly the nature and purpose of law—*i.e.*, the law of any particular community. He begins by citing the words of St Isidore of Seville, "Lex est constitutio populi, secundum quam majores natu simul cum plebibus aliquid sanxerunt", and continues that law is directed to the common good. To order things for the common good belongs either to the whole multitude or to him who represents (gerens vicem) the whole multitude, and therefore the authority to make law belongs either to the whole multitude or to that public person who has the care of the whole multitude. The statement is clear and important, both in its description of the end or purpose of law and in the words used to describe the legislator as "gerens vicem"—that is, as the vicar or representative of the multitude, and his responsibility for the good of the community; but again Aquinas does not tell us how the "public person" comes to have this authority.

The truth is that St Thomas clearly held that there were two possible cases with regard to the law-making power. In a passage to another part of which we have already referred in dealing with the authority of custom, he says that either the multitude may be free and can make laws for itself, or it may not possess the free power of making laws, or abrogating the laws made by a superior. In another place he relates the different kinds of laws to the forms of the constitution of the State : in the kingdom there are the constitutions of the prince; in the aristocracy, the "responsa prudentum" or the "Senatus consulta"; in the democracy the "plebiscita", but again he does not discuss the question

how these various authorities came to have the legislative power. He does, however, in this passage indicate his own clear preference for a mixed constitution in which, as St Isidore had said, the laws are made by the "majores natu cum plebibus."

In the next chapter we shall have occasion to consider more fully St Thomas' theory of the best form of government and the nature and limits of political authority, and we shall consider how far this may be thought to throw any further light upon his theory of legislation.

In the meanwhile it would seem true that St Thomas had no one definite theory as to the source of legislative authority, but rather seems to think that in some constitutions the people are the ultimate source of law, in some not. It is certainly very singular that St Thomas, who was evidently well acquainted with the Roman law, should nowhere refer to the universally accepted doctrine both of the Corpus Juris Civilis and of the Bologna Civilians, that it was the Roman people who had conferred upon the prince his legislative authority. If we were to venture a conjecture, we should be inclined to say that this may possibly be a consequence of his study of Aristotle's discussion of the various forms which government may assume. Even so, it is curious that he should not show the influence of Aristotle's consideration of the question whether it was better to be governed by the best men or by the best laws.

In the last years of the thirteenth century the theory of an absolute monarchy was asserted by an important writer, by that Egidius Colonna to whom we have referred in an earlier chapter, as illustrating the influence of Aristotle, not, indeed, that in this matter he follows Aristotle; on the contrary, as we shall see, he deliberately differs from him. The origins of the position of Egidius are indeed obscure; there is no trace in his work of the conception that this absolute authority rests upon a "Divine Right"—that is, upon the theory that the prince was in such a sense the representative of God that he must be obeyed whether he was good or bad, right or wrong. This theory was stated by St Gregory the Great, and was known in the Middle Ages, and had even been asserted by some writers in the course of the struggle between Henry IV. and the Papacy, but it does not appear that it had any importance in the twelfth and thirteenth centuries, nor does Egidius Colonna appeal to it. What is, however, much more remarkable is that Egidius Colonna does not seem to derive his principles, at least directly, from those Civilians who had maintained that the whole and sole legislative authority in making law belonged to the emperor. It cannot be doubted that he was acquainted with the Roman law and the work of the Bologna Civilians, but it is not from these that he draws his arguments. It is possible that this may partly be explained by his curious and somewhat laughable contempt for the lawyers; in one place he speaks of them as "ydiote politici".

The immediate antecedents, therefore, of this defence of absolutism are obscure, but the importance of it is great. Some two hundred years later Sir John Fortescue drew a sharp distinction between the "regimen politicum et regale" of England and the "regimen regale" of France, between the kingdom where the king governs according to laws made by the whole community, and the kingdom where the king makes the laws himself. It may, indeed, be doubted whether Sir John Fortescue was not, for his own time, pressing the distinction too far, whether it was really true that the constitutional principles of the French kingdom were in his time as clearly defined as he thought; but he was only anticipating the full developments of the seventeenth and eighteenth centuries.

However this may be, the distinction which Fortescue made was one of the greatest significance, and it is here, for our purposes, important to observe that the distinction between the two forms of government was already being made at the end of the thirteenth century, and that Egidius Colonna expressed his preference for the "regimen regale".

Before we consider his position, we may, however, observe that a distinction which is parallel, if not quite identical, is discussed by Ptolemy of Lucca, to whom is now generally ascribed the authorship of the greater part of the treatise, 'De Regimine Principum', which was begun by St Thomas Aquinas. In one place Ptolemy ascribes to Aristotle the distinction between two forms of

government, the political and the despotic. He describes the first as that in which the country or community is governed, whether by many or by one, according to its own laws (ipsorum statuta), while in the second the prince governs according to a law which is in his own heart, and this form of government has the advantage that it is more like that of God. On the other hand, the despotic government, which is in its nature like the relation of the master to the slave, is in its nature arbitrary, and he illustrates this by the words in which Samuel described the nature of kingship to the Israelites, and pointed out to them the advantages of the "regimen politicum" which he and the judges had administered. Ptolemy contends that there are considerations in favour of each form, which he now distinguishes as the "regimen politicum" and the "dominium regale". The first is well adapted to the state of innocence or to the rule of men who are wise and virtuous, like the ancient Romans, but the second to the government of those who are perverse and foolish, and the number of the foolish is infinite. He also urges that the characteristics of the peoples who inhabit different parts of the world are different, and that some seem adapted to slavery and some to freedom. There are therefore, he concludes, some reasons for preferring the "polity" to the kingdom, and some for preferring the "regale dominium" to the "polity."

Ptolemy of Lucca was a pupil of St Thomas Aquinas, but we must not attribute to St Thomas the responsibility for the indifference with which he treats the two forms of government. St Thomas does, indeed, recognise that in some cases a people is free and makes its own laws, while in others it does not possess this power; but in one place at least, as we have seen, he does express his own preference for the mixed constitution in which the laws are made by the "majores natu cum plebibus". Still less must we attribute to St Thomas the responsibility for the dogmatic preference which Egidius Colonna expresses for the "regimen regale".

We must now examine the position of Egidius in more detail. The work with which we are here concerned is his treatise, 'De Regimine Principum'. It was written probably before the death of Philip III of France, to whose son, afterwards Philip IV, Egidius was apparently in some relation of tutor or teacher. We have already drawn attention to his position, as having learned, probably through St Thomas Aquinas, to know of the Aristotelian political theories. We are here concerned with his conception of law and its relation to the prince.

Egidius makes a distinction between the "regimen regale" and the "regimen politicum" like that of Ptolemy of Lucca. The State may, he says, be ruled in two ways; the "regimen regale" is that under which the prince rules according to his own will (arbitrium) and according to laws which he has made himself. The *regimen politicum* is that where the prince rules, not according to his own will or according to laws which he made, but according to the law which the citizens have made. As he puts it in another place, laws may be made either by the prince or by the whole people, if it is the people which rules and elects the ruler.

Like Ptolemy he recognises the two forms of government as possible and legitimate, but he also contends that it is better to be ruled by the king than by the law. This is the more remarkable, because he carefully states that Aristotle had maintained that the true prince was an instrument of the law, and that it was better to be governed by a good law than by a good king. Egidius states Aristotle's argument as he understood it, but only in order to maintain the opposite—namely, that it is better to be ruled by the king than by the law; and he adds that, while the king is under the natural law, he is not under the positive law.

This is, indeed, a highly significant development of political theory, for this is a thoroughgoing contradiction of the principles of Bracton, and practically of all mediaeval theory, for the principle that the king is the servant and not the master of law belongs not only to the feudal system, but to the whole structure of mediaeval society, and is expressed by practically all the mediaeval writers, except some of the Bologna Civilians. It is, indeed, with Egidius Colonna, as we have said, that we

come on the beginning of that conception of the monarchy which was to be developed in the sixteenth and seventeenth centuries.

It must, however, be observed that Egidius carefully and consistently maintains the Aristotelian principle that the test of all good government is that it is directed to the common good, and that, just because the prince makes the laws and is himself a living law, he must maintain justice; and that if he fails to do this he is not worthy to be a king, and loses the royal dignity. He does not hesitate to describe the ruler who pursues his private good and not the public welfare as a tyrant.

In a later work, written, as it is thought, in 1297, with reference to the abdication of the Papal throne by Pope Celestine in 1294, while Egidius maintains that those who are superior in intelligence and energy should rule over others, he also argues that this must be done by the consent of men, and that by this same consent the ruler may retire or be deposed. This belongs, however, rather to the subject of our next chapter, but we mention it here as confirming the impression of the last passage cited.

It is, however, also noticeable that in one place he urges that when it is considered how much good arises from kingship, not only when kings rule well, but even when in some respects they play the tyrant, the people should strive to obey, for some tyranny on the part of the ruler is more tolerable than the evils which would arise from disobedience to the prince.

The position of Egidius Colonna is, as we have said, remarkable, and different from the normal mediaeval tradition.

It may possibly be suggested that we have here at least some significant evidence as to the tendency of the political institutions and theory of France. We must observe, however, that while it is true that Egidius was writing in France, and for a French prince, he was not himself a Frenchman, but an Italian.

There are two contemporary French writers with whom we shall have more to do later, but whose work we may examine with regard to our present point. The first is the author of the tract entitled 'Disputatio inter Clericum et Militem', which deals with the conflict between Boniface VIII. and Philip the Fair, written not earlier than 1296. In one passage he claims that the legislative power of the king of France is the same as that of the emperor, that as the emperor has power to make and unmake laws for the whole empire, so also the king of France has power not only to repudiate the laws of the emperor, but also to promulgate new ones ; he can add to, can diminish, or modify laws and privileges, taking account always of equity and reason, for he has no superior. The author seems to mean that he can do this, either by his own authority or with his chief men. The author is clearly thinking of the legislative power of the French king in terms of the position of the emperor in the Roman jurisprudence; and while he formally allows for the possibility of the king legislating with the advice of his "proceres", he does not seem to think of this as essential.

The second is John of Paris, whose tract on the Royal and Papal power was written probably in 1302 or 1303, also in relation to the conflict between Boniface VIII and Philip the Fair. John of Paris was a determined advocate of the position of Philip, and a penetrating critic of the papal claims. He maintains stoutly that the royal power was in no sense derived from the papal, but from God and from the people who had elected the king or his family. To maintain that it was the Pope who gave laws to princes, and that the prince could not establish his laws unless they were sanctioned by the Pope, was really to destroy the "regimen regale et politician"; and he goes on to make the distinction between the State where the ruler governs according to the laws which he had made, and that which is governed not according to the will (arbitrium) of the ruler, but according to laws which the citizens or others had established. The first government is called regalis, the second "civilis vel politicus".

John of Paris does not in this place express any preference for the one or the other, but a little later, in a passage probably founded upon St Thomas Aquinas, which we shall consider in the next chapter, he says that in his opinion the best form of government was that in which all the members of

the community have their share. Such a form of government, he says, is the best security for the peace of the people, and all men love and maintain it. He ingeniously argues that this was the form of government which God instituted for the Hebrews when Moses or Joshua occupied the position of a king, and seventy-two elders were appointed under them as an aristocracy of virtue, while these seventy-two were elected by the people and from the people, thus representing the principle of democracy. It is a mixed government of this kind which he considered to be the best, for in this constitution all would have some part.

It is clear that if, as is just possible, the author of the 'Disputatio inter Clericum et Militem' thinks of the king as the absolute legislator, John of Paris, like St Thomas Aquinas, prefers a mixed or constitutional government.

We have, then, considered in these two chapters how far the traditional mediaeval conceptions of the nature and source of law were continued in the later thirteenth century, and how far other conceptions had begun to appear, and as the subject is of the first importance for political theory, it may be well to state our conclusion in summary form.

We have seen that there was no hesitation about the principle that all positive law must express the principles of justice and "acquitas", and that its authority is always subject to that of the Natural Law. We have also seen that the writers of this century, whether theologians like St Thomas or Civilians and Canonists like Odofridus and Hostiensis, all held that custom was both the original form of law, and continued to have the force of law, and that they were therefore in substantial agreement with the great French and English feudal jurists of the century, like Beaumanoir and Bracton.

We have, however, also seen that in the course of the thirteenth century the conception of law as custom was being modified by another—that is, by the conception of law as the expression of a conscious will and determination. There is, as we have pointed out, an evident incoherence in the principles of law as set out even by Bracton and Beaumanoir. Bracton begins with the broad statement that English law was not written but customary, but he goes on to say that, in England, that has the force of law which was defined and approved by the authority of the king, with the counsel and consent of the great men, and the approval of the whole commonwealth; and Beaumanoir, who laid down the general principle that all pleas were determined by custom, and that not only the counts but the king must maintain the custom, also said that the king has power to make laws for the whole kingdom "par tres grant conseil et pur le commun pour fit."

To us it seems evident that there are here two conceptions or principles of law, and we venture to urge that the transition from the one to the other was of far-reaching importance, for we think that it is here that we find the first beginning of the modem theory of sovereignty—that is, the conception that there is in every political society the power of making and unmaking laws, that there is some final authority which knows no legal limits, and from which there is no legal appeal. (We do not, of course, mean that this conception is really adequate to the proper conception of law or sovereignty.)

It is, we think, clear where this conception found its literary source. The passage of Bracton, to which we have referred, seems to us to be an adaptation and modification of the famous phrase of Papinian. It was the Roman jurisprudence with its clear and emphatic doctrine that law was that which the Roman people, or those to whom it gave legislative authority, commands and establishes, which was the literary source of this conception. It is no doubt true that the principle was recognised as early as the ninth century, as we can see from the famous phrase of the Edictum Pistense, "Quoniam lex consensu populi et constitutione regis fit," and it may reasonably be urged that the mere development of mediaeval society and the growing complexity of its institutions would have, in the long-run, compelled men to recognise the necessity of some deliberate legislative process. It is, however, we venture to think, perfectly clear that it was the influence of the revived study of the

Roman law, and the interpretation and popularisation of its principles by the Civilians of Bologna, which gave form and expression to the new principle.

We can, indeed, also see the terms under which the new conception was reconciled to the older. In another phrase of Bracton, which we have cited in the fifth chapter, the laws made by the king with the advice and consent of the great men and the common approval, when they have been confirmed by the consent of these who are concerned (utentium) cannot be changed without the consent of those by whose counsel and consent they were made. Laws may, indeed, be made by enactment, but they are confirmed by custom. We see here the significance of that doctrine of Gratian's, that laws have no force unless they are approved by custom. We have pointed out that, while there was much controversy among the Civilians about the principle of the continuance of the legal effect of custom, the great mass of opinion was still clear that, even when laws were made by a definite and legitimate authority, the custom of the people remained supreme, and Gregory IX recognised this principle as holding in ecclesiastical law.

We have also seen that, so far as law was thought of in the thirteenth century as something deliberately made and promulgated, it was normally held that it was established, not by the prince alone, but by the prince with the counsel and consent of the great men and, in some general sense, the approval of the whole community. This is the principle of legislation which the Middle Ages left to the modem world. This was the principle of the feudal jurisprudence, and was represented in the constitutional practice not only of England, but of Western Europe.

The truth is that the conception of an absolute monarch, the source of law, and superior to all law, was wholly alien to mediaeval civilisation. Bracton's famous saying that the king is under God and the law represented the tradition not only of England, but of all Western Europe. So far as the law was not merely the custom of the community, it was the expression of the will and command of the community. This principle was, indeed, admirably expressed by one of the earliest jurists of Bologna, possibly Imerius himself, when he said that the "universitas"—that is, the people—establishes and interprets the law, for it is its function to care for all its members.

It is, however, also true that in the twelfth and thirteenth centuries we have found the first beginnings for the modem world of another conception of the source of law, that it is the prince or ruler who is the legislator, the fount of law; and there cannot be any doubt as to the origin of this conception. It came from Bologna, from the revived study of the Roman jurisprudence, from the Civilians. It was in this jurisprudence that they found the doctrine that while the Roman people was the ultimate source of all political authority and of all law, it had transferred its authority to the emperor. This conception was, as we have said, wholly alien to the normal principles and practice of the Middle Ages, and we may reasonably conjecture that it was the obvious incoherence between the principles of the ancient empire and the actual constitutional position of the political societies of the Middle Ages which led some of the most famous of the Bologna Jurists to maintain not only that the custom of the people retained its legislative authority, but also that the people could resume that authority which they had delegated to the emperor. We may also conjecture that it was the same feeling which led some very important Civilians to assert that the emperor could only exercise his legitimate authority with the counsel and consent of the Senate.

The Bologna Civilians were, however, rather interpreting the constitutional jurisprudence of the Roman Empire than advocating any one form of government for their own time, and it is not till the last years of the thirteenth century that we find a writer who maintained the intrinsic superiority of an absolute monarchy, for that is the position of Egidius Colonna in his treatise, 'De Regimine Principum'. Strangely enough, he does not, at least directly, show any influence of the Roman Law. He distinguishes between what he calls the "regimen politicum", in which the king governs according to the laws made by the citizens, and the "regimen regale" in which he governs according to his own will (arbitrium) and the laws which he has himself made. He contradicts, however, not

only the mediaeval tradition, but also the authority of Aristotle in order to maintain that it is the "regimen regale" which is the best.

We hope in the next volume to consider something of the history of the development of the theory of the absolute monarchy from the fourteenth century to the sixteenth.

Here we have only to say that this conception was, in the thirteenth century, isolated and merely academic. As we have already said, it was in the twelfth and thirteenth centuries that the modem theory of sovereignty began to appear, not merely as a theory, but as a practical conception in politics; but it was the theory of the sovereignty not of the prince but of the community.

CHAPTER VII.
THE SOURCE AND LIMITATIONS OF THE AUTHORITY OF THE RULER.

We have endeavoured in the last chapters to trace the sources and the nature of the law of the State as they appear both in the theory and practice of the thirteenth century. We must now turn to the different but related question of the source and nature of the authority of the prince or ruler. We have in previous volumes endeavoured to trace the history of these conceptions in the earlier Middle Ages; we must now consider how far they remained the same in the thirteenth century, and how far they were developed or modified.

We have in previous volumes considered the nature of the mediaeval traditions with regard to the immediate source of the authority of the ruler, and have pointed out how complex these were. The divine appointment, the hereditary succession within some one family, the election or recognition or confirmation by the community—all these elements have to be recognised as having had their place in the conception of succession to political authority. It may, we think, however, be reasonably said that, taking Western Europe as a whole, in the Empire the principle of election established itself with a strong preference for a member of what was considered the imperial family, while in England, France, and Spain the succession normally became hereditary within one family. This does not, however, mean that it was hereditary in the later sense, without reference to the capacity or competence of the person who claimed the succession.

The distinction between the elective and the hereditary principle is sharply drawn by Andrew of Isernia, in his commentary on the constitutions of the kingdom of Naples. He is maintaining that the king in his kingdom is equal to the emperor in his empire, and adds, the empire is "personal" because it is by election, while the kingdom may be called "real", for it is hereditary. Jordan of Osnabrück, in an oddly unhistorical passage, says that Charles the Great, with the consent and command of the Pope, had established the rule that the emperor should be elected by the German princes, while the kingdom of the French should be independent and hereditary. Frederic II, in his encyclical letter protesting against his deposition by Innocent IV, refers to the German princes as those upon whom his position depended, while Rudolph of Hapsburg naturally recognised the rights of those German princes who elected the Roman king.

The 'Sachsenspiegel', as we pointed out in the third volume, asserts that the king is elected by the Germans, and, indeed, in another place lays down the sweeping doctrine that all temporal authority is divided from election.

The recognition of the hereditary principle did not, however, mean that the authority of the ruler was not ultimately derived from the community. Egidius Colonna, in his tract on the resignation of Pope Celestine, maintains that it is according to nature that men should be set over men, and that the wise men should be set over the others; but he adds, this must be completed by the consent of men, and by the same consent of men the ruler may resign or be deposed. The position of Egidius is the more noticeable, because, as we have seen, he preferred an absolute to a constitutional monarchy, and he thinks of government as being the natural consequence of difference in wisdom and capacity.

James of Viterbo, in a work written about 1301, with which we shall have to deal later, in several places states that the royal authority is given to men either by the ordinance and common consent of the community, or along with this by the special appointment of God, or by those who stand in the place of God.

We have already cited the words of John of Paris, in which he indignantly denies that the authority of the king is derived from the Pope, and maintains that it comes from God, and from the people who elected him in person or in his family. John is plainly concerned to assert that the royal authority comes from the people, but he makes room for the hereditary principle, the people may have chosen a particular family in which the succession should continue by inheritance.

St Thomas Aquinas does not seem anywhere to discuss in general terms the immediate source of political authority, but it is significant that he lays great stress on the representative character of princes. They are, he says, to be held in honour, even though they are evil, because they bear the person of God and of the community. He does not directly deal with the question how they come to bear this representative character, but in the 'De Regimine Principum', where he considers the question what is to be done if the king should become a tyrant, he seems to recognise only two methods of creating political authority, the one where the people has the right to make its own arrangements for a king, the other where the right belongs to some superior.

He was, no doubt, thinking specially of possible cases under the feudal system, probably of feudatories of the Papacy.

The general mediaeval conception seems to us to be admirably expressed in the words of the speech which Matthew Paris puts into the mouth of Archbishop Hubert Walter at the coronation of King John. How far it represents anything which Hubert Walter really said does not for our purpose greatly matter; it is quite sufficient that Matthew Paris thought of it as representing what he thought appropriate to the occasion. In this speech we see the conception of the elective principle blended with the hereditary. No one, Matthew Paris represents the archbishop as saying, had the right to succeed to the kingdom, unless he had been elected by the "universitas" regni, but if one of the royal race were pre-eminent, the choice would the more readily fall upon him, and they had therefore unanimously elected John.

We shall, however, recognise more clearly the normal mediaeval conception of the relation of the authority of the prince to the community, when we now consider the nature and limits of that authority. We have, in the third chapter, dealt with the significance of the principle that political authority was legitimate only when it was directed to justice and the common good; we must now deal with this in greater detail.

We cannot do better than begin by observing the careful statement of the general principles of the nature and limits of political authority by St Thomas Aquinas. He is clear and emphatic in his statement of the doctrine that the authority of the ruler is derived from the Divine order, that obedience to it is required of Christian men, and that disobedience is a mortal sin; but he is equally clear and emphatic that the Christian man is only bound to obey as far as the order of justice requires; subjects are not bound to obey a usurper or an authority which commands unjust things.

In St Thomas' commentary on the 'Sentences' of Peter Lombard (one of his earlier works), he sets out more precisely the cases when the subject is not bound to obey. An authority may not be from God in two ways, from the mode of acquiring the authority, or from the use made of it. The defect in the mode of acquisition may be due to some personal defect, so that he is unworthy of it; this does not in itself hinder the right of authority, but it may be due to the fact that the authority has been acquired by violence or by some other unlawful method. This does completely destroy the validity of the authority, and unless it is afterwards sanctioned by the consent of the subjects, or by the authority of some superior, it may properly be repudiated. The defect arising from the use made of authority may again be of two kinds : if it is used to compel men to sin, the subject is bound to disobey; if it is used to compel men to render obedience in some matters to which it does not extend, as, for instance, if a lord endeavour to exact payments which the slave is not bound to give, then the subject is not under obligation either to obey or to disobey.

In order, however, to consider the whole significance of St Thomas' judgment, we must take account of his treatment of tyranny and the tyrant. We may begin by again observing his treatment of "sedition" in a passage which we have already cited. " Sedition", he says, is clearly a mortal sin, for it is directed against the unity of the community, which is founded upon a common system of law and the common good, and therefore sedition is opposed to justice and the common good. On the other hand, St Thomas is equally clear in asserting that the rule of a tyrant is not just, since it is not

directed to the common good, but to the private advantage of the ruler, and therefore resistance to such an authority is not sedition, unless it is so disorderly as to cause more harm to the people than the rule of the tyrant.

In the same passage of that early work on the sentences of Peter Lombard, to which we have referred above, St Thomas seems to go so far as to give his approval to the principle that it is lawful to murder the tyrant; at least he cites, without expressing his disapproval, a passage from Cicero, in which, as St Thomas understands him, he had defended this in the case when the tyrant had obtained his authority by violence against the will of the subjects, and when there was no superior to whom they could have recourse. We have seen in a former volume that this was the opinion of John of Salisbury.

It is, however, clear that this was not the mature judgment of St Thomas. It is in his treatise, 'De Regimine Principum', that he deals most precisely with the whole question of the relation of the community to an unjust or tyrannical ruler. In this treatise he explains in careful and measured terms that, in his opinion, the best form of government was that of a monarch devoted to the common good, because it tended most to the unity of the society, while the worst form of government was a tyranny, or the government of one man who pursues his own advantage. It is, however, necessary to make careful provision that the monarchy should not become a tyranny, and for this purpose it is necessary, first, that the person appointed to be king should be of such a character that it would not be probable that he should become a tyrant; and secondly, that his authority should be so restrained (temperatur) that he could not easily fall into tyranny. St Thomas evidently intended to deal with the matter further in this treatise; unhappily he never completed the work.

He has however fortunately, in the 'Summa Theologica', indicated very clearly what he thought about the best form of constitution, and we may conjecture that, if he had completed the 'De Regimine', it would have been under similar terms that he would have explained what he meant when, in the passage just cited, he says that the power of the king should be restrained. In the 'Summa Theologica' he gives as his own opinion that in a good government it is in the first place important that all should have some share in authority. This tends to the peace of the people, for all men love and maintain such an order; in the second place, the best constitution is that when one man is set over all on account of his virtue, and others govern under him also on account of their virtue. Such a constitution belongs to all, for the rulers can be elected from all, and are elected by all. Such a mixed constitution combines the character of a kingdom, for it has one head; of an aristocracy, for many have their part in authority on account of their virtue; and of a democracy—that is, of the authority of the people, for the rulers can be elected from the people, and their election belongs to the people. This, he adds, was the form of government instituted by the Divine law, for Moses and his successors ruled as kings, while the council of the elders represented the aristocracy, and as these were elected from and by the whole people, they also represented the principle of democracy.

This passage indicates very clearly what it was that St Thomas meant by a kingdom in which the authority of the king should be moderated or restrained; St Thomas clearly preferred a mixed or constitutional state. It is noticeable that, although we cannot say that he anywhere shows any special acquaintance with the actual constitutional movements of his time, in his treatment of the representative principle and the elective method of creating this representation, he comes very near to that constitutional development of which we shall have to speak in a later chapter.

The best form of government, then, in the judgment of St Thomas is a constitutional monarchy, and it is by means of the restraints belonging to such a constitution that the king may be prevented from becoming a tyrant. It still remains to consider what St Thomas thought should be done if the king, in spite of all precautions, should become a tyrant. It is this question with which he deals in detail in the sixth chapter of the 'De Regimine Principum'. In the first place, he urges that unless the tyranny is very grievous, it may be better to endure it for a time, lest matters should only be made

worse. Some, he says, have contended that if the tyranny is intolerable, it belongs to the virtue of brave men to slay the tyrant, and to run the risk of death in order to set the people free, but this is not in accordance with the apostolic teaching; St Peter said that we should be subject not only to the good, but also to the forward rulers, and St Thomas points out that the Christians did not resist the tyrannical persecutions of the Roman emperors. It would be dangerous not only to the rulers but to the people if it were to be determined by private judgment whether a ruler should be killed, for wicked men find the rule of a king as burdensome to them as that of a tyrant.

St Thomas, therefore, contends that the king who has become a tyrant should be dealt with by public authority. If it belongs to the lawful right (jus) of the people to appoint the king, it is right and just that the king whom they have created, if he has tyrannically abused the royal power, should be deposed by them, or that they should limit his power. The people are not violating their faith in deposing the tyrant, even if they had conferred upon him a perpetual authority, for he has deserved that the contract (or agreement, pactum) which was made to him by his subjects should not be kept, inasmuch as he had not kept his faith in the government of the people. St Thomas cites the expulsion of the Tarquins and the destruction of Domitian by the Roman Senate as examples of such constitutional action. If, however, the right of appointing the king belongs to some superior authority, recourse should be made to it. If there is no human help against the tyrant, men must turn to God, who is the king of all, and their helper in tribulation. It is thus clear what are the general principles of St Thomas with regard to the nature of the authority of the ruler, and the limitations upon that authority; it is, indeed, clear that his conception of a good constitution is that of a monarchy limited by the authority of an aristocracy elected by and representative of the community.

We can now consider this principle of the limitation of the royal authority in other writers. It may be well to begin by warning our readers against the misconception which might arise from the occasional use, especially by the Civilians or other writers who were familiar with the Roman Law, of the phrase that the emperor or prince is "legibus solutus". Civilians like Odofridus and Boncompagni cite the words, but add those of the rescript of Theodosius and Valutinian that it is right that the emperor should acknowledge that he is bound by the laws, and Vincent of Beauvais, in words which are plainly reminiscent of John of Salisbury, says that the prince is "legis nexibus . . . absolutus," not because he can act unjustly, but because he should be a man of such a character that he pursues equity not from the fear of punishment, but from love of justice, for in public matters he may not desire anything but that which law or equity and the public good requires.

We may compare the treatment of the relation of the king to the law, as it is expressed in the Spanish law-books of Alfonso X. He describes the office of the king in the highest terms; he is the vicar of God to keep his people in justice and truth in temporal matters, but he also maintains that he is specially bound to obey the laws, and this for three reasons : the first, because it is by the laws that he is honoured and protected; the second, because it is the laws which help him to fulfil justice and right; the third, because it is the king who made the laws, and it is right (derecho) that those who made the laws should be the first to obey them. Alfonso does not hesitate to say in another place that not only the king who has obtained his kingdom by force, fraud, or treason, but even the king who has obtained his authority by lawful means, if he misuses his power and turns his lordship from right to wrong, is a tyrant.

The truth is that the conception that the prince might or should govern according to his own will or pleasure was a purely academic conception, and had no relation to the principles of government in the Middle Ages, at least till the close of the thirteenth century. The normal conception of that time was really that of Bracton, to which we have so frequently referred, that the king was under the law as well as under God. Whatever may be the explanation of the development of the theory of absolute monarchy in the centuries from the sixteenth to the eighteenth, this theory was wholly alien to the Middle Ages.

It was alien, as we think, to the whole constitutional tradition of the earlier Middle Ages, but even if this had not been the case, it is obvious that the development of feudalism in the centuries from the tenth to the thirteenth would have rendered it not merely impossible, but to the men of that time unintelligible. For the fundamental character of feudalism is to be found in the principle that it was a system of mutual and fixed obligations. The obligations of the lord, and the mediaeval king was a lord, whatever else he might be, were not the same in all respects as those of the vassal, but they were equally fixed and binding; the rights also of the feudal lord were not the same in all respects as those of the vassal, but they were just as clearly and definitely limited as those of the vassal. We have dealt with this subject at length in the third volume of the work, and only add here a few further illustrations.

Martin Silimani, one of the Bologna Jurists of the later thirteenth century, who, like some other Civilians, also wrote on feudal law, discusses in one place the conditions under which a vassal would be liberated from the obligations of fealty. If a lord were to commit an act of "fellonia" of such a kind that, if the vassal were to commit it he would lose his fief, the lord would lose his property. Again, if the lord were to require of the vassal something dishonourable or base or unlawful, the vassal would be freed from his obedience.

Andrew of Isernia, as we have pointed out, in his commentary on the Neapolitan Constitutions, clearly holds that this principle applied to the king and his vassals just as much as to other cases. If the king attempts unjustly to seize and ill-treat a vassal, the vassal is not bound to obey the king's summons, for in such action the king is no king, and the lord loses his property in the fief, just as the vassal would lose his fief if he did not render justice to his lord.

Alfonso X sets out the same principles of the feudal relations in the 'Siete Partidas'; the mutual obligations of lord and vassal, and also the results of a violation, on either side, of these obligations. The vassal owes to his lord love, honour, protection, and loyal service, but the lord has the same kind of obligations to his vassal. The vassal will lose his fief if he fails to carry out his obligations to his lord, if he kills his lord's brother, or son, or grandson, or seduces his wife, or daughter, or daughter-in-law, but also, if the lord does any of these things to his vassal, the lord will lose his property in the fief. The 'Siete Partidas' distinguishes, indeed, between the feudal relations and those which it describes under the term "naturaleza"—that is, as we understand it, the natural relations in which a man stands to the lord of the land in which he lives,—but it emphatically asserts that this relation also is terminated by the wrongdoing either of the "natural" (the natural subject) or by that of the lord of the land.

The rights of the medieval prince were then fixed rights, limited and restrained by the law, and it is from this point of view that we shall best understand the origin and significance of the principle of the limitation of the rights of the king over the property of the subject, and the constitutional principle of the limitation of his rights of taxation.

We have pointed out in the second volume that there had been considerable discussion among the Bologna Civilians about the rights of the emperor over private property, and we have referred to Savigny as having put together the traditions as to the differences among them when they were consulted by Frederick Barbarossa on the matter. The doctrine that the emperor was the owner of all private property had been traditionally ascribed especially to Martinus; and it is noteworthy that Odofridus, the most important Civilian of the later thirteenth century, emphatically repudiates the doctrine. The emperor, he says, is "Dominus", "non quoad proprietatem sed quoad protectionem". Andrew of Isernia, who was learned in Roman law as well as in feudal, in his commentary on the Neapolitan Constitution, with equal emphasis maintains, as we have said before, that the prince cannot deprive a man of his property against his will, unless he has been guilty of some crime, and adds that to maintain that the prince could do this was to fall back into the error of Martin, who said that the prince was the owner of all things, "quoad proprietatem". John of Paris, in the course of a

discussion of the relation of the Pope especially to Church property, to which we shall have occasion to return, lays down dogmatically the principle that lay property belongs to individuals who have full power of disposing of it, and that therefore neither the Pope nor the prince has "dominium vel dispensationem" in such things. It is even more significant that Alfonso X in the 'Siete Partidas', after setting out in the highest terms the dignity and authority of the emperor, adds that when the Romans gave him this authority, they did not intend to make him the lord of men's property in such a sense that he could dispose of it at his capricious will.

It is evident that there had been some uncertainty among the Civilians about this matter, and it is possible that we have here one source of later theories about the authority of the absolute monarch in taxation. It is, however, also clear that in the later thirteenth century even those who were acquainted with the Roman law were controlled by the general conception of the legal limitations upon the rights of the lord, which were an essential characteristic of the feudal system. The property of the vassal was liable to certain demands on the part of the lord. In addition to other obligations of service he was bound to render monetary help in certain cases, and these were pretty much the same everywhere in Western Europe, but beyond these he was not normally bound. This is the significance of the clause of Magna Carta which lays down the rule that no scutage or aid should be levied in the kingdom except in the three cases, of the redemption of the king from captivity, the knighting of the king's eldest son, and the marriage of his eldest daughter, except by the common council of the kingdom. This is not a mere incident of a factious conflict, but the enunciation as a rule of the national constitution of England of that which was the common principle of mediaeval society.

It may, however, be said or thought that the limitation of the authority and rights of the prince was little more than a theory, and had little relation to the actual facts of mediaeval life. It cannot, indeed, be doubted that mediaeval society was often disorderly, and that it might at times appear almost anarchical. And it is not very difficult to see the cause of this. The administrative machinery of society in the Middle Ages was still very imperfect; it was only slowly that it was taking shape. It may perhaps be said that it was the failure of the Empire to develop this that was a cause as well as symptom of its gradual dissolution, in contrast with its successful development in countries like England and France. It is not, however, within the scope of this work to deal except incidentally with this matter.

It must not, however, be supposed that there was no provision in the political systems of the Middle Ages for the enforcement of the law, and even of what we may call the constitutional laws, the laws which restrained and limited the rights of the prince.

We have dealt with this matter in some detail in a former volume, and have pointed out that the feudal systems not only recognised the mutual and limited character of the obligations and rights of lord and vassal, but also provided in the feudal court an authority whose function it was to determine questions with regard to difficulties which might arise between lord and vassal. And we have pointed out that even Bracton says that, while the ordinary processes of law could not be used against the king of England, it might be maintained that failing any other remedy the "universitas regni", and the "baronagiiun" could deal with the matter in the king's court. We cannot here recapitulate our previous treatment of the subject, hut we may notice one or two illustrations of the same principles in writers with whom we did not deal in our earlier volume, and then consider some very interesting constitutional methods which are related to it.

Vincent of Beauvais cites from a writer whom he calls "Frater Gulielmus" the statement that if a vassal has "guerra" against the count, he is to have recourse to the authority of the king, and if the count has a complaint against the king, and the king will not do him right (give him law) by means of his equals in the Court, it is lawful for him to defend his right by arms, but he may not do this merely by his own authority.

Andrew of Isernia, in his 'Commentary' on the constitutions of the kingdom of Naples, emphatically asserts the general principle that there is a proper authority to decide cases which might arise between the lord and his vassal, that the lord cannot be judge in his own case, and that such cases are decided by the whole body of the vassals who are peers.

It is only when we take account of this fundamental principle of medieval constitutional law that we can properly understand the real significance of that famous clause of Magna Carta, in which it is laid down that no free man should be imprisoned or disseized or destroyed, or even attacked without the legal judgment of his peers, or the law of the land. We are not here concerned with the detailed interpretation of all the phrases of the famous passage, or with the question how far it may be thought to embody some legal principles which are distinctly English. It is enough for us to observe that it was not an isolated attempt to establish some new principle of the law and the constitution, but that it was in its most essential principle nothing but a restatement of the fundamental principle of the feudal and constitutional system of the Middle Ages; that whatever authority was possessed by the lord or prince, it was limited and controlled by the law, and that this law had as its guardian a properly constituted court, and that this applied to the king or emperor as much as to any lesser lord.

It is, then, from this standpoint that we can consider and understand some mediaeval forms of constitutional machinery, which at first sight may appear to the student merely eccentric or merely theoretical.

In the third volume we have drawn attention to the very interesting but apparently rather paradoxical doctrine of the 'Sachsenspiegel', that there is a judge even over the emperor —that is, the Count Palatine; this is repeated by the 'Schwabenspiegel'. We did not in that volume discuss the doctrine with any special reference to the German Empire or kingdom, but we must now return to it, for we shall find a most important illustration of its practical significance in the history of the later thirteenth century.

At the Council or Diet of Nuremberg in the year 1274 Rudolph of Habsburg asked the Council to determine who was to be judge if the king of the Romans had a complaint to make against any of the princes of the empire with regard to the Imperial property, or any injury inflicted upon the kingdom or the king. The princes and barons, who were present, formally determined that from ancient times it had been held, and still continued to be held, that the Count Palatine was the judge in any case which the emperor or king might bring against any prince of his empire. Rudolph accordingly brought before the Count Palatine the question of various possessions of the empire, which were detained by violence, and especially the question what was to be done about the King of Bohemia, who had contumaciously neglected to ask for enfeoffment. Judgment was given that any one neglecting to do this for a year and a day would lose his fief, and that the King of Bohemia should be summoned to appear before the Count Palatine to answer to the complaints of Rudolph, and the King of Bohemia was accordingly summoned.

We can find further and very interesting illustrations of such methods of the limitation of the royal power in the lawbooks and history of the Spanish kingdoms.

The 'Siete Partidas' asserts emphatically the general feudal principle that in the case of a dispute between the lord and Ids vassal about the fief, the case cannot be decided by the lord. It then prescribes a method of determination different from that of the other law-books. Instead of the reference of such disputes to the Court, it provides that the lord and his vassal are to choose one or two of the other vassals to whom the case shall be referred, and the parties will then be bound to accept this decision. And then it is added that this holds of disputes between the king and his vassals just as much as it does in the case of other lords.

In the proceedings of the Court or Cortes of Benavente of the year 1202, there is the record of a judgment given under these conditions upon a question at issue between the king and certain knights.

In the proceedings of the Cortes of Leon of 1188, we have an example of the more normal mediaeval method for the decision of cases between the king and his subjects. Alfonso IX swears that he would never take measures against the persons or property of any one, of whom evil had been reported to him, until he had summoned them to his Court, to do right according to the judgment of the Court. Another clause of the proceedings of the same Cortes affirms the principle that not even the king himself is to use any form of violence against a man or his property except by process of law.

This is expressed in still broader terms in the proceedings of the Cortez of Valladolid in 1299. No one is to be killed or deprived of his property till his case has been heard and decided by "fuero" and law, those who have been imprisoned are to be properly judged, and the Alcaldes and other officers are strictly forbidden to act against this rule. These phrases are almost curiously like those of the famous clause of Magna Carta.

We can find illustrations of the same principles and methods in the records of the other Spanish States. There are several examples of the judgments given by the "Curia" in cases between Raymond, Count of Barcelona, and his vassals, and we have an account of the settlement of a dispute between James, King of Aragon, and his seneschal in 1263; the king and his seneschal submitted their case to the decision of four arbitrators, and promised to accept their judgment.

When we take account of these obvious parallels between the general principles and methods of the political organisation of the Spanish States with those of Northern Europe, we find ourselves in a position to recognise the nature of that judicial officer, the "Justicia" of Aragon. At first sight his position may seem to us strange; that there should be an official whose jurisdiction extended even over questions at issue between the king and his nobles may seem paradoxical and anomalous. An interesting attempt has indeed been made to suggest that the office was in its nature of Moorish or Saracen origin, and it is very possible that some influence of this kind may be traced in its development in Aragon. We would, however, urge that the difficulty in understanding the character of the functions of the Justicia really rests upon the failure to observe such an important parallel to the office as the position of the Count Palatine in Germany, and the general principle that the feudal Court was normally supreme in all questions between the king and his vassals.

We have, then, endeavoured in this chapter to set out briefly and with special reference to the thirteenth century the principle that the authority of the mediaeval ruler was a strictly limited authority, that the conception of an absolute or arbitrary monarchy was wholly alien to the mode of thinking of that age, and that the legal or constitutional forms of mediaeval political societies embodied this constitutional conception—that is, that this was not merely a theory or ideal of government, hut that the mediaeval law provided in various ways for its enforcement. The imperfection or inadequacy of the machinery must not blind us to the recognition of the principle or of its practical importance.

CHAPTER VIII.
METHODS AND EXPERIMENTS IN THE CONTROL OF THE RULER.

We have endeavoured in the previous chapters to make it clear not only that the authority of the ruler, in mediaeval theory was a strictly limited authority, but that there was an appropriate legal machinery to enforce these limitations.

We must, however, in order to appreciate the significance of these principles, go somewhat further, and observe that not only the theorists but the Jurists recognised the propriety of what to the modem mind might seem extra-constitutional methods, by which in the last resort the ruler, if he were to refuse to submit to legal authority, might properly be coerced and even deposed. We must bear in mind that many actions which to us may seem extra-constitutional, would have been considered in the Middle Ages proper and legitimate methods, which were well within the principles of the political order.

We must consider, first, the meaning of the principle that in certain circumstances the subject had the right to renounce his allegiance and even to resist the prince by force. We must be careful lest we should misunderstand this, and look at it from the standpoint of modem conditions and ideas ; to us, no doubt, the refusal to obey the authority of the State appears as, normally, little better than anarchism; to the mediaeval mind it had not necessarily any such character.

The refusal to obey, the withdrawal of allegiance, might be to them nothing more than the legal maintenance of a legal right against an arbitrary and illegal action or demand.

The prince, no doubt, had his legal rights, but so also had the subjects; to them the prince was not normally a sovereign power behind and beyond the law, for he could only act within the law.

This is the meaning of what might at first sight seem the extravagant and eccentric constitutional methods which are set out in the ‘Assizes of Jerusalem’, both by Jean d’lbelin and Philip of Novara. They both maintain that, if the king were to refuse to allow any one of his vassals to bring a claim against him in the feudal Court, or were to refuse to carry out the decision of the Court, or if he were to seize and imprison his vassal without the judgment of the Court, then the vassals were to declare to the lord that they were bound by their obligations to each other and by their duty to maintain the honour of the Court, and that therefore they would renounce all service to him until he had submitted the matter in dispute to the judgment of the Court, and had carried out its decisions.

This is the constitutional meaning of the agreement which Matthew Paris represents the English barons as making at St Edmund’s in 1214. The barons had received from Archbishop Stephen Langton a charter of Henry I, and they agreed that if King John refused to grant them the laws and liberties contained in this charter, they would withdraw their allegiance, and would make war upon him until he should confirm, by a charter under his own seal, what they demanded. The barons were acting within the general principles of the feudal law in threatening to withdraw their allegiance, but it may be doubted whether they were not going beyond, at least, the letter of it, in threatening to make war upon the king. Jean d’Ibelin, in the ‘Assizes of Jerusalem’ while, as we have said, clearly maintaining that, if the king would not accept the decision of the Court, the vassals were to withdraw their allegiance, is also clear in saying that they could not bear arms or use force against him personally. The right of a vassal, to whom the king refuses to do justice in the Court, to make war upon the king, and to require his own vassals to follow him, was, however, recognised by that compilation of the later part of the thirteenth century which we know as the ‘Etablissements de St Louis’.

We may compare the somewhat intricate provisions of the ‘Siete Partidas’. If the king refuses any of his “Ricos Hombres” the judgment of the Court, he must give him thirty days within which he

may leave the kingdom accompanied by his sub-vassals, and he can then make war upon the king until he has succeeded in getting possession of the equivalent of that which the king took from him.

In other Spanish documents of the thirteenth century we find the admission or assertion of a more general right of resistance to any attempt to violate the "fueros" and usages. In a privilege granted in 1282 by Sancho, who was in revolt against his father, Alfonso, to the "Concejo de Briones," we find him approving resistance not only to the king, but to himself, and all others who should refuse to respect the "fueros" and customs.

There is, however, a greater constitutional significance in the formation and purpose of the "hermandades" or leagues between various cities and others. We have an excellent illustration of the nature and purpose of these leagues in the documents concerning the formation in 1282 of a "hermandad" between the towns of Cordova, Jahen, Baeza, Ubeda, Andujar, Arjona, and Sant Esteban, together with Gonzalo Ibanez, Sancho Sanchez, and Sancho Perez. They unite and form a "hermandad" among themselves to protect their "fueros" privileges and franchises, and they agree that if any lord either in the present or the future should attack them, they were bound to come to each other's assistance.

We have said enough, we think, to make it clear that the feudal law of the Middle Ages not only recognised that the ruler or prince was subject to the law, and that there was a proper Court to decide what was law, and to judge in cases of dispute between the prince and his vassals, but also that it recognised clearly that there was a legal method of enforcing the authority and judgment of the Court—that is, by the withdrawal of allegiance, and also that, at least in some cases, direct resistance to the arbitrary and illegal action of the ruler was itself legal.

The refusal of obedience was then the first aspect of what we may call the legitimate method of enforcing the limitation of the authority of the ruler. It is necessary to distinguish this, from the principle that in the last resort the prince who refused to obey the law might be deposed. To the modem mind the renunciation of obedience or the withdrawal of allegiance may seem indistinguishable from deposition, but it was not so in the Middle Ages.

Having then observed this, we must turn to the question of the deposition of the ruler. We are not here concerned with the mere fact of deposition, or with the justice or expediency of particular cases of deposition, but with the question how far this was thought of as being in principle legal and constitutional. We must begin by dismissing from our minds such a conception as that of the modem constitutional doctrine of England, that the king can do no wrong. Those who have any acquaintance with the English history do not need to be reminded that this doctrine, which might seem to represent a theory of absolutism, actually represents the method by which the arbitrary power of the monarch has been destroyed. In the Middle Ages this doctrine, however, had no place; the king, like any other person in the community, was responsible for his own actions.

We have in a previous volume dealt with the deposition of the Emperor Henry IV and the theory of that deposition as expressed by various persons, and especially by Manegold of Lautenbach; we have also discussed the theory of John of Salisbury that the unjust and tyrannical ruler has lost all right to authority, and may properly be attacked and even slain. We are now concerned with the question how far this principle continued to be held in the thirteenth century.

We may begin by observing some words of a writer who held what we have seen to be an unusual and even abnormal view of the nature of the regal authority—that is, Egidius Colonna. As we have seen, he maintained that the best form of political authority was that of a monarchy which was itself the source of law, and was above law. It was the same Egidius Colonna, however, who, as we have seen, in his tract on the resignation of the Papal throne by Celestine V, maintained that as the authority of the ruler must be established by the consent of men, so also by the same consent he might resign or even be deposed. With this we should compare the very careful discussion by St

Thomas Aquinas of the circumstances under which and the methods by which the tyrannical ruler should be deposed, with which we have already dealt.

We may now turn to the legal works and the records of constitutional proceedings, and we may begin by observing some words of the 'Sachsenspiegel'. No man may proceed against the king's life until he has been by proper sentence deprived of his kingdom. This is repeated in the compilation which we know as the 'Schwabenspiegel', but it adds that no one can declare judgment on the king's life or honour, except the princes. It is clear that both these works assume in principle that there is a legal process by which the king can be deposed. At first sight we might very well suppose that these were little more than the phrases of a theoretical system of law, but it is noticeable that even the great Frederick II used, if only incidentally and under circumstances which might well make such a statement diplomatically convenient, words which have the same implication. In the Encyclical letter which he addressed to St Louis of France and to the "Magnates Angliae", as well as to the princes of the empire, he protested against his deposition by Pope Innocent IV as being the action of a "judex incompetens", and urged that the sentence and the whole proceedings were null and void, for none of the princes of Germany "a quibus assumptio status et depressio nostra dependit", had confirmed them by their presence and counsel.

In the proceedings related to the deposition of Adolf of Germany in 1298, we find that the princes concerned assumed that they were acting by due process of law, and it is worth while to observe the procedure in a little detail. The Archbishop of Mainz called a Council to consider the troubled condition of Germany, and to this he summoned both the princes who had the right of election, and Adolf himself. The important princes present were the Archbishop himself, who was said to be acting also for the King of Bohemia; the Duke of Saxony, holding also the proxy of the Count Palatine; and the Margrave of Brandenburg. They enumerated various charges against him, the violation of Churches and ecclesiastics, the toleration of violence against women, the interference with ecclesiastical liberties, especially by demanding gifts before he would grant the "Regalia" to the bishops, and various acts of aggression upon the rights of the German princes, counts, barons, &c. They found Adolf guilty of these crimes, and declared that he had proved himself to be incompetent and useless for so great an authority, and therefore, after careful deliberation and by the common council and will of all the electoral princes, the bishops, dukes, counts, barons, and wise men present, the electoral princes declared Adolf deposed, and also absolved all men from their oath of allegiance to him.

In the promulgation of the deposition of Adolf, and the election of Albert Duke of Austria, issued by the Duke of Saxony, stress is especially laid upon the responsibility of the electoral princes for the peace and wellbeing of the empire, and upon the incompetence of Adolf. And the Duke of Saxony proclaims that they had therefore, after careful deliberation, and following the due process of law, deprived him of the kingdom.

We are not here concerned to discuss the real political causes of this action, or the question how far the action of the princes was reasonable and in the circumstances justifiable; we are concerned only with the fact that they represent themselves as exercising their constitutional power in accordance with constitutional law. We would suggest that this affords an illustration of the suggestion of St Thomas Aquinas, that there should be some method and form of public action by which the prince who proved incompetent or tyrannical should be deposed.

It is in truth clear that the authority of the medieval prince was not only limited by the law, but that some at least of the political systems of the Middle Ages provided a constitutional form by which this limitation might be enforced even by deposition. The right of withdrawal of allegiance and the right of deposition were, however, cumbrous and inconvenient methods for the restraint of the prince.

We must therefore now consider very briefly the significance of some very important thirteenth-century experiments in the establishment of easier and more effective methods of control. We do not pretend here to discuss the history of these experiments in detail; that has already been done for England with characteristic restraint and caution in the great work of Bishop Stubbs, and recently there has appeared an admirably detailed study of some aspects of these experiments. We are concerned with the political ideas which lay behind these experiments; for they were important not only in themselves but for that which they anticipated.

It is in England that we find the most important examples of these experiments, but there are also some important parallels in Spain.

This is the larger historical significance of the sixty-first clause of Magna Carta, the clause in which the king sanctioned the appointment by the barons of a Committee from their number, which vas to have authority not only to demand of the king and the justiciary the execution of the provisions of the charter, but to compel this with the assistance of the whole community (communa totius terrae), if necessary by force. No doubt the situation was exceptional, the good faith of John was more than doubtful, and it would be unreasonable to suppose that the barons thought that they were creating a permanent constitutional system. And yet it is in these provisions that we have the germ of the public control of what we should in modern times call the administrative action of the Crown.

If this arrangement stood alone, it would no doubt have little significance, but when we observe that the methods which were here proposed were carried much further in the demands of the barons of 1244 and 1258, this clause of Magna Carta receives a new importance.

We only know the demands of the barons in 1244 through Matthew Paris, and we must therefore treat the subject with caution, but it would appear from his narrative that the barons complained that the provisions of the great Charter were not being carried out, and they therefore demanded the appointment of a justiciar and chancellor. Matthew Paris also gives an account of a scheme of reform which seems to belong to the same time under which a new charter was to be drawn up, and its execution entrusted to four counsellors chosen by the common consent.

It is in the Provisions of Oxford of 1258 that we find these tentative schemes assuming a definite and precise form. Much in the details of these are difficult to make out, and we should refer to Bishop Stubbs for a complete account, but the general principles are clear.

A council of twenty-four was to be appointed, half by the king, half by the barons; the king's representatives were to select two of the barons' representatives, and the barons' representatives two of the king's, and these four were to elect fifteen who were to be confirmed by the whole twenty-four, and to form the perpetual council of the king. They were to have authority to advise the king on all matters concerning the government of the kingdom, and to amend and put in order all things which required this; and they were to have authority over the "haute justice" (the Justiciar) and over all other people. It was also of great significance that the justiciar, the treasurer, and the chancellor were to be appointed only for a year at a time, and were to give account at the end of the year; and that the justiciar was to swear that he would act according to the provisions to be made by the twenty-four and the council of the king, and that the chancellor was to swear that he would seal no writ except writs of course (brefs de curs) without the commandment of the king and his council who were to be present, or, as it is put in the passage cited before, he was to seal nothing outside of the ordinary course (hors de curs) by the sole will of the king, but only by the authority of the council, who were to be with the king.

It is no doubt true that St Louis in 1264 annulled the Provisions of Oxford, when they were submitted to his arbitration by the king and the barons, but his award was not accepted, and after the defeat of Henry III at Lewes, the system of the Provisions was re-established in the Parliament of 1264, with some modifications. Three electors were to be chosen, and the king was to give them

authority, in his place, to appoint a council of nine members of whom three at least were to be in rotation at the Court. By their counsel the king was to administer the affairs of the kingdom, and to appoint the justiciar, the chancellor, the treasurer, and the other officials both small and great.

We have an excellent commentary upon the principles which lay behind these proposals in the contemporary 'Song of Lewes'. This was no doubt written by a partisan of the barons, but it is not the less significant as illustrating the growth of the conception that it was not enough to have good laws, but that some machinery should be created which would secure that the king should carry out these laws. The whole poem is deserving of careful study; it is enough for us, here, to take note of its most important aspects. As the author sees it, the real question at issue was whether the king should be free to govern according to his own will, and with the advice of such counsellors as he might himself choose, or whether he was to rule according to the law, and with the counsel of those who represented the community and were acquainted with its customs.

The regulations of the Provisions of Oxford were annulled by the "Dictum de Kenilworth" after the defeat and death of Simon de Montfort at Evesham, but it is evident that they were not forgotten, for the "Ordinances" of 1311 repeat the provision that the great officers of the country were to be appointed by the king, with the counsel and consent of the baronage.

There are some interesting parallels to these English experiments to be found in Spain. From the proceedings of the Cortes of Cuellar in 1297 it would appear that the representation of the cities had, presumably at an earlier Cortes, appointed twelve "good men" to be with the king, who was a minor, and to counsel and serve him and the queen his mother, and his uncle, who was his guardian, and the king gives his consent to the arrangement.

On the death of King Ferdinand IV of Castile, his heir was again a child, and the Cortes of Palencia of 1313 not only elected his guardians, but also appointed a body of four prelates and sixteen knights and "good men" without whom nothing was to be done. A similar arrangement was made by the Cortes of Burgos in 1315; they appointed twelve knights and "good men", six from the "fijos dalgo" and six knights and "good men" of the towns, to be continually with the king and his guardians, who should receive complaints when anything was done wrong in the country and see to it that the guardians put it right.

It is no doubt true that these arrangements belong to troubled times during minorities, and that their significance must not be exaggerated, but the parallel to the "Provisions of Oxford" is remarkable.

These constitutional experiments are of great interest. It may, no doubt, be argued that in England they represent nothing more than the attempt of the baronage to establish their own control over the king and the country. We are, however, here not concerned with the question of their immediate conditions and causes; to us they are of the highest interest as representing some of the first attempts to devise a method by which the ruler might be compelled to carry out the law of the land, and be restrained within the limits of his authority by some method more normal and less revolutionary than the withdrawal of obedience or deposition. It was a long time before the principle of the responsibility of the ministers of the king to the community was fully established, but it was in that direction that these experiments looked, and they are therefore of great importance as representing an intelligible development of the mediaeval principle of the limitation of the authority of the ruler.

CHAPTER IX.
THE DEVELOPMENT OF THE REPRESENTATIVE SYSTEM.

We hope that we have succeeded in making plain the main elements in the normal political principles and practice of the Middle Ages, and especially the principle that the law was the supreme authority in the political society, and that all other authorities were subordinate and subject to this; and that, so far as men conceived of the law as having any other source than the custom of the community, it was the community as a whole, the king, the barons, and the people. We have endeavoured in previous volumes to show that these principles can be traced throughout the whole of mediaeval history, and in this volume we have, we think, said enough to make it plain that they were as clearly held in the thirteenth century as before.

It is true that the revival of the study of the Roman Law in the twelfth century had brought with it a new conception of the authority of the prince, and especially that of the prince as the source or fountain of law, and in a further volume we shall have to consider how far this may have contributed to the development of a new conception of monarchy. We have said enough, however, in this volume to make it plain that, as far as the thirteenth century is concerned, this conception was represented only in the purely academic discussions of some of the Bologna Civilians and in one or two quite abnormal political writers like Egidius Colonna. The normal conception was quite clear, that the law was supreme, over the prince as over all other members of the community, and that while the prince had his place, an important place, in the declaration and establishment of law, it was from the community as a whole that it proceeded.

It is not our part in this work to trace the development of the machinery of government in the Middle Ages, nor, indeed, is this necessary, for it has been handled with great learning by the constitutional historians. Our treatment of the principles of government would, however, be wholly inadequate if we were not, at this stage, to take account of their relation to that great system of the representation of the community which the Middle Ages created and handed down to the modem world. It is, indeed, a somewhat curious and even humorous thing to find, as we occasionally do, persons who claim to be attached to the traditional aspects of political institutions, criticising the representative system as though it were a modem thing, a product of some crude political idealism of the nineteenth century, or discussing the merits and demerits of a representative system upon merely abstract grounds. While all the time the truth is that the representative system was not only created when the civilisation of the Middle Ages was at its highest point, but that it was also the natural and logical outcome of its political conditions and ideas.

We must, therefore, briefly examine the nature and extent of this development in the thirteenth century, and must especially observe that it did not belong to any one western country, but was rather the common product of the common elements of political civilization. It is no doubt also true that the representative system was founded upon traditions and methods of social organisation which can be traced far back into the earlier Middle Ages. For the discussion of this question we must refer our readers to the constitutional historians; we must confine ourselves in the main to the thirteenth century, and we can for that time consider it in relation to England, Spain, the Empire, and France.

The immediate circumstances out of which it arose varied in the different parts of Europe, but we venture to think that it will not be incorrect if we say that behind the particular and local conditions we can see the recognition of the need of a more effective organisation of the national determination and resources than the feudal system could furnish.

We have in a previous volume pointed out how the principle of the national, as distinguished from the merely feudal, relations of the people to the ruler expressed itself. We venture to suggest that the development of the representative system was not only parallel to this, but was the

intelligible form in which the national as distinguished from the merely feudal principle was embodied. For, if the king was to become the national sovereign, as distinguishable from the feudal lord, it was necessary that there should be developed some new organisation which should relate him to the whole body of his subjects, which should make his action powerful and effective as being founded upon the counsel and consent of the community as a whole.

This is, we venture to think, exactly what is expressed in the terms under which the first representative bodies were summoned in England. It was in the course of the great conflict between John and the barons that for the first time we find men who seem to have the character of representatives of the counties summoned to meet the king in November 1213, and it is noteworthy that they were summoned to discuss the affairs of the kingdom with the king.2 We do not, indeed, know whether this meeting was ever held, but it is the principle of the summons which is to us important.

It was in the course of the long-drawn-out conflict between Henry III. and the barons that we find, in 1254, the second case of the summons of representatives of the counties to a council. And the writ of summons says expressly that two knights are to be chosen by each county to act in the place of all and each of the county. The purpose of the summons is that they should provide what "aid" (i.e., "financial aid") they would render to the king. In 1261 the barons summoned three knights from each county to meet them and to deal with the affairs of the kingdom, and Henry III, evidently anxious lest this should lend weight to the baronial party, instructed the sheriffs to see that these knights should not attend the council of the barons, but should come to him at Windsor, "colloquium habituros".

The further development of the principle of the representation of the community was brought about by the baronial party under the leadership of Simon de Montfort.

To the Parliament of 1264 were summoned, in addition to the prelates and "magnates", four knights elected by each county to deal with the affairs of the kingdom,3 and in the Parliament of 1265 this system of representation was completed by the summons not only of the knights of the shire, but of representatives who were to be sent by the boroughs of the whole country; and these representatives were summoned in the same terms as the prelates and magnates, to deal with and give their counsel on the establishment of peace and other affairs of the kingdom.

It was the great merit of Edward I that he recognised that a method which had grown up in revolutionary times, and had been last used by the opponents of the king, was really that which was best adapted to consolidate the unity of the kingdom and to increase its effective power. The terms under which he summoned the representatives of the counties or boroughs express very clearly the conception that it was desirable in important matters to take counsel with and seek the assistance, political and financial, of the whole community.

In 1282, in connection with the Welsh War, he summoned the knights of the shires and the representatives of the boroughs who were to have the full authority of the counties they represented, to hear and take action upon those matters which he should lay before them. The summons of representatives of London and a number of other cities in 1283 especially states that the purpose of this gathering was to consult with the king's faithful men what was to be done with David of Wales. In 1290 the knights of the shire were summoned to consider and consent to that which was agreed to by the lords and barons. In 1294 the knights of the shires were again summoned in almost the same terms. The summons to the Parliament of 1295 only expresses the same principle in larger and more complete terms. The bishops and representatives of the lesser clergy were summoned "ad tractandum ordinandum et faciendum nobiscum et cum ceteris prelatis et proceribus et aliis incolis regni nostri qualiter sit hujusmodi periculis et excogitatis malitiis obviandum". The earls and barons were summoned in the same terms. The representatives of the counties and burghs were summoned in terms which express very emphatically the principle that they were to have full powers to act for the

communities which they represented, and to accept the decisions which should be made by the whole assembly. The stress laid upon the principle that the representatives of the counties and boroughs were to receive complete authority from the communities which they represented, and that it was by the common counsel that all determinations were to be made, are of the highest significance. When we take account of this we shall understand that the citation, in the writ of summons to the Archbishop of Canterbury and the other bishops and clergy, of the words of Justinian, that what concerns all should be approved by all, must not be taken as a mere literary phrase, but rather as the embodiment of a general principle which underlies the whole constitutional development.

We have dealt first with the development of the representative principles and methods in England, but we must be careful to observe that this took place in Spain even earlier than in England, and was not less important. As we have seen in an earlier chapter, it was in and with the councils of the prelates and great men that the kings of Leon legislated or declared the customary law. In the proceedings of the Council of Leon, held in 1188, we first find a contemporary and explicit reference to the presence of elected representatives of the cities of Leon as members of the council, and the king promises that he would neither make war nor peace nor any "placitum" without the counsel of the bishops, nobles, and "good men" by whose counsel he ought to be ruled.

The presence of representatives of cities is indicated in the proceedings of the Council of Benavente in 1202, and in the Council of Leon in 1208, and it is specially mentioned in the latter case that the law issued by the king was made with the consent of all. In the proceedings of the Council of Valladolid of 1258, we find the "good men" of the cities of Castile, Estremadura, and Leon present along with the bishops and "ricos ommes", and the king again gives his authority to that which they had established. The representatives of the cities appear again in the proceedings of the Cortes of Valladolid of 1295 and 1299, of Burgos in 1301 and of Illescas in 1303. In the proceedings of the Cortes of Medina del Campo, 1305, we have a detailed statement that the king had instructed each "conceio" to send two representatives who should bring a carta de "personeria" (presumably a document showing that they had been appointed representatives), and these representatives are described as the knights and good men who came to the Cortes "por personeros de los conceios" of the cities and " villas" and "logares" of Castile. The purpose of the summons is described as being, to discuss with the king various matters concerning the service of God and the good of the kingdom. In the proceedings of the Cortes of Palencia of 1313 the representatives of the cities are described as good men, "personeros" of the "conceios" of the "villas" and "logares" of Castile who brought "cartas de personeria". In the proceedings of the Cortes of Burgos of 1315, they are described as "procuradores delos çibdades é delas villas del sennorio del dicho sennor."

It is thus clear that by the end of the twelfth century in Leon, and in the course of the thirteenth century in Castile, the representatives of the cities were regular members of the Cortes, and that they were appointed and sent by the cities. It is also clear that the Cortes were meeting frequently, and it is noteworthy that at the Cortes of Palencia, 1313, it was laid down that the guardians of the king, who was a minor, were to call together the Cortes every second year, and that, if they did not do this, the Cortes were to be summoned by the council of four prelates, and sixteen knights and "good men" who had been appointed to act with the guardians.

It is no doubt true that it is in Spain and England that we find the chief development of the attempt to provide some system by means of which the whole community might in some measure take its place in the control of government, but it is clear that the same thing was taking place throughout Western Europe. We find Rudolf of Hapsburg in his instructions in 1274 to the Archbishop of Salzburg and the Bishops of Passau and Regensburg authorising them to take into their counsels not only the lords and barons, but also the citizens and communities of the cities, on all matters which concerned the wellbeing and reformation of the empire. In the same year he summoned a general council or "Curia" of the empire, in terms very similar to those of Edward I in

1295—"ut quae singules tangere noscitur, ita a singulis approbetur", and it is evident from another document that among those summoned to the Curia were persons to be sent by the city of Lübeck.

Many years before this, indeed, we find Frederick II in 1231 summoning Siena and each of the Tuscan cities to elect and send representatives to a council to be held in April, with full authority from those who sent them to accept, what should be decided by the counsel of all, on behalf of those whom they represented. Later in the same year we find Frederick announcing to the Podestà and the Commune of Genoa that he proposed to hold a Curia in November to consider the conditions, and to set forward the peace of the empire, with the counsel of the Pope, the princes, and his faithful men. He therefore required them in the name of their fidelity to the empire to elect suitable men of their commune, and to send these along with the Podestà to the Curia at Ravenna, with full authority to take part in the deliberations and to carry out what should be decided by the general council. It may no doubt be said that in these summons we are dealing with the political and diplomatic methods by which Frederick was endeavouring to strengthen his position in Italy rather than with the development of constitutional institutions, but even if this is so, the use of an elective and representative machinery is important.

Frederick also made at least experiments in the kingdom of Sicily with representative methods both for the kingdom as a whole, and for its various provinces.

Finally, it was in 1302 that Philip the Fair called together the first States General of France, and these were composed not only of the prelates and magnates in person, but of representatives of the towns of the kingdom, who were to have full powers from the various bodies which they represented.

We think that these illustrations of the development of the representative system in the thirteenth century will be sufficient to prove its importance, and to make it plain that this was not an accidental or isolated phenomenon, due to conditions peculiar to England or to any other country, but rather represents the operation of forces and tendencies which belonged to the whole of Central and Western Europe. It is no doubt true that in each particular country we can in some measure trace particular circumstances or conditions out of which the representative system immediately arose, but it is highly improbable that it was by a mere coincidence that in all these countries the conflicts and difficulties of the time should have brought about the same development. It is much more reasonable to recognise that the rise of the representative system was the intelligible and logical development of the fundamental principles of the political civilisation of the Middle Ages.

CHAPTER X.
THE THEORY OF THE EMPIRE.

In the third volume of this work we dealt with the conception of a universal empire in the eleventh and twelfth centuries, and we came, then, to the conclusion that while the tradition of a universal empire was not dead, yet it is impossible to say that it had any real part in determining men's actions or the principles and theory of the structure of society. We must now inquire whether it had any place in the political theory of the thirteenth century.

We shall again find that the conception of the emperor as the lord of the world, as set over all kings and other political authorities, is found occasionally in certain writers, especially in some of the Civilians and at least in one Canonist. That eminent Civilian, Odofridus, to whom we have often referred, says in his comment on the rescript of Justinian which was prefixed to the 'Digest', that the Roman prince is called the emperor, for he should be able to rule as emperor over all who dwell under the sun. He was not apparently able to say that the emperor did exercise this authority, but he thought that he should properly be able to do so.

Boncompagni, in his 'Rhetorica Novissima', written in 1235, enumerates various forms under which the emperor should be approached. In one the emperor is addressed as that imperial majesty who, under the providence of God, possesses the monarchy of the whole world; in another as the emperor and Augustus who controls the whole world with the bridle of law and justice; in another, as that authority by whom kings reign and justice is preserved in the world, and to whom the Lord has given the power of the temporal sword.

These phrases are the expression of the traditional conception of the imperial authority of Rome, and are very natural in those who were legally subject to the emperor.

Somewhat analogous to these are the terms used occasionally in the imperial constitutions. In one of these Frederick II speaks of himself as being placed by God over kings and kingdoms. In 1239 Frederick issued his Encyclical Letter protesting against the action of Gregory IX in stirring up the Milanese and his other enemies against him. He concludes the form of the Encyclical which was addressed to the Germans, by adjuring them to remember the greatness and dignity of that empire on account of which they were envied by all nations, and in virtue of which they held the monarchy of the world. It is noticeable that he does not use these terms in the form of the same Encyclical addressed to Henry III of England.

More important, however, than these is the judgment expressed more than once by the great Canonist to whom we have frequently referred, the Bishop of Ostia. In one very important passage in the 'Summa Decretalium', he discusses with great care the relation of the imperial to the papal authority (to this we shall return later), and while he asserts the immense superiority of the spiritual as compared with the temporal power, he also asserts that the emperor is the lord of the world and that all nations are under him. That this is not a mere chance phrase would appear from the fact that in another work, the 'Commentary' on the Decretals, in dealing with another passage, he again expresses the same judgment.

This would be of considerable significance if we could take it as representing the general opinion of the Canonists and ecclesiastical writers, but this is not the case. Innocent III in the Decretal letter 'Per Venerabilem' not only says that the King of France recognised no superior in temporal matters, but founds upon this the conclusion that, if the king desired it, he could refer a question about himself to the judgment of the Pope. Pope Innocent IV, in his 'Apparatus' to the Decretals, says that some men (Canonists presumably) maintained that kings were not subject to the emperor but only to the Pope.

William Durandus, the most important Canonist and Civilian of the last part of the century, sets out quite definitely the opinion that there was no appeal from a judgment of the Court of France, for the French king recognised no superior in temporal matters; he is citing the authority of Innocent III, but speaks of this legal principle as one which was in fact observed.

It would appear then that, except for Hostiensis, the opinion of the Canonists of the thirteenth century was clearly against the theory of a political authority of the emperor over all other rulers. We have indeed found only one other ecclesiastical writer of the time of whom it can be said that he seems to hold that the emperor had this authority. This is the author of a tract written to support Boniface VIII against Philip the Fair of France. He says that all kings and princes acknowledge that they are subject to the emperor in temporal matters, and they must therefore admit that they are "mediately" subject in these to the Pope, for the empire is held from him; and, he adds, if they refuse to acknowledge that they are subject to the emperor, they must then admit that they are directly subject to the Pope in temporal things. We shall return in a later chapter to this writer's treatment of the temporal authority of the Pope.

Perhaps the most suggestive treatment of the subject is that of Andrew of Isernia in his 'Commentary on the Constitutions of the Kingdom of Naples'. The king, he says, who is monarch in his own kingdom makes laws even contrary to the positive law; but what, he asks, are these "universitates" which have jurisdiction, since the emperor is lord of all the world? He replies that they are kings who are free and exempt from the authority of the empire, as, for example, the King of Sicily, who holds from the Roman Church; and he seems to mean that this exemption was due either to long prescription, or to the grant of the emperor. Having thus explained the origin of this position, he sets out dogmatically the principle that every king, who is thus free from the empire, occupies the same position in his kingdom that the emperor does in his empire; the king is monarch in his kingdom. The king who is free from the empire has his own "fiscus", as the King of England, the King of Italy, and the King of Lombardy.

It would seem that Andrew of Isernia, who was presumably a Civilian by training, was already attempting to find a solution of the problem how the actual independence of various European States could be reconciled with the standpoint of the Roman law. The most important point, however, of his statement is that there were independent kingdoms which were not under the empire.

With Andrew of Isernia we may compare the terms of the great eulogy of the 'Empire', written by Jordan of Osnabrück in the latter part of the thirteenth century. He had the highest reverence for the Roman Empire, which was now held by the German nation, and solemnly warns the Romans and the Pope, as well as the German princes, of the great dangers which would be brought upon the world if the empire were to be destroyed, and he says that the authority of Caesar was above all other earthly authorities, and contained them all. In a later chapter of the same work, however, he gives, in a passage already cited, a curious account of the creation of the French kingdom by Charlemagne. He says that this kingdom, in contrast with the empire, was to be hereditary, and that the king was not to recognise any superior in temporal things.

The French writers of the thirteenth century repudiate emphatically the conception that the emperor had any authority in France. The author of the very interesting tract, in the form of a discussion between a knight and an ecclesiastic, written in the course of the conflict between Boniface VIII and Philip the Fair of France, says dogmatically that no one can make laws for those over whom he has no "dominion", and that therefore the French cannot make laws for the empire, nor the emperor for the King of France. And in another place he develops more fully still the principle that the true dignity and authority of the King of France is the same as that of the emperor, and contends that when the Empire of Charles the Great was divided, the kingdom of France retained the same powers as that part which had the name of the Empire.

John of Paris, writing on the same conflict, admits that there should be one spiritual head of the world, and that Peter and his successors held that place, not by the authority of some council, but by the institution of Christ Himself; but, he continues, this is not true in temporal matters, for there is no Divine law that the lay people should be subject in temporal things to one monarch. It is true that in one place he uses a phrase which is a little ambiguous. The king, he says, is supreme in his kingdom, and the emperor, if he were monarch, would be lord of the world. It is not very easy to say what John means. That he does dogmatically repudiate any claim to superiority on the part of the emperor in France is, however, clear from a later passage in which he discusses the "Donation" of Constantine—we shall return to this in a later chapter; he argues that, whatever may be the validity of the donation, it has no reference to France, for the Franks were never under the domination of the Roman Empire.

The position of France is clear, and we can now observe that the position in Spain was the same. In one place in the 'Siete Partidas' Alfonso X uses the highest language to describe the dignity of the emperor, and his place as the vicar of God in the empire to do justice in temporal matters, as the Pope is God's vicar in spiritual things. A little farther on, however, he uses practically the same terms to describe the dignity of the king; he also is the vicar of God in his kingdom, to maintain justice and truth in temporal things as the emperor does in the empire. A little farther on Alfonso even argues that kings have not only the same powers in the kingdom as the emperor has in the empire, but larger powers, because they hold their lordship by inheritance while the emperor holds his by election; and in yet another place he says explicitly that by the grace of God he has no superior in temporal matters.

It is plain that while Alfonso X may think of the emperor as having the place of highest temporal dignity in the world, he quite as clearly repudiates the notion that the emperor has any authority over other kingdoms, and indeed claims for the king exactly the same authority as that of the emperor.

The conclusion, which appears to us reasonable and well-founded, is very much the same as that which we expressed at the end of our third volume—that is, that while the conception of the political unity of the world under the one authority of the emperor still survived as a theory in some quarters, it had no real significance in the political theory of the thirteenth century, or in the actual structure of political society. We venture to think that it is time that students of history should recognise this, and should recognise that it is not really in accord with the characteristics of the political order of the Middle Ages to think of them as tending towards an international or universal unity, as far as this was to be found in the temporal order. What importance there may have been in the conception of a political unity under the control of the spiritual power we shall consider in detail in the second part of this volume. In our next volume we hope to consider what was the real importance and significance of such conceptions as those of Dante and other writers of the fourteenth century.

As far as the mediaeval civilisation in the proper sense is concerned—that is, the civilisation which reached its culmination in the thirteenth century,—we feel ourselves compelled to say that its tendency was not towards unity but rather towards disintegration, not indeed to such a confused anarchy as that of the tenth century, but to the development of the national system of modem Europe. How far this system is again to be transformed by the creation of some new organisation of unity the future alone can show.

PART II.
THE THEORIES OF THE RELATIONS OF THE TEMPORAL AND SPIRITUAL POWERS.

CHAPTER. I.
INNOCENT III.

In a previous volume we have dealt with the theories held by Innocent III regarding the relations between Church and State so far as they appear from the Decretals. These passages are very important but they do not cover the whole ground, and it is necessary to consider his sermons and letters not included in the Decretals.

The compiler of the Decretals did not hesitate to include very strong statements regarding the powers and pre-eminence of the Popes; these do not, however, give a complete idea of Innocent's claims. So far as they go we have shown, in discussing the relevant passages, that while Innocent held that the spiritual power was greatly superior in dignity to the temporal, yet he also held that both alike were of divine appointment. In the case of the empire Innocent admitted the right of the German princes to elect their king to be promoted to the empire, after his coronation by the Pope, but he claimed the right and authority to examine the person elected and to decide whether he was fit for empire. He also claimed the right to decide in the case of disputed elections. In the case of disputes between rulers, Innocent claimed the right to arbitrate where a question of sin was involved.

In the Vercelli case he laid down the rule that suitors would not be heard by the Holy See in matters within the jurisdiction of the secular courts, unless justice were refused by the civil authorities concerned. Should justice be refused, recourse might be had to the bishop or to the Pope; especially at a time when the empire was vacant and there was no superior to whom they might appeal for justice. Finally, it seems that he maintained that it was for the Pope to decide in cases where it was uncertain whether the matter was one for ecclesiastical or for secular authorities to deal with. The passages cited in the Decretals, from Innocent, do not include any reference to Constantine's donation, but there is an important statement on this subject in one of his sermons to which we shall refer later on.

Every reader of Innocent's letters must be struck by his tremendous assertion of the Pope's exalted position. Gregory VII was content to be the vicar of St Peter. For Innocent, the Pope is the vicar of Christ (or sometimes of God); less than God but greater than man; the successor of Peter and vested with the same powers. Thus in a sermon on the consecration of the Pope (possibly the sermon preached by him on the day of his own consecration) he speaks of himself as placed above all peoples and kingdoms, endowed with the fulness of power, less than God but greater than man, judging all, but judged by God alone. In another sermon on the anniversary of his consecration he speaks of his marriage to the Church (of Rome) and of the dowry he has received—a priceless dowry, the fulness of spiritual and the "latitudo" of temporal powers. As a sign thereof he has received the mitre to indicate his spiritual and the crown to indicate his temporal power. His authority is divine rather than human. He has received of God such fulness of spiritual power that no increase thereof is possible. Innocent complained in March 1211 to the Archbishop of Ravenna of the behaviour of Otto IV. From his letter it appears that many held that he had brought his sufferings on his own head by raising Otto to the throne. His reply was that God Himself said He repented having created man. As there is no acceptance of persons with God, so there can be none with him. He has been exalted to a throne where he judges even princes, and should the King of France,

trusting in his might, oppose the Pope's commands, he will be unable to stand before the face of God, of whom the Pope is viceregent. Innocent compares the despatch of his envoys to the faithful, to the missions entrusted by Christ to his disciples. He cannot tolerate contempt shown to himself, nay, rather to God whose place he holds on earth. Philip (of France) should recognise what honour and glory he had received from all Christians for his obedience to the Pope's orders. Kings so revere him that they hold devoted service to him to be a condition of good government. Injured persons may have recourse to the Pope, the highest authority, and bound to do justice as "debtor both to the wise and to the unwise". The Archbishop of Tours is commended for consulting the Pope about matters regarding which he was in doubt, as the Apostolic See has by divine ordinance been placed over the whole world, and should be referred to by all in doubt on any matter. The King of Armenia is praised because he sought the help of the Roman Church, not only in spiritual but also in temporal matters, and because he appealed to it to help him in defending his just claims. The name of the Apostolic See is revered even among nations which do not know God.6 God who "wrought effectually in Peter to the apostleship", also "wrought effectually" through Innocent, persuading Philip by means of the papal legate to make a truce with Richard. He writes to Richard of England that he has taken action after consulting with the cardinals, and in accordance with divine revelation (divinitus revelatum). The pre-eminence of the Apostolic See is due, not to the decree of any synod but to divine ordinance. There proceeds from the Apostolic See a sword, very sharp and swift, and it binds those whom it strikes, not on earth alone but also in heaven.

It is as the successors of Peter that Innocent claims for the Popes their exalted position. In virtue of this succession they are vicars of Christ, and as his vicars they have received from him authority (principatum et magisterium) over all Churches, over all clerics, nay more, over all the faithful. Others have limited rule, the Pope alone has the fulness of power. While the Popes are inferior to Peter in sanctity and in the power of working miracles, they are in every respect his equals so far as their jurisdiction is concerned. It is from St Peter that the Apostolic See (or as Innocent also calls it the Roman Church, or the Universal Church) has received the primacy over all other Churches. James, the brother of our Lord, content with Jerusalem, left to Peter the government not only of the Church Universal, but also of the whole world (saeculum).

We must now examine what authority Innocent did claim as Pope in temporal matters. In a previous volume we have seen that in one of his letters he compared the pontifical and the royal authority to the sun and moon. In another letter he developed this. As the moon receives its light from the sun, so the splendour of the royal power and authority is derived from the pontifical authority. The logical conclusion would appear to be that the royal authority is derived from the pontifical. Innocent, however, did not draw the conclusion, though here as in other cases he appears, consciously or unconsciously, to be laying a foundation for future explicit claims. It is clear from other letters that Innocent did not as Pope claim supreme temporal power. Thus, in a letter to the consul and people of Jesi, he speaks of his unlimited spiritual jurisdiction over peoples and kingdoms, while by the grace of God he has also much power in temporal matters. Again, in a letter to the Archbishop of Bavenna, he writes, that ecclesiastical liberty is nowhere better secured than where the Boman Church has authority both in temporal and in spiritual matters. In the Government of the Ecclesia two swords are required, the spiritual and the material. Both are given by God direct; the one to spiritual and the other to temporal rulers. We shall deal later on with Innocent's reference to Constantine's donation; we need only mention here that he treats the donation by the emperor as of grace, and there is no suggestion, as in Innocent IV's letters, that the Pope only received from Constantine that to which he was already entitled.

We have still, however, to explain Innocent's explicit assertion of Peter's supremacy, not only over the whole Church, but also over the whole "saeculum" or "mundum". It was in virtue of his office as Christ's vicar, in succession to Peter, that he appointed and deposed kings, that he gave

them protection, that he ordered contending parties to make peace, that he took the orphans and widows of crusaders under his protection, and that he confirmed treaties of peace, agreements, grants, and statutes. We shall give some examples of the action taken by him in various cases, and the grounds given by him for taking it.

Towards the end of 1199 or the beginning of 1200 Innocent had written Kaloyan of Bulgaria (whom he addressed simply as "nobilis") asking him to receive his legate. Kaloyan did not reply till 1202. In his letter Kaloyan, who styled himself emperor, asked the Church of Rome to grant him a crown and the honours given to his ancestors. Innocent replied on the 27th November 1202, addressing Kaloyan this time as "dominmus" of the Bulgarians and Wallachians, informing him that he found in the papal registers that many kings, of the lands now subject to him, had been crowned, and that his chaplain whom he was sending to Bulgaria would, among other matters, inquire into the facts regarding the crown conferred by the Church of Borne on his ancestors.

As Bulgaria had only regained its independence from the Greek Empire a few years before, and the fourth crusade had just commenced, caution was obviously necessary in formally recognising the Bulgarian kingdom. In the following year, after the capture of Constantinople in July and the restoration of the emperor Isaac Angelus to the throne, the situation had altered. Some time before September 1203, Kaloyan wrote Innocent telling him that the Greeks had sent him their patriarch, promising to crown him as emperor, and to make his archbishop a patriarch (Innocent had not done so), but he refused their advances and again asked the Pope to have him crowned as emperor and to promote his archbishop. Innocent replied holding out to the "dominus Bulgarorum" hopes that his requests would be granted. A few months later the Pope wrote Kaloyan, "the King of the Bulgarians and Wallachians", that he was sending him by a cardinal, a sceptre and a diadem. In virtue of his power as vicar of Christ, and hound to feed his sheep, he appointed him king over his flock, trusting in the authority of him by whom Samuel anointed David as king, and seeking to provide for the welfare of the people both spiritually and temporally. Before his legate crowned him, Kaloyan was to swear that he and his successors, and all the lands and peoples subject to him, would remain devoted and obedient to the Roman Church. As requested by Kaloyan's envoy, he gave the king authority to mint money with his image on it (tuo charactere insignitum). There is no reference in this letter to the previous history of Bulgaria, nor to the inquiries previously ordered by Innocent, the action is based solely on Innocent's authority as vicar of Christ. In a separate letter, probably written at the same time, he sent the king a standard (vexillum) to "use against those who honour the crucified one with their lips, but whose heart is far from him."

Sverre, the King of Norway, had for some time been engaged in a serious conflict with the Church in Norway, and Innocent directed that his followers should be excommunicated and their lands placed under interdict. He also ordered the King of Denmark (per apostolica scripta mandamus) to take up arms against him. He also directed the Archbishop of Norway to excommunicate a bishop supporting him. This was in 1198. In 1211, long after Sverre's death, the disputed succession again came before Innocent, the supporters of his descendants still refusing to accept the Pope as arbiter.

Besides appointing and deposing kings, we find Innocent actively supporting them. Thus in March 1202, before John's final breach with Philip, Innocent wrote the Archbishop of Rouen, directing him to take action against John's rebellious barons in Normandy, or in his other lands in France. He was, on the Pope's authority, to warn them, and if this failed he was to inflict ecclesiastical punishments.

We may take other instances of Innocent's action in protecting kings from his dealings with Hungary. It is noticeable that, though the Roman Church had long-standing claims on Hungary as a feudal State, the Pope does not issue any of his orders as feudal lord of the kingdom. Bela, King of Hungary, was succeeded by his son Emerich, who had been crowned during his father's lifetime.

Coelestine III forbade the Hungarians to assist Andrew, Emerich's brother, on pain of excommunication, and in support of this policy one of the first letters written by Innocent after his accession was to the Abbot of St Martin's, summoning him to Rome to answer for the support he had given to Andrew. Before his consecration he also wrote Andrew, directing him to carry out the promise he had given his father to go on crusade. In case of failure he would be anathematised, and should his brother die childless he would be passed over in the succession by his younger brother. In June the same year, at Emerich's request, Innocent allowed the king, so long as Hungary was in a disturbed state, to retain in the kingdom any twenty crusaders he chose. He wrote at the same time to Andrew, ordering him (per apostolica scripta tibi mandamus) to be faithful to his brother, and forbidding him to make an armed attack on the king or to stir up sedition against him. Disobedience was to be punished by excommunication, and his lands and those of his supporters were to be placed under interdict. In February 1203 he directed the archbishops and bishops in Hungary to give an oath of fidelity to Ladislaus before his father, Emerich, started on crusade. He gave this order that the pontifical authority should so guard and defend the kingdom that it could not be transferred to another. A year later, at the king's request, he ordered the Archbishop of Gram to crown his son, though a minor; the father giving, on behalf of his son, the customary oath of obedience to the Roman Church, and an undertaking to maintain the liberty of the Hungarian Church. In April 1205, after the death of Emerich, the Pope wrote, as vicar of Christ and bound by his apostolic office to protect minors, directing Andrew not to allow the regalia to be dispersed during the minority of his nephew, Ladislaus. At the same time he directed the Hungarian clergy to defend the king against attack. In June 1206 he again addressed the Hungarian prelates and nobles on behalf of Ladislaus, directing them on pain of ecclesiastical penalties to take the oath of fidelity.

We must turn to another important aspect of Innocent's relations to the Temporal Power. We find him frequently intervening in conflicts between rulers, endeavouring to persuade or compel them to peace with each other. We shall in later chapters have to consider the similar action specially of Boniface VIII, and in our next volume we shall have to deal with some works which seem to indicate that the conception of some international system or method of setting forward peace was, for some time at least, of importance.

In a previous volume we have dealt with Innocent's letter to the French archbishops and bishops regarding his claim to arbitrate between Philip, King of France, and John, King of England, and requiring the cessation of hostilities.

There were many previous and subsequent cases in which Innocent directed the contending parties to make peace or a long truce, but this case is remarkable from the stress laid by Innocent on the fact that he was taking action on a complaint by John that Philip had sinned against him, and that he was therefore bound as Pope to deal with the complaint and to inquire into the charge. This was the letter finally selected for the Decretals, no doubt because it appeared to give the Pope all the power he required, while avoiding the appearance of direct intervention in political controversies. It would be difficult to conceive of a case in which one or both the contending parties could not be accused of sin.

According to Wendover, a papal legate had endeavoured, in 1189, to compel Philip of France and Richard to come to terms with Richard's father, Henry II., and had threatened to put all Philip's lands under interdict. Philip refused to submit to the legate's orders, and denied that the Roman Church had any right to sentence a King of France for punishing a rebellious vassal, the very point taken by Philip in 1203. In 1198, the first year of Innocent's pontificate, Richard appears to have complained to the Pope of injuries he had received during his absence on crusade. One of the persons he accused was Philip. The Pope replied that Philip had brought counter charges, and that he hoped to be able to come himself and inquire into the matter. Should he be unable to come, he would have the matter settled by a legate. He concluded his letter by a peremptory order to Richard to make

peace and to keep it; otherwise, trusting in the power of the Almighty, whose vicar he was, he would by ecclesiastical pressure compel him and the King of France to keep the peace. He also wrote a similar letter to Philip, dwelling on the obligation that lay on himself as Pope to restore peace among those at variance with one another.

While Philip and John were at war in 1203 the Pope issued peremptory orders to Philip to make peace, or a truce with a view to a lasting peace.

He threatened Philip in case of disobedience with ecclesiastical penalties, and wrote a similar letter to John. In his letter to Philip he based his action on the duty laid on him to seek peace and ensue it. He dwelt on the horrors of war, and on the encouragement given to the Saracens by this conflict between Christians. He was bound to interfere lest the blood of the multitudes slain be required at his hand, and he therefore sent his envoys to secure peace, or a truce leading to peace, between the two kings. Philip, before answering, called a meeting of his magnates, ecclesiastical and lay. After he was assured of their support, he replied, according to a papal letter, that he was not bound to submit to the papal decision in feudal matters, and that the Pope had no say in controversies between kings. Innocent, in his reply, expressed his astonishment that the king should appear to wish to limit the Pope's jurisdiction in matters. He expressly disclaimed any intention of dealing with a feudal matter, but with the question of sin, raised by John's complaints against Philip. This is the first letter in which the Pope refers to these complaints. He still dwells in this letter on the evils and wickedness of war. This was on the 31st October 1203. A few months later, probably in April 1204, Innocent wrote the French ecclesiastics a letter, portions of which were incorporated in the Decretals, and to which we have previously referred. In this letter the Pope lays much more stress than in his letter to Philip, on the fact that he does not desire to diminish or to interfere with Philip's powers, and he emphasises the fact that he is dealing with a question of sin in which the Pope's jurisdiction could not be questioned. He makes a very brief reference to the horrors of war, but the special feature of the letter, included in the Decretals, is the stress laid on John's complaint that he had been sinned against.

Innocent asserted his right to intervene in quarrels between secular rulers before and after his contest with Philip, but he did not endeavour to justify his action as based on a complaint by one of the parties. We shall cite a few cases.

In 1199 there was a dispute regarding Borgo San Donino between Piacenza and Parma. Innocent wrote that "inasmuch as according to the apostle love is the fulness of law, dissension makes men transgressors of the divine law", and he directed his representative to require Piacenza and Parma to come to terms, and if they failed to do so of their own accord, to compel them, if necessary by excommunication, to submit to the Pope's judgments. Here it will be observed that the mere fact of dissension is treated as a sin, and as giving the Pope ground for compelling submission to his judgment. In 1207 Innocent wrote the Florentines requiring them to make peace on reasonable terms with the Siennese, as the quarrel was the cause of "grave rerum dispendium," grave injury to men's bodies, and "immane" danger to their souls, while it belonged specially to the Pope, as vicar of Christ, to restore peace. He had accordingly instructed one of his cardinals to take the necessary action, and should either party prove contumacious, he was to deal with it by ecclesiastical censure.

In 1209, in a letter to the consuls and citizens of Genoa, Innocent dwells on the danger to souls, the injury to property, and the "porsonarum dispendium" caused by the quarrel between Genoa and Pisa, and on his duty to deal with those disregarding his orders. He refers also in his letter to the way in which the quarrel hindered relief being given to the Holy Land.

The last letter we shall refer to, in this connection, is one addressed by Innocent to John in April 1214, a few months before the battle of Bouvines. In it Innocent directed John, on pain of ecclesiastical censure, to make a truce with Philip to last at least till after the General Council, summoned for 1215, was over, and it appears from the letter that he also wrote to Philip in similar

terms. He gave these orders as the war between John and Philip prevented help being sent to the Holy Land and was causing other dangers, and he was therefore bound in virtue of his office to intervene. Besides ordering an immediate truce, Innocent directed that two arbitrators (mediatores pacis) be appointed to treat for a permanent peace. Should they fail, the two kings were to submit to Innocent's decision, and give guarantees that they would obey. There is no reference to any complaint by either party, and it is singular Innocent should have ventured to give peremptory orders after his previous rebuff by Philip. Possibly he counted on the political situation to compel the parties to yield.

The cases we have cited appear to show that Innocent held that as vicar of Christ he could require the rulers of States or cities at war with one another to cease hostilities and to submit to his judgment, even though neither party had appealed to him.

There was another class of cases in which Innocent frequently intervened—namely, where the interests of widows and minors were concerned. He describes himself as "debtor to widows and orphans"; and one of those whose wrongs he endeavoured to right was Berengaria, the widow of Bichard I. In this capacity in 1204 he wrote John that he had given orders that unless he voluntarily did justice to Berengaria, he would be compelled to do so by ecclesiastical pressure. Next year he wrote again on the same subject, as the representative of Christ, who is no acceptor of persons and who does justice to all, and accordingly directed John to carry out his agreement regarding Berengaria's dowry. Should John fail to do so, an inquiry was to be made and the proceedings referred to the Pope for orders. In 1208 the dowry had still not been paid, and Innocent wrote to John that if he did not admit any obligation to her, he should refer to the Pope, who as the vicar of Christ was inspired by God in his judgments. John had failed to appear before the Pope, though Berengaria had been represented, and Innocent could no longer postpone action. Should he not appear within a month all lands included in Berengaria's dowry would be placed under interdict.

Shortly after his accession there was a remarkable case of papal intervention. Innocent gave as the ground of his action that by virtue of his office he was bound to give comfort to the afflicted, and he therefore ordered the release of Sibilla, widow of Tancred, and of others all imprisoned by the orders of Henry VI. in Germany. It seems very unlikely that Innocent would have ventured to issue such orders except in the state of confusion in Germany due to the death of Henry VI and the dispute as to the succession. Innocent not only ordered the release of Sibilla and other prisoners, but directed the recipients of his letter to excommunicate those holding the prisoners in custody, and to place the whole diocese in which they were imprisoned under interdict. There is no suggestion in the letter that the Pope had acted as feudal overlord of Sicily. He based his action entirely on his duty as Pope to comfort those in trouble.

Crusaders were under the special protection of the Church. We need only refer to a few letters issued in the first year of Innocent's reign as Pope. In one letter to the Archbishop of Magdeburg and his suffragans he directs that the property of all crusaders, from the time they take the cross, be taken under the protection of St Peter and of himself, as well as of all archbishops and bishops. He also gave instructions regarding the action to be taken in the case of wrongs done to crusaders placed under the protection of the Church during their "peregrinatio". In the same year he gave orders to Philip of Swabia and to the Duke of Austria to return the ransom paid by Richard for his release while he was on his way back to England from Palestine.

An important function of the Pope at this time was to confirm agreements between secular rulers. For obvious reasons it was often of great advantage to both parties to have an agreement solemnly confirmed by the head of the Church and recorded in his registers. A case in point is his confirmation at the request of the King of France of an agreement between him and Count Baldwin of Flanders. It was, Innocent wrote, his duty in virtue of his apostolic office to provide for the peace and quiet of all, but it was specially incumbent on him in this case owing to his affection for the king

and owing to the advantage (commodum) to the Church when Philip and his kingdom were at peace. He confirmed the agreement as reasonable, drawn up by religious and prudent persons, properly authenticated and sworn to, and accepted by both parties (ab utraque parte recepta). Frequently in confirming agreements the Pope laid down that any one infringing them should be dealt with by ecclesiastical censure (this would ordinarily be excommunication).

Besides confirming agreements, we find other cases in which Innocent directed the clergy to enforce orders given by a prince—*e.g.*, he wrote the Archbishop of Guesen and his suffragans directing them to enforce the decision of the Duke of Silesia that Cracow should always be held by the eldest son of the reigning duke.

We have already referred to the Vercelli case, in which Innocent laid down that injured persons were entitled to appeal to the Pope for redress where there was no other competent court or temporal superior to do them justice. He quotes Alexius as urging this principle in an appeal to the Pope against his uncle, another Alexius, who had usurped the empire of the East. In this case political considerations, and possibly also the difficulty of enforcing an award, may have prevented his taking action. A remarkable instance of intervention, going apparently far beyond the Vercelli case, occurred in 1205, when he directed the Archbishop of Armagh to deal with a complaint brought by one Norman noble in Ireland against another. The complainant alleged that he had been compelled by force to give up his property in Ireland and leave the country and abandon all his claims there. Innocent's orders to the archbishop were to inquire, and should he find that war had been levied unjustly on the complainant, the aggressor must restore the property taken and release him from his oath. Should he disobey the archbishop's orders, he was to be excommunicated, his lands placed under interdict, and the complainant released from his oath.

Among the most noteworthy incidents of the pontificate of Innocent III. is the Albigensian Crusade. The two great headquarters of Manichean forms of heresy, at the end of the twelfth century, were Southern France and Northern Italy, and specially the former. These forms of heresy had long engaged the attention of the ecclesiastical and of the secular authorities. As far back as 1022 a number of heretics had been condemned at a synod held at Orleans, and the matter had repeatedly come before other provincial synods, some of them presided over by popes. In 1179 the Lateran Council referred in one of its decrees to the open profession of heretical doctrines in Gascony and in parts of the county of Toulouse. The faithful were bidden protect the Christian population against the heretics. The property of heretics was to be confiscated, and it was declared that their rulers might lawfully enslave them. Those who took up arms against them were to receive some remission of the penalties of their sins, and they were to have from the Church the same protection as was given to crusaders. Two years later Lucius III at Verona, supported by Frederick I, anathematised the Cathari and other heretics, and on the advice of his bishops at the suggestion of the emperor, he directed that inquiries should be made by the clergy in every parish where heresy was suspected. Counts, barons, "rectors", &c., were to swear, if required by the archbishop or bishop, to help the Church against heretics and their supporters. Those disregarding the order were to be punished by excommunication, and their lands to be placed under interdict. Cities resisting the order were to be cut off from intercourse with other cities, and to be deprived of their bishoprics.

Innocent held it to be one of his most important duties to deal with heretics, as his office required of him to maintain the kingdom of God free from scandals. In April 1198 he despatched a monk named Rainer to visit the South of France, and he ordered the ecclesiastical and secular authorities to help him. He ordered them in the case of obstinate heretics, excommunicated by Rainer, to confiscate their property and to banish them. Should the heretics stay on after Earner had issued an interdict, the nobles were, as became Christians, to deal still more severely with them. Earner had received from the Pope full powers of excommunication and interdict, and the princes must not be displeased at such severity, as Innocent was determined to do all in his power to

extirpate heresy. Any one who favoured or shielded such heretics was also to be excommunicated and was to receive the same punishment as those whom they favoured.

In the same year he confirmed orders issued by his legate in Lombardy forbidding the admission of heretics to any dignities; nor were they to be allowed to take part in elections. All podestas, consuls, and members of official bodies were to swear to maintain these orders. In the same letter he confirmed the authority given by the legate to the Archbishop of Milan to enforce these provisions by excommunicating any who might prove contumacious, and by placing their lands under an interdict. In a letter to the King of Hungary the Pope stated the penalties he enforced against heretics (in his own territories), and asked him to banish them and to confiscate their property.

Returning to Innocent's action with regard to heresy in France, we find that for several years he endeavoured to deal with the heretics of Toulouse and of the neighbouring districts through their rulers, but relations became more and more strained. In 1207 Raymond, the Count of Toulouse, was excommunicated by Peter of Castelnau, the papal legate, and Innocent wrote the count, endorsing his legate's action and threatening to take away lands held by him of the Church, and to summon the neighbouring princes to take away his other lands. A few months later, 15th January 1208, Peter was murdered. The Pope, acting on suspicion of his complicity, again excommunicated the count, and a crusade was started against the heretics.2 Innocent also authorised the seizure of his lands by any Catholic, subject to the rights of the overlord. The Pope had before this made several ineffectual attempts to get Philip, King of France, to take the matter up, but Philip was not prepared to run any risks with King John of England still on his hands, and he even attempted to limit strictly the number of crusaders from his kingdom, but had to withdraw his orders in view of the popular enthusiasm. He also took exception to the Pope's orders regarding the count's lands.

After the conquest of Baziers by the crusaders, they bestowed it on Simon de Montfort, their leader. This grant was confirmed by Innocent, who also gave orders that each house should pay annually three denarii to the Holy See as a sign that Simon de Montfort would maintain them in devotion to the Holy See and to the true Church. When later on he was pressed to agree to the confiscation of all the lands of Raymond of Toulouse, he refused on the ground that he had not so far been convicted of heresy. Innocent, notwithstanding his treatment of the Count of Toulouse in 1208 in connection with the murder of the papal legate, yet had doubts in the matter, and was disinclined to press matters too far, but the more violent party in the Church prevailed, and at the Lateran Council of 1215 the lands already taken by the crusaders from heretics and those who had supported them, including those of Raymond, Count of Toulouse, were made over to Simon de Montfort "ut eam teneat ab ipsis a quibus de jure tenenda est," thus reserving the rights of the suzerain, the King of France. Raymond was deprived of his lands, as he had failed to deal with heretics and "ruptarios". A decree was also passed regarding heretics generally, providing for the confiscation of the property of any convicted of heresy or of failure to deal with heresy. The punishment in the case of contumacy, to be inflicted by the Pope, was the release of vassals from their obedience, and the lands of the rulers were to be open to occupation by Catholics who extirpated the heretics, subject always to the rights of the overlord. Provision was also made for annual inquiries by the bishops in any parish where heresy was suspected. The Lateran Council of 1215 thus ratified the action already taken in the Albigensian Crusade.

It will be observed that Raymond of Toulouse was not deposed for heresy, but for his failure to suppress heresy, and the suppression of heresy was declared a duty incumbent on rulers : neglect was punishable by the loss of their dominions. Heresy hunting was also now made a duty incumbent on the bishops of the Church.

The principles were those on which Innocent had acted throughout his pontificate, though he was much more inclined to mercy in giving effect to them than the more extreme, and possibly even than the majority of the clergy.

The exercise of direct temporal power by Innocent was confined to Italy. We shall deal hereafter with his demands based on imperial grants, and need only refer very briefly to his one material reference to Constantine's donation. This was in a sermon on St Sylvester's Day, and we may assume therefore was primarily intended for an Italian audience. He told how the Pope, St Sylvester, had cured Constantine from leprosy at the time of Ids baptism, and how thereafter Constantine had made over to the Roman See the city (Rome), the senate, his subjects, and the whole of the West, and had then retired to Byzantium and contented himself with the empire of the East. Sylvester, from reverence for the ecclesiastical crown, or rather from humility, would not accept the crown which Constantine had offered, but used instead of a royal diadem the circular orphery. It was in virtue of his pontifical authority that the Pope appointed patriarchs, primates, metropolitans, and other ecclesiastical dignitaries; while in virtue of his royal powers he appointed senators, prefects, judges, and notaries. In view of the interpretation by Innocent of the donation, it is singular that he should apparently never have made use of it in putting forward territorial claims.

Besides lands directly subject to the Pope's temporal power, there were many countries in which the Boman Church had at one time or another claimed feudal superiority for the Pope. Innocent was careful to claim any "census" to which he might hold the Pope to be entitled, but it was principally in the case of the Sicilian and English kingdoms (after the surrender by John) that he supported his action, as justified by his feudal superiority. In both cases it was of importance to the Church that no assistance should be given by the kingdoms concerned to a hostile emperor, and we can understand Innocent's enthusiastic acceptance of John's surrender, inspired by the Holy Spirit. Later on, after Bouvines, the Pope's position as overlord gave him a legal standing when he intervened between the king and his barons, and finally declared null and void the provisions of Magna Carta.

As we have seen, papal support had been forthcoming for John in 1202 when war was threatening between Philip and John, but it was now far more sustained and emphatic; and no doubt this was partly because John had become a vassal of the Roman See. Moreover, after John's surrender of his kingdom to the Pope, we find not only Innocent but also the barons and John urging this as a ground for papal intervention, and the feudal relationship was clearly treated by all parties as an important feature of the situation. Louis in his statement of his claims to the English Crown referred to it, but denied that John was Richard's lawful successor, and argued that in any case the surrender was contrary to his oath and made without the advice and consent of his barons.

Important, however, as the feudal relation may have been in the case of England, it was not on it that the Pope mainly relied. Even when he declared null and void the provisions of Magna Carta he gave his orders as vicar of Christ, and the disregard by the barons of the papal rights is only one of several grounds for the orders he passed.

Innocent was not a man to throw away any weapon which might some time or other prove serviceable, but it was on his powers as vicar of Christ that his policy seems to have been based, and as we have seen, his claim to a right of intervention in case of disputes gave him ample opportunity for the exercise of those powers.

CHAPTER II.
INNOCENT III AND THE EMPIRE.

We have dealt in our last volume with the relations between the papacy and the empire down to 1177, when Frederick, in the Peace of Venice, recognised Alexander III as the legitimate Pope. The Peace of Venice ended a long chapter in the history of the relations between the popes and the emperors, beginning with the deposition of John XII by Otto I in 963, and ending with Frederick's unsuccessful attempt to have a disputed election decided by a council summoned by the emperor.

In the thirteenth century we shall find the empire on the defensive, except during the last stages of the struggle between Frederick II and Innocent IV. The emperors no longer claimed special powers in relation to the Church, save so far as their duties as "advocatus" might entitle them to make demands on inhabitants of the papal states. But we shall find the papacy pressing ever new claims to superiority over the empire. On the other hand, it was the acquisition of Sicily by Henry VI through his marriage to Constance, the sister of William I, and heiress to William II her nephew, that forced the papacy into a life and death struggle with the Hohenstauffen. It was this that compelled them openly, or secretly, to support the Lombard League against Frederick II, and finally to call in the help of a French prince to oust the Hohenstauffen from the Sicilian kingdom, and to take their place.

From the time of Gregory VII popes had sought, directly or indirectly, to influence the election by the German princes of their king, and they had on various occasions confirmed or approved their choice. The papal claims were placed by Innocent III on a legal basis, and they were still further developed by his successors. In the course of the thirteenth century the papacy claimed the right to forbid the election of persons they considered unsuitable, to examine the regularity of electoral proceedings, and to decide when there was a disputed election which candidate was to be preferred. In one case, at all events (that of Henry Raspe, the Landgrave of Thuringia), the electors were told by Innocent IV. whom it was their duty to elect. It was largely owing to papal influence that, in the course of the century, relationship to the last ruler was treated as a serious objection. Before the thirteenth century there were only two cases in which a successful competitor for the kingdom did not, in part at all events, owe his selection to his near relationship to the king he succeeded. Claims were gradually developed by the popes during this century to a right to exercise imperial powers during a vacancy in the empire. These claims were not acceptable to the majority of the German princes, as will appear in the course of our narrative. It was also during the thirteenth century that the number of electors was reduced to seven. The history of the process is very obscure, but by the end of the century it seems to have been generally believed that the electoral body, consisting of seven electors, had been established by Gregory V.

After peace with the papacy had been restored in 1177, relations between the Pope and the emperor were, on the whole, friendly; but the question of the rights of the Church under Matilda's legacy was not settled, and Frederick failed in an attempt to get Lucius III to crown his son Henry, who was already king, as emperor. The Pope is said to have objected on the ground that it was not suitable (conveniens) that there should be two emperors at the same time. Lucius was succeeded in 1185 by Urban III, the Archbishop of Milan, a Milanese, and very hostile to the emperor. A concession refused by Lucius was not to be obtained from Urban, and in 1186 Frederick sought to obtain his end by declaring Henry VI., Caesar, evidently as indicating the future emperor. By the time of Urban's death, the very serious situation in Palestine was known in Europe, and probably influenced the cardinals in electing as Pope one known to be a friend of the emperor's. News of the fall of Jerusalem was received in Italy soon after Gregory's accession, and Gregory's short pontificate was spent in an effort to unite Christendom in a crusade. For this he was prepared to

make great concessions, from the papal point of view. In November he wrote Henry, addressing him as "emperor elect of the Romans", evidently to indicate that the papacy would waive its objections to his promotion. Gregory died after a few months, but Clement III, following the policy of his predecessor, agreed in 1189 to the imperial coronation of Henry and his wife. Frederick died, however, before this could take place, and Henry was sole emperor when crowned by Celestine in 1191.

Before Henry's coronation as emperor, William II of Sicily had died on the 18th November 1189. Homage had been given to Constance about fifteen years before this in case of William II leaving no direct heirs, and after his death some of the barons, including Tancred, a grandson of Roger II, but not by legitimate descent, held a meeting at Troy and offered the crown to Constance and Henry. Mainly owing to the opposition of the chancellor, Tancred himself was induced to accept the throne, and was crowned in January 1190 at Palermo. Clement appears to have favoured Tancred, but did not actually invest him with the kingdom.

Clement died in March 1191, and was succeeded by Celestine III. Henry was at this time close to Borne on his way to be crowned before asserting his claims to Sicily, both as husband of Constance and as emperor. His coronation was delayed by Clement's death, but finally took place on the 15th April, after he had made over Tusculum to the Pope, as required by Celestine. Immediately after the coronation, Henry proceeded to invade the Sicilian kingdom, notwithstanding the Pope's opposition. The expedition finally broke down over the siege of Naples. Henry had to return to Germany owing to troubles there, and Clement at last in June 1192 invested Tancred with the Sicilian kingdom.

Tancred died in 1194, leaving an infant son as his heir, and by the end of the year the whole kingdom was in Henry's possession, and he and Constance were crowned at Palermo on Christmas Day.

A few days later Henry accused Tancred's family, the Archbishop of Salerno, and others of conspiring against him, and they were sent in custody first to Apulia, and later on to Germany. There was a second and very serious conspiracy about February 1197, which was put down with great severity and cruelty, even persons imprisoned in Germany in connection with the first rising suffering for a second rising in which they could not have been implicated.

In connection with Henry's coronation as emperor in 1191, it is worth noticing that Innocent III in his 'Deliberation' drawn up in 1201, makes a somewhat obscure reference to the behaviour of Henry VI at the time of his coronation, seeming to imply that Henry asked Celestine to invest him with the empire. According to Innocent, Henry VI, having at his coronation received the crown, withdrew, and after going a short way, returned and sought to be invested by Celestine with the empire by the golden palla.

Henry made a serious attempt, which at one time seemed on the point of succeeding, to make the succession hereditary in the Hohenstauffen family. He got the consent of a number of the German princes, but was strongly opposed by Adolf, the Archbishop of Cologne. Henry endeavoured to secure his object against any German opposition by requesting the Pope to crown his son as king. He was defeated by the Pope's refusal to lend himself to the scheme, and finally Henry had to be satisfied with the election by the princes in 1197 of his infant son Frederick as king. Finally, even Adolf, the Archbishop of Cologne, accepted the election. Henry's youngest brother, Philip, was on his way to bring the child to Germany to be crowned, when news reached him at Montefiascone in Central Italy of Henry's death. There followed a general rising against the Germans, and Philip had to retire hastily to Germany without his nephew.

Henry's death put an end to the attempt to make the empire hereditary. It was unquestionably a revolutionary scheme, as elections had not in Germany become a merely formal matter.

Henry left at his death a widow, Constance, Queen of Sicily in her own right, and a son not four years old, the future Emperor Frederick II. The curia was evidently on the watch for an opportunity to press its territorial claims. The Bishop of Fermo, after Henry's death, took measures in the March of Ancona to secure the cities and castles to the Church of Borne. Celestine wrote approving what he had done, and directed him to extend his action to the whole of the March and Bimini, which he claimed as belonging to the papal "patrimony". Legates were also sent at once to Tuscany to stir up the cities in Imperial Tuscany against the empire, and with the assent of the legates a Tuscan league was formed for mutual defence and common action in dealing with emperors, kings, and other potentates. Help was also to be given the Pope to recover or to defend his territories, excepting in cases where the lands in dispute were claimed by members of the league. The members of the league also undertook not to acknowledge any one as emperor or king except with the consent of the Church.

Celestine died on the 8th January 1198, and Innocent III was immediately elected to succeed him. In his view, as we have seen, matters were best regulated where the Church was not only in spiritual but also in temporal control. In his efforts to recover or to seize the lands he claimed in Italy, Innocent did not hesitate to appeal to Italian dislike of Germans. Immediately after his election he sent legates to compel Markwald of Anweiler to give up the March of Ancona and the Romagna. He also forced Conrad of Urslingen to give up the duchy of Spoleto and other territories held by him. In the case of Imperial Tuscany he was very indignant with the legates because the league had not acknowledged the supremacy of the Pope. Ficker has shown in his 'Forschungen zur Reichs und Rechtsgeschichte Italiens' how largely Innocent revived old claims long in abeyance It is not necessary for onr purposes to discuss these claims, nor to inquire how far Innocent succeeded. It is enough to point out that by these claims, more or less successfully asserted (in the case of Imperial Tuscany we hear no more of them from Innocent after 1198), he was the founder of the enlarged papal states stretching from sea to sea, which survived, with comparatively few alterations, to 1861. While the papal patrimony, properly so called, had grown up round Eome many centuries before Innocent's time, all claims to lands outside this territory seem to have been based by him on old imperial grants, or on Mathilda's bequest. We have dealt with Innocent's reference to Constantine's donation, which he treated as conveying to the Pope the whole of the western empire, but he never refers to it in any specific case in which papal claims on the empire are involved.

In Sicily, Constance sent for Frederick after the death of Henry VI, and had him crowned on the 17th May 1198 as King of Sicily. Before this she had, as far as it was in her power, driven the Germans out of the kingdom. Up to the time of the coronation Frederick is "Rex Romanorum et Rex Siciliae." After it he is only "Rex Siciliae". Constance died on the 27th November 1198. A settlement was effected with the Pope very shortly before her death, too late, indeed, for her to receive the official letters from the curia. By this settlement the kingdom of Sicily and the countries attached to it were given as a fief to her and to her heirs. Constance had to submit to the loss of many of the ecclesiastical privileges enjoyed by her predecessors, though curtailed to some extent in Tancred's time. Shortly before her death she bequeathed the guardianship of Frederick to the Pope, who not only accepted but claimed it as his by right.

A number of German princes had started for Palestine shortly before Henry's death, and on the news reaching them they renewed their homage to Frederick. In Germany, Philip, his uncle, acted as his guardian and styled him king in official documents. Some of the German princes, led by Adolf of Cologne, would not honour their bond, and in consequence even supporters of the Hohenstauffen finally gave up the attempt to support Frederick's cause. Eventually Philip consented to stand as candidate, and was elected at Mülhausen on the 8th March 1198 to be emperor (in imperatorem imperii). The opposition, after some difficulty in getting a candidate, finally adopted Otto, and elected him on the 9th June 1198 to be king (in regem). Otto was a son of Henry the Lion, who in his

later years became the bitterest enemy of the Hohenstauffen, and was a favourite nephew of Kichard I of England, by whom he had been made Count of Poitou. The German princes who elected Otto had him crowned at Aix on the 12th of July by the Archbishop of Cologne, and thus Otto, though elected by a very small minority of the princes, was crowned at the right place and by the right person. Philip, on the other hand, delayed his coronation, as, according to his own account given to the Pope a few years later, he was deceived by false promises that his opponents would also give him their votes. Aix having been taken by Otto, Philip had to content himself with Mainz, where he was crowned by the Archbishop of the Tarantaise on the 8th September 1198, the Archbishop of Mainz not having returned from the Holy Land.

Otto and his supporters reported the election and the coronation to Rome. Otto himself did not ask for confirmation, but only that he should be summoned to receive the imperial crown; but the letters of his supporters, contained in the Pope's register of imperial correspondence, all include a request to the Pope to confirm the election. Several declared that Otto was elected by the princes to whom the right of electing the king belonged, thus apparently confining the right to a limited body. Stress was also laid on the fact of the consecration and coronation at Aix by the Archbishop of Cologne.

Philip's supporters did not report his election to the Pope till the 29th May 1199. They then informed him that they had elected Philip to be emperor of the Roman throne. They begged Innocent not to injure the empire (this is evidently aimed at the Pope's action in enforcing papal claims in Italy, just as they would not allow any infringement of the rights of the Church). They also announced that they would shortly come to Rome with Philip, their lord, that he might receive the imperial crown.

The letter was sent in the name of twenty-six of the German princes and magnates who claimed also the assent of twenty-four others, while only thirteen persons are named as Otto's supporters, and these include the King of England and the Count of Flanders. Moreover, while Philip's supporters came from all over Germany, Otto's were confined to the northwest and to Lorraine.

It would appear from the letter of Philip's supporters that the great majority of the German princes held that confirmation by the Pope was unnecessary, and that it was for the Pope to crown as emperor one duly elected by themselves. The declaration by Philip's supporters that they had elected him to be emperor is novel, though it is akin to the title of "emperor elect" given Henry VI by Gregory. The object of using this title would appear to have been to make it clear that the king elected by the Germans was thereby *ipso facto* entitled to exercise imperial powers.

On the other hand, Otto's supporters, not, as already observed, Otto himself, asked for papal confirmation of his election. Stress was laid by them on three points : (A) that Otto was elected by those princes to whom the election belonged as of right; (B) that the coronation and consecration took place as laid down by Charlemagne at Aix; (C) that Otto was crowned and consecrated by the right person. The first point is of importance as indicating that the idea was growing that only a limited number of the German princes were qualified to be "electors". Probably the second and third points carried some weight with both parties, for in 1205, when Philip had recovered Aix, and the Archbishop of Cologne had changed sides, Philip had himself re-elected and crowned at Aix. It is possible that the second coronation was a condition laid down by the archbishop before joining Philip's party, but even in that case the fact that the archbishop could compel assent would seem to indicate some popular support for his claim.

Innocent's answer to Otto's supporters is dated 19th May 1199. In his reply he did not commit himself, though he ended by expressing the hope that he would be able to honour and benefit Otto. Otto evidently read a good deal into this letter, for shortly after the return of his envoys from Rome, he asked the Pope to bring to a happy conclusion what had been so well begun by the help of God

and of the Pope. He also wrote that now his uncle Richard was dead, he looked on Innocent as being, after God, his special comfort and support.

In Innocent's answer to Philip's supporters he gave his view of the part to be played by the Pope in imperial elections, and cannot have left much doubt of his opposition to Philip. He told them he knew who deserved his favour. It was untrue that he was seeking to injure the empire; on the contrary, he wished it well. Some emperors had done harm to the Church, but others had been of much service to it. While he desired to recover and to maintain the rights of the Church, he did not wish in doing so to encroach on the rights of others. It was for the Pope to grant the imperial crown to a person elected with the proper formalities as future emperor, and then duly crowned as king. As successor of Peter in the apostolic office, he would seek to glorify the divine name, honour the Apostolic See, and enhance the greatness of the empire. In a letter to the ecclesiastical and secular princes of Germany, written apparently on the 3rd May 1199, shortly before Philip's supporters addressed him, Innocent had written of the discord between the princes and their presumption in nominating two kings. He had expected them to put an end to this state of things, with its attendant evils, by seeking his help, "to whom it belonged first and last to make provision for vacancies in the empire".

Philip's supporters appear to have taken no notice of these letters, and the next important step was taken by the Pope in 1200. Conrad, the Archbishop of Mainz, had returned from Palestine in 1199, and had visited the Pope on his way to Germany. Innocent had failed to get Conrad's support to his policy, but he had got a promise from him that he would not take any final steps regarding the disputed election till he had consulted him. Conrad on his return to Germany did not join either party, but endeavoured to get them to agree to refer the dispute to a body of sixteen princes, eight from each party. He was to preside, and all the princes were to accept the decision of the majority. Otto accepted, but wrote the Pope, asking him to get the arbitrators to support him. The Pope was, if necessary, to threaten them. Innocent on hearing, apparently from Otto, of what was going on, wrote a very indignant letter to the archbishop for not fulfilling his promise before any final step, such as now proposed, was taken. He informed the archbishop that he was sending a trustworthy envoy with letters, to let him and the other princes know what he wished aid advised. In his letter to the German princes, Innocent informed them that he had often discussed with the cardinals and with others what he could do to put an end to the quarrel. Many had suggested that, as two rival kings had been elected, the Pope should inquire into the aims of the electors and the merits of the persons elected, to enable him to decide whom he should favour. He then set out the arguments on each side. On behalf of Philip it was urged that he had more numerous supporters, and was in possession of the imperial insignia. On the other hand, he had not been crowned in the right place nor by the light person; he had seized the kingdom without consulting the Pope, notwithstanding his oath of allegiance to Frederick; he had been excommunicated by Celestine, and his absolution given after he had been named king was irregular. He was not only under sentence of excommunication at the time of his election, the sentence was still in force, and the oath of allegiance was not binding. Another objection was the danger of establishing the principle of succession by inheritance should Philip succeed his brother. As he did not wish to appear vindictive, he would not repeat the charges brought against Philip's family as oppressors of the Church and of the princes. It was urged on Otto's behalf that he had been crowned at the right place and by the right person. Innocent exhorted the princes to take whatever action might be necessary to put an end to the dispute, as he did not wish to do anything derogatory to their dignity. He had warned them of the danger of delay, and announced that if they did not act themselves, he would give the apostolic favour to the most suitable candidate, suitable by his own merits, and marked out for selection by the aims of those supporting him. The Pope was rejoiced to hear that at last they intended to take action to secure the peace of the empire, as he had exhorted them to do. He insisted on the necessity of their selecting one fit for rule, as such

an one was needed not only by the empire, but also by the Church, which could no longer dispense with a defender. He must be one whom the Church could crown, otherwise the trouble would only be aggravated, as the city (*i.e.*, Rome) and the Church would be displeased, and it would be necessary to maintain the cause of justice and truth. This warning was not given them because the Pope had any desire to interfere with their privileges, but in order to prevent the dissensions and scandals that must otherwise arise.

There could no longer be any doubt that Innocent was opposed to Philip, and now that he had declared himself, he wrote letters to back np Otto. Thus he let the Duke of Brabant know be would remove any obstacles on the ground of affinity to the marriage of his daughter to Otto. He promised tbe princes to support any agreements affecting their possessions, dignities, and honours, if made with one approved by him as their ruler. He authorised his legates to release Philip of France and John from any illicit obligations (*i.e.*, that would prevent them from assisting Otto). The Archbishop of Trier had not fulfilled his promise to the Archbishop of Cologne to support whoever the latter chose as king. This promise had been paid for, and the Pope directed him either to carry out his promise or to repay the money received. Moreover, he was to present himself to the Pope to answer for the breach of his oath. He issued conditional orders to excommunicate the Landgraf of Thuringia for similar reasons. He also pressed John to pay the money due to Otto under Richard's will. Should John fail to do so, the Pope would, as bound by his office, see justice done.

Innocent's promises and threats proved of no avail. He could not induce the princes to leave the settlement of the dispute to him, or to arrive at a settlement by sacrificing Philip to the Pope. Towards the close of 1200 Innocent drew up a confidential memorandum (known as the Deliberation in which he discussed at length whom he should recognise as king and future emperor. The settlement of this question was first and last for him to decide, and Innocent proceeded to consider the claims not only of Otto and Philip, but also of Frederick. As regards Frederick, his election had been confirmed by the oaths of the princes, given by them voluntarily. On the other hand, these oaths were unlawful (illicita) and the election injudicious, inasmuch as the princes elected a child two years of age, unbaptised, and unfit for any office. The princes were accordingly not bound by their oaths. The election of a person unfit for office could not be cured by the appointment of a "procurator", nor could a temporary emperor be appointed. On the other hand, the Church could not dispense with one. Frederick was the Pope's ward only as King of Sicily, and the Pope was not thereby bound to support his succession to the empire, which would involve the union of the kingdom of Sicily and of the empire. Such a union would be disastrous for the Church, as, besides other dangers, Frederick would, like his father, consider it beneath his dignity as emperor to give the oath of fidelity for Sicily and to do homage. As regards Philip, Innocent maintained that he was still under excommunication, as the absolution by the Bishop of Sutri was invalid. Moreover, he was also under excommunication as the instigator and supporter of Markwald in his misdeeds. It was also right that the Pope should oppose him, lest the empire, which should be the free gift of the electors, cease to be elective and pass by succession. Moreover, the Pope was bound to oppose him, as a persecutor of the Church and a member of a family of persecutors. To act otherwise would be like arming a madman against oneself. Innocent proceeded to enumerate the misdeeds of his ancestors, including Frederick's quarrel with Hadrian over the use of the word " beneficium." The objection in Otto's case was that he was elected by fewer than Philip. On the other hand, at least as many (tot vel plures) of those who had a special right to elect the emperor had accepted Otto. In dealing with an election, it was necessary to consider the merits of the person elected and his fitness for the post, and the wisdom of the electors was more important than their number. Innocent touched shortly on the superior fitness of Otto to govern the empire, and then proceeded definitely to reject Philip, because of the obvious objections to his appointment, and he decided to resist his usurpation of the empire. His legate was to endeavour to get the princes to agree on a suitable person, or to refer the matter to

him. Should the legate fail with the princes, the Pope would decide in favour of Otto and accept him as the king, whom he would hereafter summon to Rome to be crowned as emperor. It will be observed that Innocent deals not only with the merits of the candidates from the point of view of the Church, he also discusses the validity of the several elections from a legal point of view.

In accordance with this decision, Innocent wrote two letters on the 1st January 1201, addressed to the Archbishop of Cologne and the German princes generally. In the letter for the German princes, ecclesiastical and secular, he informed them that he was sending his legate to endeavour to get them to agree on some one whom the Pope could accept and crown as emperor, a ruler whose selection would benefit the empire and not prejudice the Church. Should they be unable to agree, the legate was to seek to persuade them to leave the decision to the Pope. This would not prejudice their freedom of choice in election, nor would it affect the dignity of the empire. They could have no better mediator than the Pope, and he could, in virtue of the powers divinely given him, deal with any oaths already given by the princes (i.e., he could release them from their oaths of allegiance). Moreover, the decision of this question belonged first and last to the Pope. First, because it was the Church which transferred the empire from the Greeks in order to secure a protector; last, because the Pope bestowed the imperial crown.

For some reason unknown to us, Innocent changed his plans and decided to recognise Otto as king, without further reference to the German princes. In a letter to Otto, dated the 1st March 1201, but evidently not delivered till the legate arrived in July at Cologne, Innocent wrote of the two great powers, the "Ecclesia" and the "Imperium", and their respective functions. He told him of his great desire to see the vacancy in the empire filled, and he announced, in virtue of the power he had received from God through the blessed Peter, he received him as king, and ordered that in future Otto be given the reverence and obedience due to royalty. The honour so bestowed was the greatest that could be given to any secular ruler. Later, when all the usual preliminaries were completed, he would summon him to Rome to receive the imperial crown. In this letter no reference is made to the electors nor to the election. Innocent wrote a letter bearing the same date to the German princes, announcing the action he had taken and giving his reasons. He stated the right of the papacy to deal with the matter. In mentioning the objections to Philip, he included the "insolentia" shown by him and his Hohenstauffen predecessors to the princes, and the danger of making the succession hereditary. Otto, on the other hand, was personally deserving; he was descended on both sides from families devoted to the Church, and was crowned after his election at the right place and by the right person. He accordingly received him as king, and directed that regal honours be paid him. He would hereafter, as was right, summon him to Rome to receive the imperial crown. This letter was backed up by a number of letters to individual princes and to the kings of England and France.

Innocent's legate, the cardinal bishop of Palestrina, informed him of the result of his mission, probably in August 1201. According to him his reception was not at all friendly; among others the Archbishop of Mainz and the Bishops of Speyer and Worms would not receive his messengers. Some of the princes went so far that they actually hung messengers sent out by supporters of the papal party. He added that some of the princes were so angry with the Roman Church that had there been further delay they would have elected some third person. The legate accordingly read out the papal letter to Otto. He also read those to the princes concerning his "reception and approval", and finally, on the authority of the Pope, declared him king, and excommunicated all who might oppose him.

Innocent's notary, who had accompanied the legate, wrote that Philip of Swabia complained to his supporters that the papal opposition was due to his consenting to be emperor without having received the Pope's permission; if they gave way, their liberty of election would be gone, and no one could henceforth rule without the Pope's consent. The action of the Archbishop of Mainz in refusing to receive the legate's messengers is specially noteworthy, as he was elected in opposition to Philip's

candidate. The Pope was evidently disturbed at the view taken in Germany of his action. In a letter to the Archbishop of Cologne, about the end of 1200, he thought it necessary to warn him to pay no attention to the slanders (maledicta) of those who asserted the Pope wanted to deprive the princes of their freedom of election. So far from this being the case, he had taken such action as would secure their freedom. He had not elected any one, but he had favoured, and was still favouring, the person elected by the majority of those who had a right to take part in the election. The person favoured by him had been crowned by the right person and at the right place, and therefore ought to be crowned emperor by the Pope.

It will be observed what efforts the Pope makes to show that in appointing Otto he had given effect to his election by the majority of those entitled to take part in it, and had maintained the freedom of election against claims based on hereditary rights.

Besides writing the archbishop, Innocent also directed his legate to use the same arguments with other German princes, and to impress on them all that he had by his action preserved the liberty of the princes, which he desired to see maintained.

There was a meeting of Philip's supporters in Bamberg in September 1201, and again at Halle in 1202, at which a large number of German princes, ecclesiastical and secular, decided to protest against the legate's proceedings, as an unprecedented interference with the election of the king. In their letter they affected to believe that the legate's action could not have been taken with the knowledge of the Pope, nor with the consent (conniventia) of the cardinals. The legate had no locus standi, either as elector or as judge (cognitor). In the case of a dispute regarding the election of the king there was no judge who could give a decision; the matter must be left to the electors to settle. Christ had by his conduct and by the separation of his powers (*i.e.*, as priest and king) shown clearly that one fighting for God should not be involved in secular affairs, just as a secular ruler should not deal with spiritual matters. Even granting the legate could act as a judge, his decision was invalid, for he could not lawfully pass sentence, as he had done in this case, in the absence of one of the parties. The princes pointed out how their emperors, so far from pressing unjust claims, had abandoned their right to be consulted before a papal election took place, and they could not believe that the Pope would not seize a privilege (bonum) to which he had never been entitled. They ended their letter by requesting the Pope at a suitable time and place, in accordance with his office, to anoint Philip. The Pope's reply was the famous bull "Venerubilem". We have dealt with this bull in a previous volume, but only as a part of the canon law, and it appears necessary to discuss it here shortly in its historical setting. In his letters before the "Deliberate", Innocent had not only admitted the right of election by the German princes, he had urged them to come to some agreement and fix on a person whom he could accept, or else to refer the dispute to him for settlement. He had, however, also declared that the question of filling up a vacancy in the empire was first and last one for the papacy. Innocent had warned the princes that the man they selected must be acceptable to the Church, and he had also warned them that if they would not come to an agreement he would be compelled to take action, as it could no longer dispense with one who could defend it. In that case he would favour whoever was most deserving, taking into account the aims of the electors (studia). Later on he openly decided in favour of Otto, and declared him king. As we have seen, his proceedings had caused intense anger in Germany, and from the conduct of Siegbert of Mainz and from the Pope's letter to the Archbishop of Cologne, it is evident that this was not confined to Philip's party. How strong that party was, is shown by the numerous and very powerful princes who forwarded a protest to the Pope. Innocent had thus every reason to be as conciliatory as possible in his reply, and the bull shows clear signs of his desire to propitiate the princes, so far as was possible without making any vital concessions. He emphasised the right of the princes to elect a king, whom the Pope was afterwards to promote to emperor, and declared that he was as unwilling to encroach on their rights as to allow others to encroach on the rights of the Church. He could not, however, forbear pointing out that they derived

this right from the action of the Church in transferring the empire. He denied that his legate had meddled with the election, either as "elector" or as "cognitor". The legate had confined himself to announcing who was deserving of the kingship and who was unworthy. Innocent does not explicitly assert, as in previous letters, his claim to be entitled to make the "provisio imperii", but merely asks whether the Church could be expected indefinitely to dispense with a defender. But conciliatory as it is in tone, the bull made no real concessions. While in form Innocent based his action on the right to examine the fitness of the elected king, and to select where the electors were divided, he gave many reasons for his action which do not fall within those limits. The facts that Philip was under excommunication, was a perjurer and a persecutor of the Church, were relevant, so also were Otto's merits. The Pope, however, referred to many other points, such as irregularities in Philip's election and coronation, and the alleged majority of qualified electors in Otto's favour. He also raised a new point regarding the election—namely, that Philip's electors had lost their privileges by excluding princes entitled to take part in the election. Whatever Innocent's purpose may have been in mentioning matters not strictly relevant to the question of fitness of the rival kings for empire, they afforded material for future claims by the Church to deal with the regularity of the royal elections.

It is noticeable how persistently in his correspondence Innocent harped on Philip's relationship to his predecessors as a serious bar to his election. This attempt to make relationship a bar to succession was as revolutionary in its way as Henry VI's attempt to do away with elections. It was nearly three hundred years since Henry I was elected as King of Germany, and from his time down to Philip's, Lothair was the only generally acknowledged king who seems to have owed nothing to relationship to the ruling house. Another point deserving of notice is the gradual development of the theory that the election was vested in a few only of the German princes. In his letter to the German princes of 1200 there is no attempt to deny that the majority of the electors were in favour of Philip. In the *Deliberatio* towards the end of 1200 it is admitted that he was elected by a majority of the princes, and by princes higher in rank than those who elected Otto, but it is urged that as many or more of those specially concerned in the election of the emperor consented to Otto's appointment. In the bull, "tot vel plures" has become "plures", who consented to receive Otto as king. With regard to the objection that Philip's electors had all forfeited their rights to take any part in the election by not allowing others to take part, Innocent is apparently extending to royal elections a rule of canon law; an instance of a tendency, still further developed later on, to apply ecclesiastical rules to matters concerning the empire.

It was no doubt from his desire to spare the susceptibilities of the German princes that Innocent was so careful to avoid the use of the word "confirmare". He was asked by Otto's supporters to confirm his election, and seventy years earlier Innocent II had not hesitated to use this word with regard to Lothair and Conrad. The terms Innocent uses are such as "favorem apostolicam impertiri", "recipere in regem", "cujus nominatione approbata", "denuntiavimus regem", "consentire in regem", and so on. Evidently Innocent felt that the word "confirmare" would give offence, for while a good many princes wavered between Otto and Philip, a prince did not necessarily become a papalist by changing over to Otto's side, and Innocent was a very practical statesman.

Innocent's case rested throughout on the union in one person of the German king, who on election becomes "Rex Romanorum", and of the emperor. In one of his letters he stated definitely that the person properly elected and crowned king should be summoned by the Pope to Rome to receive the imperial crown, the very point on which Philip's supporters had laid stress. Innocent thus accepted the position that the king was also the person elected to be emperor, but he turned it against Philip's supporters by basing on this fact his right to examine the qualifications of the person so elected. Accordingly we find that, while before their letter he had only spoken of an election to the kingship, in later letters after he formally received Otto as king, he addressed him as king of the Romans elected to be emperor, and this became the regular title given by the curia to German kings

before they received the imperial crown. On the other hand, it was a title very rarely used by German kings, who usually styled themselves "Romanorum rex et semper Augustus". Before announcing Otto to be king, Innocent had obtained from him his sworn acceptance of the papal territorial claims in Italy. On the 8th June 1201 at Neuss, Otto swore to respect these claims, so far as they were already in the possession of the Church, and to help to recover them where this was not the case. The oath would appear from the signatures to have been given before three papal officials. Apparently it was a secret transaction, and as it concerned rights of the empire, it was invalid without the consent of the princes. The contest between Philip and Otto went on for some time with varying success. In 1203 the King of Bohemia and the Landgraf of Thuringia deserted Philip for Otto. Next year the pendulum swung the other way, and Otto's cause was abandoned by Adolf, the Archbishop of Cologne, by the King of Bohemia, and by Otto's brother Henry, while the Landgraf of Thuringia was subdued by force of arms. Early in 1205, Philip, having got possession of Aix, formally laid down his crown and gave up his title. He was re-elected, and crowned for the second time by the Archbishop of Cologne. A chronicler reports that this was done by Philip by the advice of the princes, that they might not lose their old freedom of election, and that his election might be unanimous. As we have previously pointed out, the coronation at Aix by the Archbishop of Cologne was considered an important element in the legitimacy of a king, and no doubt Philip and his supporters wished to cure any possible defects in his coronation. So far as the fresh election is concerned, it has been suggested that the princes wished to guard against undue importance being attached to the coronation as compared with the election. In 1206 there was a meeting of a number of German princes, attended among others by Wolfger the Patriarch of Aquileia, whom the Pope deputed to persuade Philip to abandon his support of Lupold of Mainz, and to make a truce with Otto and the people of Cologne. Philip's answer was a very conciliatory letter to the Pope, setting out why he had allowed himself to be elected king to govern the empire. He offered to submit to the decision of his princes and of the cardinals on the action to be taken to restore peace and concord between the Church and the empire (inter sacerdotium et imperium), also on the satisfaction to be given for wrongs done by him to the Church. On the other hand, he would leave it to the Pope's own conscience to decide if he had done any injury to Philip or to the empire. The letter leaves no doubt that Philip still claimed to be the duly elected king, the ruler of the empire, and did not leave this to the Pope's decision.

Innocent did not apparently reply to Philip, but he wrote Wolfger expressing his general satisfaction with the letter, though he could not accept Philip's solution of the Lupold question. Negotiations commenced, and by November 1207 they were so far advanced that Philip had been granted absolution, and that Innocent wrote him direct. In 1208 Innocent deputed Hugolinus to Germany for the final negotiations. While on his way there he received the news of Philip's murder on the 21st June.

Immediately on hearing of Philip's death, even before receiving Otto's report, Innocent took action to secure Otto's peaceable reception as king by all the German princes. He assured Otto of the unwearied efforts he had made on his behalf, and authorised him, if he thought it advisable, to proceed with the marriage of Philip's daughter, as had been proposed in the negotiations proceeding at the time of Philip s death. He wrote all the archbishops and bishops, directing them "in virtute obedientae" to do all in their power to prevent the election of another king, and he forbade them on pain of anathema to anoint or to crown any one else. He also wrote a general letter to all the German princes, ecclesiastical and secular, to seek the peace of the empire, and to support Otto. In addition he sent letters to a number of princes individually, insisting in the case of ecclesiastics on the duty of obedience under their oath to him. They must therefore support Otto, in whose favour divine providence had clearly declared itself. We can here only draw attention to the very great importance politically of this subordination of the bishops to the papacy in secular politics.

Philip Augustus made a fruitless attempt to set up a rival to Otto. Many, however, of Otto's former opponents, though they would not support a rival, insisted on a fresh election. There was accordingly a meeting of the Saxon princes at Halberstadt on the 22nd September, at which Otto was elected, according to the chroniclers, as emperor. There was a larger gathering of the princes at Frankfort, at which Otto was elected "in regem". There can, we think, be little doubt that the German princes intended these elections to be a demonstration of their electoral rights as against the Pope. In some cases princes only reckoned his kingship from the Frankfort election.

Negotiations followed regarding Otto's summons to Rome to receive the imperial crown. Innocent dwelt on the great importance of harmony between the Church and the empire, if they worked together nothing could stand against them. He pointed out, on the other hand, the evils arising from dissensions between these two great powers, and urged on Otto the importance of removing any causes of discord and suspicion, and pressed him to grant the requests which would be presented to him by the papal legate. This was in the middle of January, and the result was, no doubt, the undertaking given by Otto in March 1209 at Speyer. The oath at Neuss in June 1201 had dealt mainly with the territorial claims of the papacy in Italy. The engagements then made were reproduced in the Speyer promise, and Otto now also undertook that episcopal elections should be freely held, and decided by the chapters or by the larger and "sanior" part of the chapters (thus giving up the very important right of dealing with disputed elections). He also gave entire freedom of appeal to the Apostolic See in ecclesiastical cases. He gave up all claims to the "spolia". All "spiritualia" were to be disposed of freely by the Pope and by other prelates of the Church. He undertook to give effective help in suppressing heresy. The promise was countersigned by the chancellor, the Bishop of Speyer, but was not supported by the signature of any other German princes. Innocent also, in the end somewhat grudgingly, had given his assent to Otto's marriage to Beatrice, the daughter of Philip. It was of importance for Otto as a means of conciliating the friends of the Hohen-stauffen family, and Otto was betrothed to her in May 1209.

The first signs had already appeared that all would not be well between Otto and Innocent. Sometime before March, probably in February 1209, Otto had written the Pope complaining that Frederick was stirring up trouble against him. He begged Innocent most earnestly not to support Frederick, and not to take any action in his favour till Otto could discuss the matter personally with him in Italy. Innocent replied that Frederick's father and mother had both of them entrusted Frederick to the care of the Roman Church, that he was a subject of the Church and owed fidelity as a vassal, and the Church must therefore support him. Thus it was impossible for the Pope to withdraw his help from Frederick, but it would not be used to injure Otto.

Otto started from Augsburg on his way to Rome for the imperial coronation about the end of July. He had been preceded by Wolfger, Patriarch of Aquileia, whom he had appointed as his legate in Italy in January 1209. Wolfger, on his return from the imperial court to Italy in March, took vigorous action to recover imperial rights usurped by Italian cities. Innocent had, at Wolfger's request, recommended him to the cities of Lombardy and Tuscany, but Wolfger extended his action to lands claimed by the Pope, and included in Otto's concession. Innocent sent Wolfger an extract from Otto's oath at Neuss in 1201. We are not informed of the details of what followed, but we find that after Otto's arrival in Italy he pursued the policy adopted by Wolfger regarding imperial claims, notwithstanding his engagements to the Pope.

Negotiations with the Pope proceeded, and evidently Innocent had to recognise that he could not compel Otto to honour obligations which had not been confirmed by the German princes.

Innocent crowned Otto on the 4th October, although pending questions were not all settled. Otto had to leave Rome immediately after the coronation, but endeavoured to arrange a meeting with the Pope a few days later in order to arrive at an agreement. This Innocent declined, but negotiations evidently went on for a time. According to Innocent, Otto refused an offer to refer to arbitration

matters in dispute, and proceeded with his assertion of imperial rights, notwithstanding the claims of the Church. Otto brought matters to a head in February 1210 by appointing Dipold of Acerra to be Duke of Spoleto. Dipold proceeded to style himself also "Magister Capitaneus" of Apulia and of the Terra Lavoris, parts of the Sicilian kingdom. This was a declaration of war, not only against Frederick, but also against Frederick's liege lord, the Pope, and it is remarkable that Innocent did not take up the challenge till after Otto had crossed the border of the kingdom of Sicily in November 1210.

Though Innocent was unwilling to break finally with him, yet he as well as Otto had for some time been preparing for the coming struggle. Otto, for instance, extorted from the Archbishop of Salzburg in July 1210 a promise of support, even against the Pope, in matters concerning the honour of the empire and of the emperor.

Otto crossed the frontier of the Sicilian kingdom early in November. Innocent took immediate action, excommunicating him and releasing his subjects from their allegiance, and he also entered into negotiations with Philip of France to secure his support. Two months later he called on the German princes to elect another in Otto's place. A little later again he stirred up the Italian subjects of the emperor, calling on the bishops to publish the sentence against Otto, and to hold no services in any place where he might stay. He also stated that he would declare him guilty of heresy if he continued to have divine services celebrated in his presence. It is reported that even at this late stage Innocent made another attempt to come to terms with him. The very well-informed writer of the 'Ursperg Chronicle' states that he heard from the papal agent that Innocent was willing to put up with all the territorial losses incurred, provided Otto would keep his hands off Philip of France and the Sicilian kingdom, but that it was all in vain.

Otto began his second campaign in the south of Italy in the beginning of March, and by October he was about to cross over to Sicily. Frederick is said to have had ships ready for flight, when events in Germany changed the whole situation.

After Otto's excommunication a movement against him had commenced in Germany, led by Siegfried of Mainz, the Landgraf of Thuringia, and the King of Bohemia. In the early summer Siegfried published the excommunication of Otto by the Pope. Ottocar of Bohemia was the first of the princes openly to rebel against Otto, and to declare himself in favour of Frederick of Sicily. Innocent was very careful not to intervene openly in the choice of a successor to Otto, but he had, in his letter of February 1211 to the German princes, shown pretty clearly that Frederick would be acceptable to him. In September a number of German princes assembled at Numberg and elected Frederick "in imperatorem". The princes who took part in this election were obliged to look to the Pope for support, and they asked him to confirm their election; they were so far in a minority, though a very important minority.

Otto, hearing of these movements in Germany, made his way back instead of crossing to Sicily. He was delayed by further fruitless negotiations with the Pope and by disturbances in the north of Italy, so he did not get to Frankfort till the middle of March 1212. On his arrival in Germany he found many even of the bishops and abbots still faithful, and many of the rebels now returned to his allegiance. In order to strengthen his position and to secure some following among the friends of the Hohenstauffen, Otto married (on the 22nd July) Philip's daughter, Beatrice, to whom he had been betrothed since 1209. Unfortunately for Otto she died on the 11th August. Otto was at the time besieging Weissensee, and the disastrous results of her death were immediately apparent. The Swabians and Bavarians at once left his camp, and so many of his followers abandoned him that he had to give up the siege. Presently he moved to the south to deal with the threatened entry of Frederick upon the German scene.

After Frederick's election had been reported to the Pope, negotiations went on for some time on the subject, and finally, with Innocent's support, Frederick was hailed as emperor by the citizens

and the people of Borne, and the Pope confirmed his election. This was not, however, till after the consent of Frederick had been obtained, and the Pope and Frederick had come to terms. Frederick's consent was not given as a matter of course; his wife Constance and the Sicilian nobles were strongly opposed. We have no detailed account of the negotiations between Frederick and the Pope, but some of the conditions are clear from documents executed in February 1212. Frederick had to swear to be faithful to the Pope and to his successors ; he placed on record the territories he held from the Pope and the tribute (census) to be paid. He undertook personally to do homage when summoned to appear before him. He had also to accept a concordat regarding ecclesiastical elections in the same terms as the one forced on his mother in 1198. It was not till he had done all this that he added to his title of King of Sicily that of emperor elect. At the request of the Pope, Frederick had his infant son Henry crowned as Kang of Sicily. It seems probable that the object was ultimately to do away with the personal union between Sicily and the empire, as Frederick agreed to do in 1216. Another reason for the coronation was no doubt to secure a successor, with a good legal title, before he started on his very adventurous expedition to Germany. He commenced his journey in March, and arrived in Rome about the middle of April. At Rome, where he did homage to the Pope for the Sicilian kingdom, he was very kindly received by Innocent and helped with money, and there he styled himself emperor elect by the grace of God and of the Pope. Frederick left Rome by the end of April or early in May, but was unable to cross the Italian frontier till some time in August, as he had to make long halts at various towns in Northern Italy to avoid Otto's supporters. He arrived at Constance in September, a few hours before his rival, who was also on his way there. His occupation of Constance gave him time to rally his supporters in Germany, thus enabling him to hold a meeting of his supporters on the 5th December at Frankfort. There he was elected king by a large number of German princes in the presence of the legate and of envoys from France. From that time onward, with very rare exceptions, Frederick dropped the style of emperor elect, and adopted that of "Romanorum rex semper Augustus et rex Siciliae". By the summer of 1213 a large part of Germany had accepted Frederick, and at a meeting held at Eger on the 12th July of that year he paid his price for the papal support. He renewed, almost word for word, the promise given by Otto at Speyer in 1209, and supported it by a personal oath. Innocent, however, was not content with this, and required the assent of the German princes. A number of them, including such important persons as the Archbishops of Mainz and Salzburg, the King of Bohemia, the Dukes of Bavaria and Austria, and the Landgraf of Thuringia, signed the document as witnesses. The Pope also got the express consent of individual princes in subsequent years. The curia was not satisfied even with these agreements, and had them strengthened later on in the time of Honorius III, but Innocent had by the agreement he obtained put the territorial claims of the Church on a legal basis, accepted by the German princes. As in the case of Otto's Speyer agreement, the clauses relating to the Church seriously modified the powers left to the emperor by the concordat of Worms.

Fighting went on during 1213 without any decisive results. In the following year the victory of Philip Augustus at Bouvines (27th July 1214) put an end to any chance of a victory by Otto. In 1215 Aix went over to Frederick, and he was crowned there for the second time. As there was at that time no Archbishop of Cologne recognised by the Pope, he was crowned by the Archbishop of Mainz on the 25th July. It was on this occasion that Frederick took the cross, the cause of so much trouble to him later on. A few days later the city of Cologne, Otto's last stronghold outside his own domains, also accepted Frederick, and Otto had to retire to Brunswick. Although Otto lived three years more and never gave up the struggle, yet he was unable to affect seriously Frederick's hold over the greater part of Germany.

Otto's supporters tried to reopen the question of his deposition at the Lateran Council in 1215. Innocent stopped a very hot controversy that arose, and at a subsequent meeting declared Frederick's election by the German princes to be emperor approved and confirmed.

Frederick's succession to the empire would have been impossible, as far as one can judge, without the support of the Pope. This contributed to weaken the coalition against Philip Augustus, which was defeated at Bouvines, a landmark in European history, but it also led in the end to the catastrophic struggle between the papacy and the Hohenstauffen—a danger to which Innocent was not blind, but which he could not avert.

Innocent relied in his dealings with secular powers mainly on his authority as vicar of Christ. He did not disdain nor neglect to use authority of human origin, as, for instance, that of a feudal lord, but such powers were treated by him as of human origin, and not as belonging to the Pope as Pope. His conception of the papal authority was no less exalted than that of his great predecessor Gregory VII, but he handled it much more as a lawyer, systematising where possible the use of his powers. Thus in the bull (finally embodied in the Decretals) Innocent based his right to deal with quarrels between princes on his authority to decide where questions of sin were involved. Again, in the case of the empire, he claimed the right to examine the qualifications of the king elected by the German princes as, if we may use the expression, a matter of official routine.

Innocent had not carried the majority of the German princes with him, and his claims to interfere in German elections or to nominate in case of disputes were not generally admitted, but we must reserve our remarks on this subject for a later chapter.

CHAPTER III.
FREDERICK II, HONORIUS III, AND GREGORY IX

Honobius, who was elected Pope on the 18th July 1216, two days after the death of Innocent III, was of a very different temperament to his great predecessor, and accordingly, though there was no change in the policy of the curia, yet the methods were different, and the great struggle with the Hohenstauffen was postponed.

When the pontificate of Honorius began, the Church was not in full possession of the lands included in the promise made by Frederick at Eger in 1213, as it was not till the contest with Otto was over that Frederick could attend to affairs in Northern Italy; but by 1221 the Pope was able to announce to the world that the Church of Pome had received possession of the lands it had claimed, and to acknowledge the help given him by Frederick. The Pope and the emperor did not agree as to the rights left to Frederick as emperor in these lands, and there was trouble over his claims to armed assistance from papal subjects in 1226. Frederick also appears to have alarmed the curia by suggesting at a conference at Vercelli in 1222 that it should employ him as its agent to govern these lands. The friction that arose from time to time was not in itself very serious, but it must have played its part in strengthening the determination of the curia to secure for itself supporters in Italy by protecting Milan and its friends from Frederick.

Another source of trouble was due to differences regarding ecclesiastical appointments in the Sicilian kingdom. Frederick, before he was accepted by Innocent as the future emperor, had undertaken to allow freedom of election in his Sicilian kingdom, but it was subject to his assent to the persons elected. Honorius in a number of cases refused to accept the elections made, and finally, after the sees had long been vacant, filled them up without consulting Frederick. This and the question regarding Frederick's rights in the papal states were the cause of a very angry correspondence between Frederick and the Pope in 1226, in which the emperor disclosed his real feelings towards the Church by accusing the Papacy of having failed in its duty towards him when Innocent III was his guardian during the time of his minority. The question of elections to vacancies became acute again in the time of Gregory IX, and was among the causes stated for his excommunication in 1239.

As we have seen, Frederick had taken the Cross in 1215, and after that he made repeated promises to start by a fixed date, and had to get the Pope's consent to repeated postponements. The final promise was made in July 1225 to start in August 1227, and Frederick's failure to carry it out was the immediate occasion of Gregory's first excommunication. Though peace was restored after a time, yet both sides had shown their mutual distrust and fundamental hostility, and the ground was prepared for the final struggle between the papacy and the Hohenstauffen family which began in 1239, and only ended with the death of Conradin in 1268. The main cause of this hostility was the union of the imperial Government and of the Sicilian kingdom in Frederick's hands, as it endangered the papal independence, unless a counterpoise could be found by the curia in Northern Italy.

Innocent had long foreseen the dangers of the situation, and a few days before his death, Frederick had given a written undertaking immediately after his coronation to release his son Henry from subjection to his authority and hand over to him the kingdom of Sicily to be governed during his minority by some person approved by and responsible to the Pope. It is very doubtful whether, Innocent once out of the way, Frederick ever intended to fulfil his promise. A few days after his death Henry Mas taken to Germany, where he was appointed in 1217 Duke of Swabia. In 1218 Henry dropped the title of King of Sicily. In April 1220 he was elected king by the German princes. This was inconsistent, in spirit if not in letter, with Frederick's promise of 1216, repeated in February 1220, and Frederick and his chancellor both wrote the Pope. Frederick explained the election as due to the sudden conviction of the princes, owing to a serious quarrel among them, that such an

appointment was necessary during Frederick's approaching absence on crusade. The chancellor for his part wrote Honorius, he had heard from a cardinal that the Pope had declared the election of a German king did not concern him. The letters are written from different points of view, but they are not irreconcilable, and it seems unlikely they were meant to deceive the Pope, who must have been kept fully informed of what had taken place by his envoy Alatrin, who was at the time in Germany. The statement attributed to Honorius was no doubt made by him, but probably only meant that the Pope was not concerned till the time came when he had to decide whether the Teutonic king was fit to be emperor. The curia was not satisfied with the explanations offered, and very shortly before Frederick's coronation the papal envoys, who were negotiating on the conditions to be fulfilled in connection with Frederick's coronation, were directed to inform Frederick that the election was inconsistent with his promises. He was obliged shortly before, and again shortly after, his coronation to declare that the Sicilian kingdom was his entirely as heir to his mother (not to his father), and that it was quite independent of the empire. He also acknowledged that he and his predecessors held it from the Roman Church. Though the curia had to accept these declarations, and acquiesced in Frederick's retention of the Sicilian kingdom, it does not seem ever formally to have acknowledged Henry as King of the Eomans. On the few occasions when he is mentioned in papal correspondence, it is as son of the emperor, and in a letter of Gregory's in 1235 calling on the German magnates to support Frederick against his rebellious son, Henry is called merely "vir nobilis".

Frederick had achieved a diplomatic triumph over the Church, but it was at a great cost, as it increased the importance long attached by the Church to securing for itself supporters in Northern Italy, and this could only be done in the long-run at the cost of a conflict with the empire.

Even before Frederick had succeeded in securing the permanent retention of his Sicilian kingdom, the curia had shown the importance it attached to Lombard affairs. It was impossible for Frederick, so long as he had a rival in Germany, to do much in the way of re-establishing imperial rights in Italy, but six months after Otto's death we find his imperial vicar, the Bishop of Turin, requiring Cremona and Parma, imperialist cities, to accept his decision in disputes with other Italian cities. The papal legate in Lombardy, Hugo, the future Pope Gregory IX, at once intervened, and compelled these cities to accept his mediation between them and Milan; Cremona, at all events, doing so very unwillingly. He also put great pressure on Frederick to allow this. Hugo, in addressing the people of Cremona, dwelt on the excellent work it had done in resisting the rebellious Milan, which had continued to support Otto even after he had become the Pope's enemy, but in the end he treated both parties exactly alike, directing them to make peace on equal terms. We have noticed the action of the legate in this case, as it foreshadows what happened in later quarrels between Frederick and the League—namely, constant pressure on the empire to accept papal mediation, and great leniency shown to its enemies.

Immediately after Frederick had obtained his last postponement of the crusade to August 1227, he gave notice of a meeting to be held at Cremona at Easter 1226, with the object of restoring peace, of extirpating heresy, and of making arrangements for the crusade. The prospect of the arrival of the emperor in Lombardy with large forces, not only from his Sicilian kingdom but also from Germany, was very unpalatable to Milan and many of the other cities of Northern Italy, not only because it would enable Frederick to recover imperial rights usurped by the cities during the troubled years that succeeded the death of Henry VI, but also because heresy was very widely spread, and to some extent favoured by the governments of the city states. The result was that the Lombard League was renewed on the 8th March 1226, and was joined in April 1226 by Verona ; this enabled the League to close the passes to the German troops. Frederick attempted at first to negotiate, but the terms proposed by the Lombards appeared to the Germans so exorbitant that the bishops in Frederick's camp declared that the Lombards had laid themselves open to ecclesiastical censure, under the terms of papal letters providing that disturbers of the imperial rights and honours might be so dealt with.

Terms of peace were, however, at last accepted by both parties, but finally rejected—we do not know why—by the Lombards, whereupon Frederick pronounced the ban of the empire upon them. This had no effect, and as a crusade in 1227 would have been difficult with a hostile Lombardy in arms against him, Frederick had to ask the Pope's help in settling the dispute.

As we have already mentioned, there had been much friction between the Pope and the emperor while Frederick was on his way to Cremona, both with regard to Frederick's demands for armed assistance from papal subjects, and the filling up by the Pope of vacancies in Sicilian bishoprics. Frederick had to drop his quarrel with the Pope, and Honorius, who eagerly looked forward to a great crusade under the emperor, accepted Frederick's request to restore peace. He gave his award in January 1227.

Under the terms of this award, both sides were to withdraw all hostile orders issued and to restore all prisoners taken while hostilities were going on. The Lombard members of the League were required to rescind all laws in contravention of ecclesiastical liberty, and to observe all ecclesiastical and imperial laws concerning heresy. They were also to provide at their own expense 400 "milites" to assist the emperor in his crusade. A letter from the Pope to the League informed them that this last provision was not binding should the emperor fail to start, unless he was specially exempted by the Pope from doing so. The effect, so far as the empire was concerned, was merely to restore the status quo ante, while there were important gains to the Church. The award did not, however, deal with the questions at issue between the emperor and the League, so that it was still open to the emperor to revive his claims at a more convenient time and without reference to the Pope.

Frederick at once accepted the award, but the Lombards raised frivolous difficulties, and had not signed the agreement when the Pope died.

During the pontificate of Honorius, Frederick had by very considerable concessions to the German princes, ecclesiastical and secular, secured peace in Germany so far as to enable him to devote his attention to Sicily, where he set about establishing a centralised and powerful government. By 1226 he apparently considered himself strong enough to extend his authority over Lombardy. His first attempt was a complete failure owing to the stubborn opposition of the League, and he was thus obliged to accept the Pope's restoration of the *status quo ante* for the time being.

The net result of events during the pontificate of Honorius was to bring about a critical state of relations between the Papacy and the empire. Frederick had maintained the personal union of Sicily and the empire. At Vercelli in 1222, and again in a more serious form in 1226, he had showed his desire to modify the territorial arrangements agreed to at Eger, and in the 1226 correspondence he had disclosed his real feelings towards the Papacy. In 1218, and again in 1226, the Church had shown that it would do its best to prevent any serious weakening of the anti-imperial cities in Lombardy. This was a matter on which neither side could give way, and it was to play a very large part in the final struggle between Frederick II. and the successors of Honorius. Finally, by his constant postponements of the crusade, whether justified or not, and by his pledge in 1225, Frederick had laid himself open to attack by the Church, on grounds very disadvantageous to himself.

Honorius died on the 17th March 1227, and was succeeded on the 19th by Gregory IX, who was a relation of Innocent III. With Gregory a very different régime begins, for he was not like his predecessor—willing to shut his eyes temporarily to matters which might be a cause of offence. Gregory was the Cardinal Hugo who, as papal legate, had unwillingly started for Germany to arrange terms of peace with Philip of Swabia, and who again as papal legate had forced the people of Cremona to accept him as arbiter. Within a week of his election he had written Frederick a letter quite friendly in tone, but ending with a serious warning of the results if he did not start on his crusade by the time fixed. Gregory also wrote the rectors of the Lombard League to send the forms

of agreement prepared by the papal office, and to do it quickly, so that Frederick might not become aware of their delay nor of the constant reminders sent to them by the Apostolic See.

The time of Frederick's departure for Palestine had been settled for August 1227, and Brindisi was the port of departure. Large numbers were attracted by Frederick's offers of free transport to those desirous to take part in the crusades, and a serious epidemic broke out among the crowds waiting to embark. The emperor's account of what happened up to the time of his excommunication is that he fell ill, but notwithstanding went to Brindisi, and the arrangements for departure were pressed on. Finally he made a start, accompanied by the Landgrave of Thuringia and many other German princes, on the 9th September. Two days later he landed again at Otranto, where he lay ill, while the Landgrave died shortly after landing. On the advice of his princes the expedition went on to Palestine, while he postponed his own departure till the following May. Envoys were sent to Gregory to explain what had happened, but the Pope would not even receive them, and on the 29th September he pronounced him to have incurred the penalty of excommunication under the terms of his oath given at San Germano in 1225.

In his encyclical issued a few days later, Gregory sums up Frederick's shortcomings, which were aggravated by the fact that he was protected during his minority by the Church, to which he also owed his promotion first to king (of the Romans) and finally to emperor. He gave as the specific grounds of excommunication not only his failure on frivolous pleas to start at the time fixed, but also his failure to provide the stipulated military forces and the money payments required. He taxed him with not providing enough transports, and with fixing the rendezvous at the height of summer in an unhealthy climate, Brindisi having been selected by Frederick, as he had fallen out with other cities with ports. He made him responsible in the past for the loss of Damietta, and the rejection of the Moslem offer to give up the Holy Land in exchange for that city. Frederick had also offended in many ways against clerics and laymen, but the Church had ignored the cries of the sufferers, lest it should give Frederick some excuse for postponing his departure. This last complaint evidently refers to the Sicilian kingdom, for in a letter to Frederick in the end of October he called on him to mend his ways in the kingdom (*i.e.*, the Sicilian kingdom), both in his treatment of rebels whose agreements with him had been guaranteed by the Church, and also in his conduct to ecclesiastics and laymen, a matter of special concern to the Church, and he ended with a threat if Frederick did not mend his ways. In this letter Gregory dwells on the leniency with which Frederick has been treated, as his excommunication was merely the putting into effect of Frederick's own agreement two years before. A little later, on the 18th November, Gregory held a council of Italian bishops in Rome, and announced for the second time Frederick's excommunication. According to Frederick his envoys were admitted to this council, but not until the matter had been practically settled.

Frederick now at last published his defence; unwillingly, as he professes, but forced into it by the Pope. In his answer he dealt with the specific complaints made by the Pope in his encyclical. Instead of owing gratitude to the Papacy, it had placed him in great peril in his minority, and his kingdom had suffered serious injury during the papal guardianship. He, on the other hand, had done great service to the Church when Otto turned on it, and no one else was forthcoming to govern the empire to which he himself had been elected by the princes. The loss of Damietta was due to the papal legate, and he was not responsible for the rejection of the Moslem offer to exchange it for Palestine. As regards the crusade, he had supplied the full number of knights and all the money required, but he had been compelled by illness to postpone his departure. All this his envoys could have explained, but they were not listened to. As regards Brindisi, it was the usual port of embarkation, and he had personally suffered from the effects of the epidemic. Frederick ended his encyclical by the announcement that he would start for the Holy Land in May.

Frederick also showed his determination not to submit by proceeding with his preparations to start in May, and by giving orders that any of the clergy refusing to celebrate "divine office" in his

presence were at liberty to do so, but would forfeit any temporal possessions conferred by his predecessors (per divos augustos progenitores nostros).

On Maundy Thursday in 1228 Gregory repeated the publication of the emperor's excommunication. In his encyclical announcing it, he added to his previous grounds of excommunication others connected with Frederick's conduct in Sicily. From his letter it appears that Frederick's failure in connection with the crusade was only one of many other matters for which Frederick was punished, and that negotiations with Frederick had broken down because he would not give way regarding matters connected with his administration of Sicily. Gregory increased the severity of the previous order by an interdict on any place where Frederick might happen to be staying. His answer to Frederick's order to the clergy regarding divine service was a threat to proceed against him as a heretic. He also threatened to release his subjects from their oath of fidelity, and to deprive him of his fief if he did not cease from oppressing the people of his kingdom.

Before starting for Palestine, Frederick issued an encyclical in which he informed the world that, notwithstanding his innocence, he had sent the Pope a statement of the satisfaction he was prepared to give for not starting at the time fixed, but the Pope would neither accept what he offered nor state what he would accept. He also complained that the Pope had enrolled soldiers to attack him.

It appears to have been Gregory's determination to get a settlement of the Sicilian questions that made the breach inevitable. The whole basis of Frederick's policy was a strong centralised government in Sicily, and we shall find hereafter that, however willing he might be to make concessions, whether honestly intended or not, in other matters, he would not allow his authority in his kingdom to be seriously weakened.

Frederick started for Palestine seriously hampered by the papal excommunication and interdict, not only in his relations to the Church and to the great military orders in Palestine, but also in his negotiations with El Kamel, the Sultan of Babylonia (*i.e.,* of Egypt), who was well aware of the quarrel between the Pope and the emperor.

Frederick had not a military force sufficient to conquer the Saracens, but notwithstanding he succeeded in negotiating a treaty by which the Sultan surrendered to him Jerusalem and some of the other holy places, such as Bethlehem and Nazareth. The treaty contained several provisions very distasteful to the Christians. Among others the Saracens were allowed to retain the Mosque of Omar, and for the ten years to which the truce extended Frederick was not to attack the Saracens, and was to oppose, if necessary by force, any attack on them. The territories of Tripoli and Antioch were not included in the truce, and while it lasted the emperor was not to assist the rulers of these lands against the Saracens, nor permit others to do so. Taken as a whole, however, the Christians gained more than in any, save the first, crusade. Frederick and the Grandmaster of the Teutonic Order represented it to the Pope as a great success, while Gerold, the Patriarch of Jerusalem, reported it to the Pope only to pick holes in what had been done. Gregory, in a letter to the Duke of Austria, went so far as to declare that by undertaking not to take up arms against the Saracens, Frederick had really abdicated as emperor, inasmuch as he was bound in virtue of his office to wage war against the enemies of the faith.

The treaty was concluded on the 18th February 1229. Frederick left Palestine on the 1st May, and landed in Brindisi on the 10th June. Here active hostilities were in progress between the Pope and Frederick's representative, Reynold of Spoleto. Before leaving for the Holy Land, Frederick had appointed Reynold of Urslingen his legate and vicar of the kingdom of Sicily. He also made over to him two documents, one appointing him his legate in the March of Ancona, the lands of the Countess Matilda, the "Vallis", "Lacus", and the "Maritima", the other withdrawing grants which he had made voluntarily to the Church (*i.e*., at Eger). Frederick after his arrival in Palestine made a fresh attempt at a reconciliation with the Pope, and named Reynold as his representative in any negotiations that

might ensue. It is very unlikely that he would have done this had he not intended Reynold only to act on these documents in the case of an attack by the Pope.

Gregory at the end of July at Perugia released Frederick's subjects, and specially those of his kingdom of Sicily, from their oath of fidelity. Reynold, who had personal reasons for desiring to recover Spoleto from the Church, chose to take this as a sufficient justification for an attack on the Church. He began by invading the Duchy of Spoleto; later on he also attacked the March of Ancona. An appeal by the Pope to Reynold proved ineffectual, and Gregory took measures not only to recover the papal territories, but also to carry the war into the Sicilian kingdom. In order to defend the Church, Gregory demanded from clergy of various states, tithes, and he asked temporal rulers to assist him. Later on, after Frederick's return, he went so far as to demand military assistance from the clergy.

Gregory was at first very successful, and by the time Frederick had returned from Palestine a great part of the mainland was either occupied by papal troops or in open revolt. The whole situation changed on Frederick's arrival, and by the beginning of October he had recovered all the territories, belonging to the kingdom, he had lost. So far, however, from attempting to make use of his victory to recover any of the lands lost to the empire at Eger, Frederick pressed peace negotiations on the curia. These negotiations dragged on until, in February 1230, Frederick invited some of the German princes to mediate between him and the Pope. After long-protracted discussions he received absolution on the 28th August. The terms of the peace appeared on the surface a great victory for the Pope. Frederick, though the victor so far as the war was concerned, had to give up all the papal lands occupied by his troops, and to repay any expenses incurred by the Pope in defending them; he had also to agree that the civil courts should have no jurisdiction over the Sicilian clergy saving in feudal matters. The clergy were to be exempt from taxation. These concessions were of some importance, but, as was proved by results, they did not suffice to weaken Frederick's hold over the kingdom.

The Lombard League had sent troops to assist the Pope, and Frederick was obliged, among the other conditions of peace, to promise to forgive all offences committed by them and by others in connection with the help given by them to the Church. This left it open to him to take up any cause of offence prior to his excommunication. Gregory in his first (apparently) letter to the Lombard League after the peace, enclosing Frederick's promises, assured them that he would take the lightest offence to them as a grave offence to himself.

The net result was really in Frederick's favour. Gregory had been obliged to accept the result of the crusade, and he had not succeeded in weakening Frederick's hold over Sicily. During the contest Gregory had been compelled, by his need of money to carry on the struggle, to make pecuniary demands on ecclesiastics which were resented at the time, and formed an unfortunate precedent for the future.

During the years of uneasy peace that intervened between the peace of Ceperano and the final breach between Frederick and the Papacy, the main subjects of difference concerned the relations between the emperor and the Lombard League, and his treatment of the clergy, military orders, and rebels in Sicily. In the case of the Lombard League the efforts of the Pope were constantly directed to securing for himself the final decision in all matters in dispute between them and the emperor. In Sicily the special subjects of complaint related to the taxation of the clergy, their trial in certain classes of cases by the secular courts, the seizure by the king of lands held by the military orders of the Temple and of the Hospital, and the banishment or confiscation of the property of rebels, whose pardon by Frederick had in some cases been guaranteed by the Church. Towards the end of the period there was constant and growing friction regarding the filling up of vacancies in the Church, as the Pope would not accept the persons elected by the chapters, on the ground apparently that there had been undue influence by the king or his officials. There were other causes of friction, but not, on

the whole, more serious than might occur in the normal relations between the Papacy and any other secular powers.

We have seen in the preceding section that Gregory, in appealing to the Lombard League to send their promised troops, disclosed how close the connection between them had been, by his statement that it was due to their pressing advice (summo desiderio et deliberato consilio) that he had started taking action against the emperor, who was wholly intent on their destruction. He had consulted them while negotiations were going on, and in his letter forw arding the terms of peace he assured them that he would look on any injury to them, however slight, as a serious injury to himself.

In April 1230, while negotiations for peace were going on, Frederick had written the authorities of Cremona authorising them to arrange terms of peace with other Lombard cities, and to grant them forgiveness of all offences whatsoever against the empire. Possibly the people of Cremona were not very anxious to have peace restored on easy terms for their enemies; at all events, whatever the reason, Frederick's offer appears to have met with no response. In 1231 he took up the matter again, and issued an encyclical, apparently to all cities of the imperial party, calling on them to send representatives to meet him in Southern Italy to discuss the steps to be taken to restore peace and justice among his subjects. We do not know what followed this summons, but we find Gregory two months later writing a letter warning Frederick not to use force against the Lombards, and urging him to let the Pope act as mediator.

As we have already mentioned, there were other causes of friction between the Pope and the emperor. A minor cause of papal dissatisfaction concerned the possessions of the Templars and Hospitallers. In the conditions of the peace of Ceperano, it was provided that all their possessions seized by the emperor or his officers should be restored to them. Gregory wrote repeatedly on the subject to Frederick, but he did not tax Frederick with a breach of faith, and Frederick's defence was that he did not deprive them of anything they were legally entitled to hold.

In July Gregory wrote a very angry letter regarding the constitutions of Melfi (a code of laws for the Sicilian kingdom), which Frederick was about to publish, declaring that they showed him to be a persecutor of the Church and a destroyer of public liberty. Frederick was very indignant, and Gregory evidently felt he had gone too far, for three weeks later he wrote a conciliatory letter pointing out that his rebuke, though sharp, had been private and by letter, in which it is difficult to give expression exactly to what one feels. Frederick did not give way, and the constitutions were published in August 1231, and declared to cancel all previous legislation conflicting with them.

Although at one time a rupture had appeared imminent, it was averted, as both parties had need of one another : Gregory required Frederick's help in dealing with rebellious Romans, while Frederick wanted the Pope's support against a rebellious son. Gregory was also at this time intent on suppressing heresy, and Frederick had, in answer to the Pope's appeal, promised to do his best to suppress it in the kingdom. He took care, however, in his constitutions to keep the preliminary investigations in the hands of his officers, and later on we find Gregory suggesting that he was using the pursuit of heresy as a pretext for burning his political opponents.

Some time in the early summer Frederick summoned a meeting of the imperial diet to Ravenna, apparently after Gregory's warning not to use force against the Lombards. Whatever Frederick's intentions may have been at the time, he finally decided to endeavour to settle his differences with the Lombards peaceably, and before September he accepted the mediation of the Pope.

Gregory wrote some of the Lombard bishops, informing them that Frederick had accepted him as arbitrator between himself and the Lombard League, and asked them to inform the rectors of the League, and to warn them of the danger of interfering with the proposed meeting between the emperor and his son. Three weeks later he wrote the bishops again, insisting on Frederick's peaceable intentions, and urging that no difficulties be placed in the way of the meeting, lest they

should appear to be the parties preventing peace negotiations. Frederick no doubt thought that, in view of the Pope's mediation, he would have no difficulty in holding the diet, and in the middle of September he issued notices, acting, as he said, on the advice of the Pope, summoning it for the following November at Eavenna, among the objects being the improvement of the state of Italy and the settlement of disputes between the cities. How little he expected resistance appears from a letter of Gregory's written after his final breach with Frederick in 1239, in which he states that the emperor entered Lombardy without an armed force. The Lombards, however, had closed their ranks on hearing of the proposed meeting, and a number of cities rejoined the League in July, notwithstanding Gregory's letters. They were not to be moved, and again blocked the passes. They did this after a meeting on the 26th October 1231 at Bologna, at which they fixed the number of troops to be employed. They also wrote the Pope that it was his duty to see that the emperor brought no armed forces to Ravenna. None of the League put in an appearance, and as Frederick's son, King Henry, had also not come, the emperor issued a fresh notice for March 1232, but to assemble at Aquileia, where the Lombards could not prevent the Germans attending. Meanwhile Gregory had appointed two new legates to restore peace between the emperor and the League. Frederick cannot have welcomed Gregory's choice, as both were Lombards; on the other hand, the envoys of Brescia, one of the League cities, wrote their podestà that they had great confidence in them, especially as one of them came of a Piacenza and the other of a Vercelli family. These legates before seeing the emperor went to Bologna, where they met the leaders of the League, and discussed the conditions of an agreement with the emperor. On the one hand, Frederick had put in claims for satisfaction on account of the wrongful blocking of the passes to the Germans ; on the other hand, the Lombards maintained they had only acted in self-defence. With regard to Frederick's claim to be the judge in cases of disputes between the cities, Piacenza replied that he was an enemy of the Lombards, and therefore no suitable judge between Lombard cities and their enemies. The Brescia envoys told the legates that in their opinion they had done no injury to the emperor, and that they were not prepared to go beyond a purely formal satisfaction. They also insisted that Frederick's son and the German princes must not be attended by more than 100 unarmed knights. The legates agreed they would not ask for more concessions without the written consent of the rectors and ambassadors of the League cities. The legates intended to go on to Ravenna to see Frederick, but probably he had heard something of the proposals they intended to put before him, and he left Ravenna before they arrived, making his way by Venice to Friuli. Faced with this situation, the legates reported their failure to the Pope.

It shows Frederick's desire for a settlement that, notwithstanding what had passed, he agreed in May to allow the same legates to arbitrate. The situation had, however, altered in his favour, as Verona had passed into friendly hands, and the scope of the arbitration was now limited to the satisfaction to be given to him and to the security to be given to the League if it had to allow a free passage to the emperor and to his son on the way to and from Germany. The legates or the Roman Church could not deal with other matters unless both parties agreed.

Negotiations proceeded, but finally the legates referred the whole matter again to the Pope, as on the imperial legate failing to attend a meeting at Lodi the Lombard rectors tried to make it an excuse for taking no further part. The emperor had in the meantime (in April) settled the dispute with his son Henry, who had endeavoured to assert an independent position, trusting in the help of the cities, the lower nobility, and the "ministeriales". His defeat was due to the combination of the emperor and the princes, ecclesiastical and secular, for it was to their interest to defeat Henry, who had endeavoured to make use of the cities against all the princes alike.

The more cordial relations between Frederick and the Pope were, as already mentioned, due to their mutual need of one another, for while Frederick had to deal with a rebellious son in Germany, the Pope had much trouble with the Romans, and had to appeal for help to Frederick on several occasions. In connection with his Roman troubles he begged Frederick to direct the people of

Viterbo to obey the instructions of his legates regarding peace with Rome. Frederick evidently sent a satisfactory reply, for Gregory answered with an almost gushing letter, foreshadowing the help of the Church in return for his support. In February 1233 there was another call for help, in which, however, more stress was laid on the duty of the emperor to help the Mother Church. A week later the Pope wrote expressing his dismay at hearing that Frederick was going to Sicily instead of doing his duty as his principal defender. Frederick had to deal with a serious insurrection in his kingdom, and probably was really unable to spare much help for the Pope. Gregory, left more or less to his own resources, at last succeeded in getting the people of Viterbo and of Rome to make peace, and was thus for the time being no longer dependent on Frederick's help against the Romans.

The cities comprised in the Lombard League gave a joint reply to the Pope in 1233. They were at this time in a very truculent mood. The great religious movement in the north of Italy known to historians as the "devotio" or "hallelujah" was at its height, and helped to strengthen the anti-imperialist parties in the Lombard cities. Gregory was no longer in need of help from the emperor, and the Sicilian insurrection had not long been suppressed by Frederick when the cities submitted their answer. They denied that any satisfaction was due to the emperor, as they had done him no injury. On the other hand, the emperor, the king (*i.e.*, Henry), and the German princes must not enter Lombardy, the March of Ancona, or Romania till the Pope had settled the questions at issue, and even after that the emperor or the Church were to let the rectors know by what route they would come, and how long they would stay; the rectors would then decide what to do. In any case, the emperor or king must not be accompanied by more than 100 unarmed knights. They also asked that Lombardy, the March, and Romania be taken under the protection of the Church.

Gregory gave his decision on the 5th June following. In his letter to Frederick he went back to the agreement of 1232, and took no notice of the Lombard claims of 1233, but he only dealt with Frederick's complaint of the injury done him at Ravenna. He ordered the parties to make peace, to forgive all injuries, and to return captives. The cities belonging to the League mentioned in the "compromissum" were to furnish at their own expense five hundred knights for two years for the Holy Land, "ad honorem Dei . . . et ecclesie . . . ac tuum". Other questions included in the "compromissum" were reserved for future orders. Both parties were indignant with the award : the Lombards because no provision had been made for them, Frederick because no atonement v as made for the wrong he had suffered; but although there was some angry correspondence, he very soon accepted the award.

In the meantime Frederick had been suppressing the insurrection in his kingdom, and apparently from a letter of Gregory's he had taken advantage of the legislation against heretics to bum those who rebelled against himself.

In 1234 Gregory and Frederick again had need of one another, and there was a fresh rapprochement. The Romans were giving trouble to the Pope, and Henry was again asserting himself against his father. The Pope had so far dealt with only one point in the Lombard question, and he now took it up again. At the request of two papal legates, Frederick in April 1234 agreed to allow the Pope and the Roman Church to deal with all questions between him and cities in Lombardy, in the March of Treviso, and in the Romaniola. The Pope informed the rectors of the League of this early in May, and he asked them to let him know whether they were prepared to do the same. He also asked them not to interfere with the passage of troops from Germany on their way to the emperor, lest Frederick should have just cause of complaint against himself and the Lombards. He wrote again on the same subject about a fortnight later, assuring them that the leaders of these forces were prepared to give a formal guarantee that they would do no injury to the Lombards either going or returning.

Soon after these letters the emperor paid at Riete a surprise visit to the Pope. He was accompanied by his young son Conrad, and his object was to attest his devotion to the Church, and to assure Gregory that he would recover for him lands belonging to the ecclesiastical states.

Gregory in his turn wrote strong letters to Palestine in support of Frederick, and sent out the Archbishop of Ravenna to see that effect was given to his wishes. But desirous as the Pope may have been to meet Frederick's wishes as far as possible, he was careful not to alienate the Lombards, for in July he wrote them again, telling them that he could not without injury to the Apostolic See avoid using the help of the emperor against the Romans—help the emperor had himself voluntarily offered (at Riete). The Pope had consequently been obliged to ask them to allow his forces to pass through Lombardy; he assured them of his determination to preserve their liberty and honour, and he ended by asking them to let him know whether they would accept the Pope's arbitration, and said that they might remain assured of the favour which he proposed to show them in everything "quantum cum Deo possumus". In September Frederick sent a fresh acceptance of the Pope's arbitration, adding that he could also deal with any complaints made by his adversaries in Northern Italy of wrongs inflicted by him, and generally with any matters out of which quarrels had arisen between them. The following month the Lombards assented.

In November 1234, Henry, Frederick's son, sent envoys to make an alliance with the Lombards, and took them under his protection. The treaty is dated 17th December. It was an alliance offensive and defensive on the part of the king, but only defensive on the part of the League. Milan and its allied cities undertook to defend Henry so long as he was in Lombardy, while Henry undertook to help and support Milan and the other League cities, and not to make any agreement, nor peace with Cremona and Pavia and their allied cities, without the consent of the Milanese and their allies. On hearing of this, Frederick arranged for a long absence from Sicily, and started for Germany in April, and negotiations with the Lombards ceased.

When Frederick left Italy, Gregory was on good terms with him, and supported him against his son. He wrote in March to all the ecclesiastical and secular princes in Germany, directing them to bring back Henry to the right way, and he released from their vows all who had given oaths injurious to the emperor.

Frederick, from whom, of course, the Pope could not expect much help at such a time, wrote him before he started, advising him not to accept a disadvantageous peace with the Romans, as he would do what he could to defend the Church, though he could not give up his journey to Germany.

How friendly the relations between the Pope and the emperor were at this time is shown by the negotiations for the marriage of Frederick to Isabel, the sister of Henry III. According to Frederick the marriage was suggested by Gregory, and he requested the Pope to settle for him details, such as the dowry to be paid. Frederick was at the time bound by alliance to Louis, and both Gregory and Frederick wrote assuring him that he would suffer no injury from the friendly relations established between Frederick and Henry III of England.

Frederick's arrival in Germany very quickly put an end to Henry's rebellion, and it ended in his imprisonment up to the time of his death seven years later.

We may infer that Frederick and Gregory continued on good terms until the end of July 1235, from the fact that in May he appointed the Patriarch of Antioch, a friend of the emperor, legate in Lombardy, the March of Ancona, and the Romaniola, while as late as the end of July he continued to support the emperor in the east.2 On the same day (28th July) that Gregory wrote to Palestine supporting Frederick, he also wrote the princes summoned by Frederick to Mainz. He begged them to induce Frederick, notwithstanding the "presumptio" of the Lombards, to leave in his hands the settlement of the Lombard question as already agreed by him (*i.e.*, in 1234 before the Lombard treaty with Henry), as a crusade was urgently needed, and peace among all Christian peoples would do more than anything else to further the cause of the Holy Land. This letter was dated the 28th July, and on the 27th August Frederick wrote informing the Pope that the Lombard question had been dealt with at a great imperial diet, and that all had agreed on an expedition against the Lombards next year, but that notwithstanding he was still prepared to leave the matter in the hands of the Pope,

provided the matter was settled by Christmas on terms honourable to the emperor and to the good of the empire (ad honorem nostrum et imperii commode). Further delay was impossible, as it might merely enable the Lombards by dilatory tactics to prevent the expedition fixed for the following year.

After Frederick's reply nothing could go right between him and the Pope. In September, Gregory informed Frederick that he had cancelled an order of the papal legate in Palestine, placing the people of Acre under interdict, and he also informed him that while he had restored the status quo ante before the quarrel began between Frederick's marshal and the nobles of Palestine, he ought to replace his marshal next year by some one to be selected by the Pope. On the same day he wrote Hermann, the Master of the Teutonic Order, complaining bitterly of the conditions attached by the emperor to the settlement by the Pope of the Lombard question. These conditions were, as we have seen, that the settlement should be on terms honourable to the emperor and for the good of the empire, and that the decision must be given on an early date. Gregory repeated this complaint to Frederick, to his legate in Lombardy, and even to the rectors of the League, though in writing them he warned them of the danger if they did not comply with his summons to attend at an early date.

The Lombards, instead of attending on the date fixed, renewed in November the League, in which Ferrara was now included. In Verona a new podestà was appointed, and imperialists, who would not obey him, were threatened with excommunication by the Pope. Gregory renewed his old complaints regarding the administration in Sicily. Frederick expressed his surprise that the Pope should be disturbed by mere rumours, and Gregory answered on the last day of February by a lurid description, but without details, of what was going on there. Frederick had in his letter taken credit to himself for disbelieving that the Church had anything to do with the renewal of the League or with events in Tuscany and Verona. The Pope let him know plainly that he would proceed with the excommunication of any disobeying the new podestà in Verona, a "fidelis" of the Pope and appointed by him. So far as the League was concerned it was not surprising that fear of the emperor should have led to its renewal, nor that the members of the League should have endeavoured to enlist public opinion in their favour by giving out that the Church had favoured their action. The letter was unfriendly, if not hostile, and ended with an open threat. Three weeks later Gregory announced the arrival of the Lombard envoys, who stated that they were unavoidably prevented from coming before (Gregory gives no reason in this nor in any other letter), and he asked Frederick to send back the Master of the Teutonic Order to enable the Pope to deal with the matter. The Lombards had undertaken to accept the Pope's orders, and the Church could not tolerate an attack in the meantime on them. Frederick answered Gregory in April, pointing out it was very difficult to deal with general complaints, and his officers might in some cases have done wrong; if so, he would deal with them severely. Clerics had only to appear in his courts when a dispute concerned a fief or lands in his own demesne. He denied the charge that he ill-treated those who had supported the Church. We need not follow him in his denial of other charges, but may note that he warned the Pope that if he excommunicated people in Verona who had, in the name of the emperor, ejected persons corrupted by the Lombards, it would confirm the opinion that Gregory desired to force Verona into the Lombard League.

Besides answering the Pope, Frederick took steps to have public opinion on his side. He wrote Louis IX, complaining of the Pope's attitude towards the Lombard situation, his insistence on an unqualified acceptance of his arbitration, and suspension of action against the Lombards pending the crusade, a crusade which could not take place till the truce with the Sultan had expired. He also wrote Henry III, asking for his good offices, and Henry III did write both the Pope and the cardinals on his behalf.

Frederick evidently did not accede to the Pope's request to leave the settlement of the Lombard affairs in his hands, for in May he issued an encyclical announcing that he would hold an assembly at Piacenza, to which he invited envoys from all Italian cities north of Rome (ab urbe citra), at which he

desired the presence also of ambassadors from Milan and other League cities. Its object was to prepare the way for a crusade, and to do this it was necessary to consider means for suppressing heresy, for securing the rights of the Church and of the empire, and finally for restoring peace, and doing justice to sufferers from the dissensions in Italy. He dwelt on the importance of the empire not only in temporal matters, but also in protecting the Church from injury by heretics or others.

Gregory's answer to the summons of a diet at Piacenza was to appoint as his legate in Lombardy not the Patriarch of Antioch, as requested by Frederick, but the Cardinal Bishop of Palestrina, a native of Piacenza. Gregory wrote Frederick that he had specially selected him, and that Frederick could rely on his studying the honour of the Church and of the empire, as he had abandoned all for God, and Frederick must pay no attention to hostile remarks regarding him. Gregory wrote at the same time to Herman, Master of the Teutonic Order, who had apparently expressed his fears that the Pope was about to take hostile action against the emperor. He hotly denied the suggestion, and defended the bishop's appointment. That Herman should have written in this way is very significant, as he was a peacemaker whose services were constantly required both by the Pope and by the emperor. The appointment of the bishop needed a good deal of justification from the imperial point of view, for, as a result of his action, in the following month the control of Piacenza was taken out of the hands of the imperialists and given to a podestà from Venice, thus entirely frustrating Frederick's plans for a meeting there.

A short time before this Frederick had addressed the Romans, complaining of their failure to send envoys to meet him on his arrival in Italy, and had reproached them with their failure to support him against the people of Milan. Frederick's attempts to get the active support of the Romans ran counter to the agreements made by him at various times with the Papacy regarding the patrimony, and could only be justified as a measure of self-defence in a contest with the Papacy.

Frederick gave further cause of offence by detaining a nephew of the ruler of Tunis, although, according to the Pope, he desired to go to Rome to be baptised.

Angry correspondence followed between the Pope and the emperor. Frederick complained of the conduct of the Bishop of Palestrina, and charged the Pope with sending him a string of complaints instead of excommunicating the Lombards for their contumacious behaviour. As regards the complaints, Frederick promised to give redress if he found in any case that wrong had been done. Gregory wrote a very angry reply. Frederick was one of those who dared "os in coelum ponere". He defended the bishop; he had no evidence that the Lombards were contumacious. They had accepted the intervention of the Church, and he refused to accept Frederick's promise to amend any wrong done. He complained of Frederick's attempt to stir up the Romans, his lack of devotion, and his conduct with regard to the filling up of benefices in the Sicilian kingdom. He ended his catalogue of Frederick's sins by declaring that the most serious of all were the hindrances he put in the way of the recovery of the Holy Land by not allowing a crusade to be preached, and by not permitting contributions towards it from his subjects save with his assent.

In the course of his letter Gregory referred to Constantine's Donation and the subsequent transfer of the empire to the Germans. As regards the Donation he claimed that it was made with the consent of the Senate, and people not only of Rome but of the whole empire, as Constantine held it right that the vicar of the prince of the apostles who ruled over the priesthood and the souls of men should also hold the lordship over the whole world and over the bodies of men. Subsequently it was the papal see which transferred the empire to the Germans, parting, however, with none of the substance of its jurisdiction. The power of the sword was given him by the Pope at the coronation when the emperor obtained his crown.

After this letter one might have expected an immediate breach, but instead there was a very marked abatement of the tension. Notwithstanding Gregory's defence of the Bishop of Palestrina, he was replaced a month later by two other legates, and the Pope wrote Frederick six months later that

he had done this on the representation of Herman, the Grand Master of the Teutonic Order, and of Peter de Vinea, the chief justice of the kingdom.

Some time before this letter Gregory had again approached Frederick with a view to making a further attempt at a peaceable settlement, and the emperor had agreed to send Herman to negotiate, though with some hesitation, in view of the predecessor of the new legates. When Gregory officially notified Frederick, he also wrote the Lombard cities belonging to the League, stating that Frederick had sent special envoys asking the Pope to assist in dealing with the matters at issue between him and the Lombards. In virtue of his office, the Pope could not refuse, and he accordingly advised and directed them to send their procurators armed with full powers to Mantua to meet the papal legates. He ended by assuring them that they would be in great danger if settlement of the matter were delayed. The whole tone of the letter is different from anything we have found in the previous correspondence, and it appears to indicate a real change of purpose, for in the negotiations which ensued the contending parties seem very nearly to have arrived at a settlement on terms very satisfactory to the emperor.

During the previous winter it had been very plainly shown that Germany, as a whole, was strongly on Frederick's side. In February 1237 Frederick succeeded in getting the princes to elect his younger son Conrad, a child, as king and future emperor. The election is remarkable in several respects. Among those who took part were three of the five great archbishops—namely, Mainz, Trier, and Salzburg,—Otto, the Count Palatine of the Rhine and Duke of Bavaria, the King of Bohemia, and the Landgrave of Thuringia. Thus the electors included some of Frederick's bitterest enemies of later years. In the election decree the transfer of the empire to the Germans is spoken of as "probabilis" and "necessarius". There is no mention of the Pope in connection with it, and by the form of words in which the princes announced the election, they appear tacitly to claim the right to elect the emperor without reference to the Pope. To prevent Conrad raising claims to govern independently of his father, he was till his father's death only to be king elect. After that he was to be their lord and emperor, and they would give him their advice and help towards obtaining the imperial diadem, with all the appropriate ceremonies. The electors churned to have acted as the successors, so far as the imperial election was concerned, of the Roman senate. They declared that they had held an election in view of the great dangers of an interregnum, and had selected Conrad because of his descent from ancestors who had ruled the empire for many generations, and because his father's labours gave him a claim to the succession. This "decretum" shows how far the German princes were from sharing the papal view that relationship prejudiced a candidate for election, and it leaves no place for papal intervention at any stage before the coronation.

After Gregory's letter of 23rd October 1236, his complaints of Frederick's conduct do not recommence till March 1238. During this period, after negotiations had broken down, the League forces were routed at Portenuovo in November 1237, and in consequence the League cities were prepared to make very large concessions. Negotiations, however, again broke down, according to Frederick, over questions regarding hostages and the imperial jurisdiction over the cities. In January 1238, Frederick sent the Romans the carrocio taken from the Milanese at Cortenuovo, with a letter indicating a close connection between him and the city, the "urbs regia"; a challenge to the curia.

In June 1238 the Pope wrote Frederick asking his consent to papal mediation between him and the Lombards. Frederick refused, but in August he himself sent an embassy to the Pope, of which we have conflicting accounts from Gregory and Frederick, each throwing the blame on the other for its failure. After the mission had left Rome, Gregory drew up a number of detailed charges against Frederick, and he deputed certain German bishops to get Frederick's answer to these charges. His detailed replies are given in a report from the bishops of 28th October 1238. The charges are important, as they agree on all important points with the grounds on which Gregory based his excommunication of Frederick in 1239. There is one important omission. The last charge as given in

the bishops' report to the Pope accuses Frederick of impeding assistance to the Holy Land by his quarrel with the Lombards, although the Church was prepared to give him effective help in making a satisfactory settlement. In the sentence of excommunication no reference is made to the Lombards.

While negotiations were going on both parties were preparing for war.

In October or November, Frederick married his illegitimate son Enzio to Adalasia, the heiress of two of the Sardinian "judicatures", and gave him the title of King of Sardinia, though the Church had long claimed the lordship of the island. The Pope, on the other hand, got the Venetians and Genoese to enter into an alliance for nine years, during which time they undertook not to enter into any sort of agreement with the emperor saving with the Pope's consent.

Just before the final rupture Frederick wrote the cardinals, who, according to him, shared equally with the Pope in all matters which he "proponit statuere, vel denunciando decreverit". He begged them to use their influence to prevent the Pope's issuing a sentence of deposition against him, and warned them that if he were attacked he would retaliate.

Frederick, according to his encyclical, also sent envoys to Rome just before the final breach, promising to give satisfaction for any wrongs done to the Church. Before the mission could arrive, Gregory ended negotiations by excommunicating Frederick.

The rupture appears to have been inevitable under the circumstances. Frederick was determined to make himself master of Italy north and south. Sicily and the south were already his, and provided him with the funds he required, but for really efficient armies he needed troops from Germany, and for this purpose it was necessary to be able to depend on the passes of the Alps being kept open for the passage of his troops. On several occasions the Lombard League had been able to close them and, for the time being, effectually to block his schemes. The destruction of the League was thus essential from his point of view. On the other hand, since 1059, when Robert Guiscard and Richard of Capua acknowledged the Pope as their liege lord, the curia had possessed in the Normans a valuable counterpoise to the domination of the Germans in the north. There had been friction at times, sometimes very serious friction, for the Normans were difficult vassals, but on the whole the Norman Government of Southern Italy and Sicily had been a valuable asset to the Papacy. This ceased when Henry VI. became king, and joined in his person the government of the empire and of the kingdom. It was to prevent a recurrence of this union that Innocent rejected Frederick as a possible emperor till his appointment seemed less dangerous to the Church than Otto's government. Innocent did what lay in his power to minimise the risk by inducing Frederick to promise to give up the kingdom of Sicily to his son, to be governed by a guardian approved by the Pope. Frederick having succeeded in escaping from his promise, Gregory attempted to take advantage of Frederick's first excommunication to diminish his power in Sicily, but did not succeed. This failure made it all the more important for the Papacy to protect the League from destruction in order to secure support in the defence of its temporal dominions. At bottom this was a spiritual as well as a temporal question, as it might well be doubted whether a Roman bishop, at the mercy of a German emperor, could still remain the spiritual head of Christendom.

It was important for both parties to have public opinion on their side, and in this respect Frederick had one advantage over his great opponent, as he could make out for himself a strong case of self-defence against rebellious vassals of the empire, supported by the Pope. On the other hand, it would have been difficult for the Pope to make out a convincing case, that in supporting the Lombards he was really acting in defence of his spiritual powers, and it was no doubt for this reason that Gregory made no direct reference to them in stating the grounds for Frederick's excommunication. The Papacy was deeply interested in the struggle between the Lombards and the emperor, yet it was constantly seeking to be treated as an impartial judge, prepared to do equal justice to both parties ; thus placing itself in a false position of which Frederick took full advantage in his letters.

Sentence of excommunication was given on the 20th March 1239. Sixteen grounds are given, of which eleven relate to Frederick's behaviour in his Sicilian kingdom. In three of these charges breaches are alleged of the treaty of 1230. Other charges relate to Frederick's attempts to stir up the Romans against the Pope, and to his occupation of Sardinia and of other lands belonging to the Church. There is also a general charge that Frederick put obstacles in the way of relieving the Holy Land and of helping the Greek empire. It is significant, as already pointed out, that no mention is made of the Lombards, as in the corresponding charge sent some months before to the German bishops.

Frederick asserted over and over again that his quarrel with the Lombards was the real cause of his rupture with the Church, and whether it was the only cause or not, it is difficult to believe that it was not the principal cause, and that other differences could not have been peaceably settled.

A notable feature in the proceedings that followed Frederick's excommunication is the appeal to public opinion on both sides. A month after his excommunication the emperor issued an encyclical to show his innocence to princes and peoples alike. He told at some length the story of his relations with Gregory, and of the injustice he had suffered at his hands. He accused him of having written the Sultan not to cede to him any of the holy places. He also accused him of asking for his support for Viterbo against the Romans, while he secretly wrote to the Romans that his (Frederick's) action was taken without the Pope's knowledge or desire. He spoke of his unjust decisions in Lombard affairs, his support of the rebels, and his unfair demand that he should place himself unreservedly in the Pope's hands. He mentioned the Pope's sudden change of front in the negotiations in the autumn of 1238, and how he had excommunicated him on hearing that he was prepared to give immediate satisfaction. He had excommunicated him against the advice of the wiser cardinals, and had prevented Frederick's mission getting to Rome.

It was impossible to accept as judge one who had shown himself a mortal enemy, and who had favoured by word and deed rebels against the empire; he attributed Gregory's hostility to his refusal to allow Enzio (the natural son of Frederick) to marry his niece. He had also shown himself unworthy of the exercise of pontifical authority by the support he had given to the Milanese, mostly heretics. While Frederick acknowledged the papal authority, to which all Christians are subject, Gregory had shown himself unworthy of office.

He begged the cardinals to call a General Council, to be attended by secular as well as ecclesiastical dignitaries, including his envoys and those of other princes ; this Council he would attend himself, and was prepared to prove all he had said, and even more.

It was, Frederick stated, the Lombard affair that really influenced the Pope, though he dared not make this public because of the scandal it would cause. He had gone so far as to offer to let him have for his own use all the tithes levied for the Holy Land, if he would let him settle it. Gregory had personally sworn to assist» the Lombards against the emperor.

The Pope's reply followed two months later, and when it came, it was even more violent. Frederick is the beast full of blasphemy of the Apocalypse, a fabricator of falsehoods, a vessel filled with abominations, a supporter of the wicked, one who delights to be called the forerunner of Antichrist.

Gregory told the story of Frederick's protection by the Church, in Sicily during his childhood and later on in Germany, and of his own friendship. He repeated the old charges in connection with the crusade, the invasion of the papal patrimony, and his misdeeds in Sicily, which he had almost reduced to ashes by his greed for money, and where he had endeavoured by bribes to get his way in spiritual matters. As regards Lombardy, the emperor had brought his troubles on himself by using force, notwithstanding the Pope's warning, and even when he had gone there without any military force, he had spoiled his case by taking sides. So far had the Pope been from putting difficulties in his way that when Frederick entered Lombardy with armed forces, he had suspended the interdict,

during the time of Frederick's stay, from any town subject to it. He defended again as in previous letters his appointment of the Bishop of Palestrina as legate. He had never offered Frederick the tithes, and denied as figments Frederick's tales about Viterbo and other places, while as regards Enzio and his niece, it was Frederick who desired the marriage. He had shown his heretical tendencies by denying the Church the power of binding and loosing, and evidence would be forthcoming that he had declared the whole world to be deceived by three impostors—Christ, Moses, and Mahomet,—and that he had denied the possibility of the virgin birth.

Frederick replied at once to the cardinals, protesting his orthodoxy, and defending his refusal to allow Gregory the power of binding and loosing, as he was no true pontiff.

Meanwhile Gregory made preparations to carry the war into Frederick's territories, and the Venetians undertook to provide a certain number of ships for the seizure of the kingdom of Sicily. The Pope, on the other hand, gave them certain fiefs and privileges in the kingdom, and undertook that the Church would provide for the fulfilment of this agreement in case it made over the "regnum" to any one else. He also provided that Venice should be included in case the Church and Frederick made peace.

Gregory appealed to Louis IX to help him against Frederick. In his letter he repeated his charge of heresy in connection with the question of the virgin birth. We have not got Louis' reply, but we know from a letter that he wrote the emperor that he refused to give any assistance. Attempts were also made to stir up a crusade against Frederick, as, for instance, in Hungary.

The papal party in Germany endeavoured to induce some foreign prince to stand as a candidate for the empire, but no one could be got to come forward.

Frederick, on the other hand, wrote early in 1240, in answer to a letter from the Archbishop of Messina, that he had tried by humility to obtain the Pope's favour, but as this had failed he was resolved now to adopt a different course, and to recover from the Pope the lands long held by the empire. He justified his action to Henry III, and gave an account of the machinations of the Pope, who had stirred up rebellion in the March of Treviso and in Ravenna.

In April and May 1240 a number of German princes endeavoured to get the Pope to agree to the opening of peace negotiations, as Frederick had declared he was prepared "stare iuri", and negotiations commenced, but broke down, according to Frederick, because the Pope insisted on the Lombards being included in the truce. Hereupon Gregory decided to call a General Council. Frederick at once wrote a letter of protest to the cardinal bishop of Ostia against a council summoned by an enemy, both of the empire, and of himself. He suspected the purpose was not peace, but discord, inasmuch as it was not called by the cardinals or by some person mutually agreed upon. Before it was called, peace negotiations should have been instituted. In September, Frederick issued an encyclical explaining why negotiations had broken down, and refusing to permit the holding of a council called by Gregory, also stating that he was determined not to allow a truce to the Lombards. Gregory's reply was a second summons for a General Council. Frederick maintained his opposition, and towards the end of the year he wrote Louis IX explaining his reason for preventing the holding of the council while declaring himself at all times ready for the peace which the Pope had refused on account of the Milanese. In February 1241 he gave orders to all his "fideles" not to allow any clerics to come to the council called by the Pope, and if necessary to capture them.

Gregory bad hired ships from the Genoese to take to the council those wishing to attend. Frederick's fleet attacked and defeated the Genoese, and a number of dignitaries of the Church, including several cardinals, were captured.

A remarkable feature in the years that succeeded Frederick's excommunication is the small effect that it apparently had on the laity. Notwithstanding the general promulgation of the sentence of excommunication and the charges of heresy published against the emperor, as we have seen not even a pious king like Louis IX. could be induced to support the Pope. On the 22nd August Gregory died.

Pope, they did not prevent the publication of the sentence of excommunication by their clergy, nor did they prevent the clergy from giving pecuniary contributions to the papal cause.

CHAPTER IV.
FREDERICK II AND INNOCENT IV.

After the dearth of Gregory IX there was a long vacancy in the papal See, broken only for a few days by the election of Celestine IV on the 25th October 1241. He died on the 10th November following, and it was not till June 1243 that the vacancy came to an end by the election on the 25th of that month of Innocent IV, a Genoese of the Fieschi family. Soon after his election, Frederick wrote him announcing the despatch of an embassy. Negotiations commenced but broke down in September. On the 23rd of that month Innocent wrote Gregory de Montelongo, his legate in Lombardy, that the emperor had asked him to enter into peace negotiations, and he had agreed as a true lover of peace and as Frederick would, after his usual fashion, have defamed the Church had he not consented. He had accordingly sent a "forma pacis" laying down conditions from which the Church, its faithful adherents, and the emperor would all have benefited, but Frederick would not accept them, and sent in his turn envoys with proposals inacceptable to the Pope. Innocent directed his legate to inform the adherents of the Church that he would only re-establish peace on terms satisfactory (expediens) to the Church and its adherents. Negotiations began again, but while they were going on active hostilities recommenced, as Cardinal Rainer, who had been appointed by Innocent Bishop of Viterbo, succeeded in recapturing it from the Imperialists. Later on negotiations were resumed, but made no progress till, at the suggestion of Louis IX, Raymond of Toulouse was released from excommunication to enable him to be an intermediary between the Pope and the emperor. Conditions of peace were now at last drawn up, and on the 28th March Frederick gave his assent to all that might be done by Peter de Vineis and Thadeus of Suessa to carry out these provisions. Among other conditions it was provided that Frederick was to let all the world know that his disobedience to the order of excommunication was not due to contempt of the keys, but to the fact that he was advised that till the order was formally communicated to him he was not bound by it; that he now recognised his error, and that he knew and believed that the Pope, even if a sinner, had full power over the emperor and over all other Christians in spiritual matters. He was to submit to the orders of the Church as to the atonement to be made. He was also to give such compensation as might be ordered by the Church for wrongs done to it, saving always his rights and honours and the maintenance intact of his empire and kingdom. So far as those were concerned who had taken the side of the Church after his excommunication, their offences were all to be forgiven, whether committed before or after that time. In the case of those at war with him at the time of his excommunication (*i.e.*, the Lombards), all offences committed after that date were to be forgiven. So far as offences committed before that date were concerned, the emperor would accept the decision of the Pope and of the cardinals, to be given within a time to be fixed by the Pope. The specially important points, so far as we are here concerned, are the unqualified admission of the Pope's right to excommunicate and the emperor's duty to submit; the distinction between the Lombards and other enemies; and the submission to the Pope's decision of the offences committed by the Lombards prior to Frederick's excommunication. As we shall presently see, this matter had been considered before the terms were agreed, and they are not fully intelligible apart from Frederick's account of the negotiations before the settlement was made.

Peace now seemed secured, but very soon difficulties arose as to the execution of the terms agreed on, and in the end of April Innocent wrote the Landgrave of Thuringia (Henry Raspe) that Frederick had chosen to withdraw (resilire) from his oath rather than to obey. A few months later Frederick issued an encyclical letter giving his version of the negotiations subsequent to the election of Innocent and up to the time of his flight to Genoa. The letter was an open letter, and any incorrect statements could at once be challenged.

According to Frederick he was prepared to comply with all the conditions laid down, but the Pope refused, and put off his absolution because the emperor would not submit unconditionally for his decision the question of his rights and regalia in Lombardy. The Pope insisted on the immediate return of all lands to which the Chinch was entitled, while other matters were to be reserved for his further consideration. Frederick's envoys demurred, as meanwhile Frederick's absolution would be in abeyance while he was partially disarming himself. They made various suggestions to safeguard him and to prevent his absolution being unreasonably withheld ; but though supported by the Emperor of Constantinople and the Count of Toulouse, they failed. Though it was not openly given out yet, it was owing to the Lombard question they failed. This was no fault of the emperor's, as the matter had been fully discussed before the "forma satisfactionis" had been finally settled. The Pope had, before that was done, constantly pressed that the Lombard question should be submitted to him unconditionally, as had been done in Gregory's lifetime. It was pointed out that at that time the Pope and the emperor were friends, and, moreover, since then the danger of such submissions to the Church had become apparent. The Pope later on suggested to omit provisions regarding the release of the Lombard prisoners, and the giving by them of an oath of fidelity. Frederick's envoys thought that the Pope meant, if this were agreed, to effect his object by means of another clause providing that peace should be given to the Lombards, and they accordingly made it plain that this clause did not cover the release of the prisoners, and the clause was in the end left as it finally stood in the "forma satisfactionis", as its meaning had been made plain in the course of the negotiations.

After the "forma satisfactionis" had been agreed, the Pope, at the request of the Milanese and other Lombards, again pressed for the unconditional submission of their quarrel to himself and to the Church. This the envoys would not agree to, specially having regard to the great partiality shown by the Pope to the Lombards and to their cause. The Pope then demanded the restitution of the lands (claimed by him) without any assurance or promise that absolution would be given to the emperor. Frederick set himself to consider all possible means by which a rupture could be prevented, and suggested that the Pope should go to some place in the Campania, where intercourse with the emperor by envoys (inter nuncios) would be easy, and where, if necessary, the Pope and emperor could meet. Frederick made a number of suggestions regarding the disposal of the Lombard question, but he would not put himself unreservedly in the Pope's hands, and he also insisted on safeguards for his absolution. Finally, the Pope, after refusing to go to the Campania, as he at one time had promised, declared his willingness to go to Riete. While, however, the nuncios and the cardinals were on their way there they heard of the Pope's flight on his way to Genoa (end of June 1244).

Frederick, however, did not abandon all hopes of a settlement. Towards the end of 1244 he wrote two of the cardinals that he had implicit confidence in them, and was willing to trust them with the settlement, provided always that it did not diminish the dignity of the empire, and that the satisfaction he had to give did not involve serious injury to it.

In April he wrote the Pope he was sending the Patriarch of Antioch, as he was in hopes he would be able to restore peace. Innocent wrote the patriarch on the 30th April that the Church was prepared for peace if Frederick accepted the conditions laid down in the form proposed by the Church and accepted by Frederick, released the captives, and restored the lands of the Church. This must be done before the council summoned by the Pope met. On the 6th May he wrote the patriarch a second letter, in which he directed him to inform the emperor that as soon as Frederick gave satisfaction for his manifest offence and sufficient security for other cases, he would absolve him. A few days before this (18th April) Innocent had in a sermon cited Frederick to appear before him at the Lyons Council. In the beginning of June Frederick wrote the cardinals. In this letter he spoke of them as placed as lights on a mountain to shine to the nations, and as "fidei cardines" who rule the house of God. He assured them that he had been and still was prepared to submit his case to the Pope, saving his honours, rights, and dignities and those of his faithful subjects in the empire and in

the regnum, provided the Pope would acknowledge him as his beloved son. Fearing that he might be prejudiced by action taken in his absence, and that the Pope might consider that he could lawfully do as he pleased, and use the spiritual sword against him "temporaliter", he was sending his servants fully empowered to appeal from any wrong done to him; first to the living God, and after God to the future Pope, a general Council, the German princes, and generally to all kings and princes of the earth and to Christians generally.

Two very violent manifestoes were published about this time, originating in Italy, and apparently specially intended to influence the Council against Frederick. He was charged with seeking to make himself the equal or even superior of the Pope, and with desiring to appoint him. Sitting in the temple of God he required prelates and clerics to kiss his feet as if he were himself divine. He required others to call him "sacrum". Both manifestoes accused him of being surrounded by persons in his service who asserted that the soul of man perished with his body. Popular rumours were repeated that he had murdered three of his wives, and that he had procured the slaughter by Saracens of a number of Christians in the Holy Land.

The council summoned by Innocent to Lyons met in due course, and at the last meeting on the 12th July the Pope declared Frederick to be deprived of all his honours and dignities. All bound to Frederick by oaths of fidelity were released from them in perpetuity, and were forbidden to obey him as emperor or king. Innocent directed those who had the right of electing the emperor freely to chose a successor. He and his cardinals would decide later on how to deal with the kingdom of Sicily. The Pope gave a brief account of events up to the time of the oath given by Frederick's envoys on his behalf. It appeared, according to Innocent, from subsequent events that he had sworn rather with the object of deceiving the Church than with any intention of obeying, and he was therefore compelled in justice to pass sentence on him. The four most serious charges against him were, frequent perjuries, wilful (temere) violation of the peace between the Church and the empire, sacrilege. by the capture of cardinals, prelates, and others of the clergy both regular and secular on their way to a council called by his predecessor; finally, suspicion of heresy not on doubtful and light, but on weighty and clear grounds. The first charge was based on the breach by Frederick of his oath thrice repeated to respect and in good faith to protect the honours, rights, and possessions of the Roman Church, and to restore any of them that might fall into his hands. Despite these oaths he addressed abusive (comminatoria) letters to Gregory and to his brothers (*i.e.*, the cardinals), and he defamed Gregory. He had legates of the Apostolic See seized and imprisoned. He despised the privileges of the keys, declaring that he took no account of the sentence of Gregory, and he disregarded his excommunication, compelling others also not to observe it. He had occupied and still held lands the property of the Roman Church. He had compelled subjects of the Church to perjure themselves by absolving them from their oaths of fidelity to the Church, and by making them give oaths of fidelity to himself. The charge of breaking peace with the Church is connected with breaches of the conditions of the peace of Ceperano. The strong suspicion of heresy is based on his disregard of the excommunication of Gregory, his relations with Saracens, the marriage of his daughter to the schismatic Vataces, the Emperor of Nice, the murder of the Duke of Bavaria (specially devoted to the Church), and deficient zeal in relieving the oppressed and in building churches and monasteries. Gregory's story regarding Frederick and the three impostors is not repeated.

Frederick was ready with his reply within a fortnight of Innocent's order deposing him.

In his encyclical Frederick denied the authority of the Pope to depose temporal rulers. The Pope had, by law and custom, the right to consecrate the emperor, but this gave no more power to depose him than the fact of consecrating and anointing their rulers gave bishops such a power in the case of their kings. Frederick went on to take a number of exceptions to the proceedings, such as that there was no proper accuser nor public inquiry, and that the mere assertion by Innocent that the facts were notorious did not make them to be so. The witnesses were few in number and tainted. He had

received no proper summons to appear, and a conviction in the absence of the accused was null and void. The extravagance of the proceedings was apparent, as the emperor was convicted of *lèse majesté*, though he was not subject to the law, and was one on whom God alone could inflict temporal punishment. On the other hand, he admitted the authority not only of the Pope, but of every priest to inflict on him spiritual punishments. He protested his orthodoxy. Finally, he warned those whom he addressed that they were also concerned, as his defeat would encourage the Pope to deal with them when their turn came.

In a letter addressed to the French in September, Frederick complained not only of the unwarrantable action of Innocent IV and some of his predecessors in deposing kings and other rulers, but also of their interference, at the request of one party to a quarrel, between rulers and their subjects or between the subjects themselves. He also complained of papal encroachments on the jurisdiction of the secular courts. He had sent envoys to Louis IX to endeavour to enlist his support after consulting the peers and other nobles of his kingdom. Even if active support were not forthcoming, he begged that none of Louis' subjects be allowed to assist the Papacy while the conflict continued. He offered to submit to the decision of the king and his nobles on the compensation due from him to the Church, provided they could procure the cancellation of the orders passed at Lyons. Should peace be restored with the Pope, and should the Lombards submit, or at all events lose the support now given them by the Church, he was prepared to enter into very far-reaching engagements as regards the Holy Land. If the danger from the Papacy and the Lombards prevented this, he would do all in his power to help Louis and all other crusaders. An encyclical was also issued apparently at the same time to kings and rulers generally. Unfortunately we have only a fragment of the letter, but from the portion preserved it appears to have contained a fresh statement of his grievances against Gregory IX and Innocent IV from the time of the second rebellion of his son Henry, the King of the Romans.

In another letter, evidently addressed to rulers generally, Frederick complained of the decline of the Church; it was ungrateful to its benefactors, and no longer resplendent with miracles. The clergy were now given over to the pleasures of the world, and it would be an act of charity to deprive them of their excessive riches, thus effecting, what he had always intended—namely, their restoration to what they had been in primitive times.

Innocent replied at some length. The Popes as successors of Peter had received by divine appointment a general "legatio" over all men and in all matters spiritual and temporal. Even under the old dispensation priests had powers over nations and kings, and it was in virtue of these powers that they deprived of their thrones kings unworthy to rule. The Roman pontiff might when occasion arose (casualiter) judge any Christian, however exalted in rank, especially when there was no one else who could do so, and when a question of sin was involved. In such cases one separated from the body of the faithful was thereby also deprived of any temporal authority he might have possessed, as there was no power ordained of God outside the "Ecclesia". Those, therefore, who attributed the Pope's imperial power to a grant from Constantine were in error. Before his conversion the powers illegitimately exercised by Constantine were those of a tyrant, "permissa" not "concessa", and these he resigned to the Church, and it was the Church which bestowed on him the divinely ordered imperial power. Both swords, the temporal and the spiritual, belonged to the Church, but it handed over the former for use to the emperor. The acceptance of this use of the sword was symbolised in the coronation service in which the emperor drew from its scabbard a sword given him by the Pope, and brandished it aloft. Frederick's argument that the Pope had no more power than bishops to depose the ruler was fallacious. Bishops were the subjects of their kings, and owed them fidelity and obedience (subjectio). The emperor, on the other hand, owed obedience and fidelity to the Pope. Moreover, kings succeeded one another by way of inheritance, while in the case of emperors succession was decided by the free election of German princes. Dealing with the more technical

objections, the Pope declared that Frederick's citation was made publicly and was known to him. The facts of the case were so notorious, Innocent gave instances, that it was possible at once to proceed to judgment. Frederick had ridiculed the idea that he could be guilty of lèse majesté, but an offence against the divine majesty was far more serious than one against a mere man, and was subject to the like penalties. In answer to Frederick's attacks on the Church he justified its wealth and power, and turned the tables on him by showing that these attacks proved Frederick's desire to oppress the Church and the clergy.

He did not deal with the statements made in various letters by Frederick as to the peace negotiations, but asserted Frederick's object was merely to get a false peace which would enable him more easily to injure the Church. He made no express reference to the Lombards, but charged Frederick with specially hating the Church because it defended the liberty of kings whom he desired to subject to himself.

Many fruitless attempts were made, especially by Louis IX, to restore peace between the empire and the Papacy. In answer to an appeal in the antnmn of 1246, Innocent wrote Louis that, while he had little hope of any results from his efforts, he was prepared to treat Frederick as leniently and kindly (mitius et benignius) as possible without sinning against God and the Church. Two and a half months later, however, he wrote the Bishop of Strassburg that under no circumstances would he make peace with Frederick so long as he remained emperor or king, and in a later letter this was extended, so far as the empire was concerned, to all Frederick's offspring.

Frederick in a letter to Henry III expresses himself as willing to come to terms provided the rights and honours of the kingdom were safeguarded, but as he included in this the submission of the Lombards, or at all events the abandonment of their cause by the Church, and the attitude of the Pope to this had always been the obstacle to peace, no reconciliation was possible.

According to Matthew Paris, Louis made a last attempt after his capture in Egypt in 1250 to get the Pope to come to terms with Frederick, but he again failed, greatly to the anger of Louis' brothers and the Duke of Burgundy, through whom this ineffectual attempt to restore peace was made. These efforts are remarkable in the case of a man so pious and with such a strong sense of justice as Louis, and it is difficult to believe he would have made them had he attached any weight to the charges of heresy against Frederick, or had he believed that the faults lay all on one side in his quarrel with the Church. While, however, the Pope could not induce him to treat Frederick as deposed or as a heretic, he would not support Frederick in his attacks on the Church, and when at one time (in 1247) there had appeared to be some danger of Frederick's using force against the Pope at Lyons, Louis and his mother had at once offered to send troops to protect him.

It was some time before arrangements were completed to elect an emperor in place of Frederick II. Finally Henry Raspe, the Landgraf of Thuringia, was accepted by the Pope as a suitable successor of Frederick, and in April 1246 Innocent wrote the archbishops and other nobles of Germany pressing them to elect Henry. He also wrote a number of the most important lay princes individually, exhorting them to proceed quickly to an unanimous election, but not naming the person to be elected.

Henry was accordingly elected, but none of the more important secular princes attended. Henry died in less than a year, and many princes, including Richard of Cornwall and the Duke of Brabant, were unsuccessfully approached. Finally, on the recommendation of the Duke of Brabant, his nephew Count William of Holland was selected to succeed Henry. Very extensive powers had been given to the legate in Germany to deal with recalcitrant clerics. William was elected, but again none of the greater secular princes, saving the Duke of Brabant, took part.

Frederick, during the period between his deposition and his death, met with one great disaster, the defeat of his forces at Parma in 1248, and a serious loss in the capture of his son Enzio early in 1249. After this he seems to have improved his position considerably in Italy, and not to have lost

ground in Germany. The Pope, on the other hand, appears at the time of Frederick's death to have been losing ground. Intense dissatisfaction was caused by the heavy financial exactions necessitated by the expenditure entailed by his struggle with Frederick, and especially by the very extensive use he made of provisions and dispensations to strengthen his party. The intense feeling roused against the curia is shown by Bishop Grosseteste's famous "sermo" before the Pope at Lyons in May 1250.2 Another striking example of the stir caused by the struggle between the Pope and the emperor is afforded us by the proceedings of a league of French barons formed in November 1246 to oppose the encroachments of the Church. The members of the league pledged themselves not to allow clerics to try any cases saving where heresy, marriage, and usury were concerned, and they expressed their desire to see the Church restored to its primitive state. It is evident that such attacks as that of Frederick on the wealth of the Church had not been without effect.

The death of Frederick marks an important stage in the contest between the Papacy and the empire, which had begun nearly two hundred years before between Gregory VII and Henry IV

Gregory had claimed very large powers as vicar of St Peter, not only over the empire but also over secular rulers generally, but they were extraordinary powers. Gregory was not content with this, and endeavoured to obtain some secular control also, by extending to as many countries as possible a claim to feudal superiority by the Church of Rome.

Innocent III, while careful to assert his powers as vicar, not of Peter, but of Christ or of God, also sought to bring the relations between the Papacy and the empire under definite rules. He maintained any subsisting feudal claims in other countries, and in the case of Sicily and England the exercise of his powers as feudal overlord played a considerable part in his policy, but on the whole he generally depended on his extraordinary powers as vicar of Christ. In the case of the empire he claimed a special position, inasmuch as the Western empire was the creation of the Papacy, which had transferred the seat of empire from Constantinople—a transfer to which the German princes owed the right to elect a king who became emperor when crowned by the Pope. He held that in virtue of this transfer the Papacy had the first and last word in such elections. They were of vital importance to the Church, and it was for the Pope to decide whether the person elected by the princes was fit for empire and to settle disputed elections. He also appears to have assumed that certain rules apparently derived from ecclesiastical law were applicable to the election proceedings. The majority of the princes, on the other hand, denied that the Pope had any voice in determining whether the prince elected by them was fit for empire, and they also contended that electoral disputes could only be decided by the electors themselves. It was no doubt Innocent's desire to conciliate as far as possible these opponents that made him so carefully avoid the use of the word " confirmation " in connection with his declaration in favour of Otto, and attempt to convince the princes that he was merely setting his seal on the legitimate and valid election of Otto, and was not tampering with their electoral rights.

No new questions of principle appear to have been raised by Honorius III, but Gregory IX went a step beyond Innocent in claiming that in virtue of Constantine's donation the empire had been transferred to the Papacy, and that when it made it over to the Germans it still retained its overriding power. He also claimed the two swords—*i.e.*, the supreme authority in temporal and spiritual matters. While, however, the Church kept in its own hands the exercise of the spiritual power, it made over the sword of temporal power to secular rulers, to be exercised under its control.

Innocent IV again went a step further. According to him the donation of Constantine was not in the true sense of the word a donation, it was a recognition by Constantine that the empire (and apparently all temporal power) belonged to the Church, and that Constantine had up till then exercised a usurped and unlawful power. Though Innocent put forward such far-reaching claims, his contest with the Hohenstauffen made it impossible for him to attempt in practice any such authority over temporal rulers generally, whatever may have been his theoretical views.

Innocent also went a step beyond any previous Pope since Gregory VII, by practically ordering some of the German princes to elect Henry Raspe in the vacancy created by Frederick's deposition. As we have pointed out, however, he did not give such a direction to all the princes, and possibly his action in this case may be interpreted as an example of the Pope's claim to the obedience of the clergy even in secular matters.

While the papal claims were not acceptable to the majority of the German princes, a minority could generally be found, even among the secular princes, willing for reasons of immediate self-interest to support the Church, while increasingly, from the time of Innocent III, the Papacy insisted on the obedience of the great prince bishops, even in secular matters. The real mind of the princes has often to be gathered from their acts rather than from their writings, but Frederick had a chancery as efficient as that of the Papacy, and was well able to develop his views of the proper relations between the Papacy and the empire, and probably these views were generally shared by the majority, at all events of the secular German princes. It is perhaps doubtful whether they would have formally accepted Frederick's argument that Gregory's excommunication was invalid, because he was unworthy of his great office. Frederick at all events did not use this argument against Innocent IV. but pleaded in his case that the Pope had no authority to inflict temporal punishments, and that his proceedings were vitiated by grave irregularities. Whatever the cause, Frederick's excommunication and deposition were not in practice effective in the case of a large number of the German princes, nor indeed in the case of the kings of other countries such as France and England. Both Henry III and Louis IX in their correspondence treat Frederick as still emperor, notwithstanding his excommunication and deposition.

As we have seen, Frederick's attack on the wealth of the Church, and on its interference in secular matters, found an immediate response among the French nobles, and though the agitation against the Church died away after Frederick's death, it was a bad omen for the future.

The death of Frederick destroyed all chance of a united German empire strong in its German armies and the pecuniary resources of its Italian kingdom. It is impossible to say what might have happened had Frederick lived some time longer, but two important factors in the situation were that Frederick was not a beaten man at the time of his death, and that the unsparing use by Innocent IV. of all the ecclesiastical means at his disposal had stirred up strong feeling in Europe.

CHAPTER V.
THE DEVELOPMENT OF THE THEORY OF THE TEMPORAL AUTHORITY OF THE PAPACY IN THE CANONISTS OF THE LATER THIRTEENTH CENTURY.

It was with the pontificate of Innocent III, as we have seen, that the question of the relation of the temporal and spiritual powers again assumed something of the same importance as had belonged to it in the great conflict between Hildebrand and Henry IV; and it is in the Decretal letters of Innocent HI. that we must look for the ultimate sources of the extreme view of the papal authority in temporal matters which was developed in the second half of the thirteenth century.

It must, however, be observed that while Innocent III often used phrases which were capable of this development, he was himself careful, at least in his strictly public utterances, to refrain from drawing out these conclusions. It was Innocent IV, especially in his ' Commentaries on the Decretals', who did this, and it is to him that must in the main be traced the principles set out by the great Canonists of the later thirteenth century, like Hostiensis and William Durandus. They may indeed, with regard to this matter, be called the pupils and followers of Innocent IV.

It is, as has just been said, in his 'Commentaries', much more than in the actual Decretals, that we must look for Innocent IV's theory of the relations of the temporal and spiritual powers. It is, indeed, a curious and rare spectacle to see a great Pope acting in two capacities, sometimes as a legislator and sometimes as a commentator upon the laws, and even upon his own judgments, and we should venture to say that Innocent IV was quite conscious of the difference.

In his decrees he is issuing judgments and dogmatic statements, while in his 'Commentaries' he is giving his opinions as a Canonist.

We must therefore begin our consideration of the extreme theory of the later thirteenth century by an examination of the principles set out by Innocent IV.

The Pope, he says in one passage, has received his power of making canons from Christ Himself, while the emperor draws his authority as a legislator from the Roman people; this is only a particular statement of the more general principle that the source and nature of the papal authority was very different from those of the temporal rulers.

In his comment on his own decree deposing Frederick II he draws out and generalises the significance of his own action, and asserts that, inasmuch as Christ, even when he was in this world, was from all eternity the natural lord, and could by natural law have deposed emperors and kings, so also his vicars—that is, Peter and his successors—could do the same; for he would not have been a wise lord if he had not left a vicar who should exercise his authority. Again, in commenting on the famous Decretal of Innocent III, 'Per Venerabilem', where Innocent III had said that the King of France did not recognise any superior in temporal matters, Innocent IV says that this may be so "de facto", but while some say that "de jure" he was subject to the Roman emperor, he himself says he is subject to the Pope.

It is apparently on a similar principle that Innocent IV justified his action in requiring the Portuguese barons to accept his appointment of a guardian or "curator" of the kingdom, on account of the king's incapacity. He maintains that in such a case it is for the superior to appoint a "curator", and if there is no other superior the Pope should do this.

Innocent IV is clearly developing the position that he is the final superior, even in temporal matters, of all secular authorities, and we should conjecture that this is the meaning of his assertion that the Pope is the "judex ordinarius" of all men, though this interpretation might be disputed.

Again he draws out a statement of Innocent III about the election of the emperor, to a conclusion which may be suggested by the words, but is certainly not asserted. Innocent III in a well-known Decretal letter had defended his interposition in the election of Philip of Swabia; he

repudiated the claim "to elect" the emperor himself, but asserted his right to declare a candidate unfit for the office, and, in the case of a disputed election, to recognise the candidate whom he preferred. Innocent IV. in his comment develops this into the assertion that if the electors were negligent in carrying out their function, the Pope had the right to appoint the emperor.

The most comprehensive statement of Innocent IV's conception of the authority of the Pope in temporal matters is to be found in his observations on that Decretal letter in which Innocent III, while instructing the bishop of Vercelli to declare null and void any letters which might be produced from the Holy See dealing with matters which belonged to the secular courts of Vercelli, asserted that if the secular court failed to do justice, an appeal could be made to the bishop, or to the Pope himself, especially at a time when the empire was vacant. Innocent IV admits that the prohibition of the interference of the ecclesiastical authority with the normal jurisdiction of the secular court is right, but he draws out the significance of the right to intervene in the case of defect of justice in great detail, and especially lays stress upon the authority of the Pope during a vacancy of the empire. There is a special relation between the Pope and the emperor, he is "advocatus" of the Pope and takes an oath to him, and holds the empire from him, and therefore the Pope takes the emperor's place during a vacancy. (If Innocent IV does not actually say that the emperor is a vassal of the Pope, he seems plainly to imply it.)

If other kings or princes who have no superior are negligent, the Pope succeeds to their jurisdiction, not because they hold the kingdom from him, but in virtue of that fulness of power (plenitudo potestatis) which he possesses as vicar of Christ. Some say that the Pope must not interfere in the affairs of vacant kingdoms unless appeal is made to him.

After enumerating the various cases in which the ecclesiastical judge can interfere in matters belonging to the secular jurisdiction, he answers the objection which may be made that these principles rest only upon the decisions of the popes themselves, and warns men that in arguing thus they are incurring the guilt of sacrilege. In order to make this clear, he sets out his conception of the origin and nature of the government of the world.

From the creation of the world to the time of Noah, God governed the world, he says, directly. From Noah to the coming of Christ God governed the world by various ministers, patriarchs, judges, kings, priests, and others. This continued till the coming of Christ, who was Himself the natural lord and king. Christ established Peter and his successors as His vicars. Therefore, though there are many different offices and forms of government in the world, men can always have recourse to the Pope when need arises, whether it is a difficulty about law, and the judge is uncertain what judgment he ought to give, or a practical difficulty when there is no superior, or when the judges cannot secure the execution of their judgments, or will not render justice.

To complete the account of the position of Innocent IV, we may observe that he is clear that the authority of the Pope extends not only over Christian people, but over the infidels and the Jews. He refers to this at the end of the passage which we have just been considering, and develops it at length in a later passage. In this place also he appeals to the evidence of the "Donation of Constantine" as showing that the Pope now held the authority of the Roman Empire, but he admits that it might be argued that this applied only to the West.

When we endeavour to sum up the principles which Innocent IV thus set out with regard to the authority of the papacy in temporal matters, it is, we think, evident that he had developed the incidental phrases and suggestions of Innocent III into something like a definite system.

As we have said, he did not in so many words say that the emperor was the vassal of the Pope, but he maintained not only that the Pope had the right to reject an unfit candidate for the empire, and the right to decide in disputed elections, but that, failing the action of the electors, he could himself appoint; and he definitely says that the emperor held the empire from him.

He claimed to be the ultimate "superior" of all States, and this in virtue of the fact that he was the vicar of Christ, for Christ was lord and king of all the world, and had committed his authority to Peter and his successors, the popes. It does not seem too much to conclude that in Innocent IV's view all temporal as well as spiritual power in principle belonged to him.

The canonical theory of the temporal authority of the papacy had thus been profoundly modified by Innocent IV, and it is to this that we must trace the principles represented by Hostiensis and William Durandus.

It is natural that it is in discussing the relations of the emperor to the papacy that this is chiefly developed, though, as we shall see, their theory is not limited to this.

Hostiensis' treatment of the subject is set out in great detail in a passage in his 'Summa Decretalium', in which he discusses and develops the implications of the well-known Decretal letter of Innocent III as to the propriety of his legitimising the children of the Count of Montpellier, 'Per Venerabilem'. He sets out his own conclusions with confidence, but it should be observed that he recognises that other Canonists had taken a different view.

It is, he says, contended by some that the Pope should not interfere in such a matter as legitimisation for secular purposes, but should leave this to the emperor; on the other hand, it may be argued that the Pope can and ought to interfere in temporal matters. He first cites a Canonist whom he designates H. (Huguccio) as saying that the emperor holds his power over temporalities from God only, as the Pope holds his power in spiritualities, and thus the two jurisdictions are distinct. He then cites the two Canonists, Alan and Tancred, as maintaining that while the "imperium" comes from God only, the emperor receives the use of the temporal sword from the Church, and that therefore the Pope is greater, and can use both swords, for the Lord and Moses used both swords.

Having thus set out the antithetical judgments, he gives his own opinion in careful and measured terms. He begins by maintaining that the two jurisdictions are not only distinct, and that each comes from God, but the spiritual comes much nearer to God, and is therefore the greater. The "Sacerdotium" and the "Imperium" do not differ much as to the source from which they proceed, but they differ greatly in majesty. It is this, he says, which is symbolised in the difference between the unction of the bishop and the king. The difference is like that between the sun and the moon. He admits that this analogy had been differently interpreted by various doctors, but he urges that it may be properly said that as the moon receives its light from the sun, so the royal power receives its authority from the priestly, and as the sun illuminates the world by means of the moon at night, so the priestly office illuminates the world by means of the royal, in those matters which it cannot deal with itself, such as the judgment of blood.

He concludes, therefore, that while the two jurisdictions are distinct, as far as their exercise is concerned, the emperor holds the empire from the Roman Church, and may be called its "Officialis" or vicar. It was the Roman Church which transferred the empire to the Germans. The Pope therefore confirms and anoints and crowns the emperor, and can censure and even depose him. The Pope is therefore the superior, but he should not interfere with that which has been properly done by the emperor in temporal matters, except perhaps in special cases (in casibus); the Pope, therefore, takes the place of the ruler in the vacancy of the kingdom or empire.

There is thus "quoad majestatem" only one head—namely, the Pope, for there is only one God, one Head, the Lord of things spiritual and temporal, and he committed all things to Peter, and Peter had both swords. The Lord of Lords gave him two keys, not one only, the one for spiritual, the other for temporal things. (Hostiensis is, however, careful to add that the words of our Lord had been interpreted in many other ways.) We are one body in Christ, and it would be monstrous that we should have two heads. This is what is implied in the Donation of Constantine, and if any one were to maintain that Constantine had not the right to grant this, he might as well say that the people had not the right to transfer their authority to the prince.

In his "Commentary" on the Decretals he adds two important contentions, that if the electors are negligent and do not elect an emperor, the Pope elects. If several are elected it is for the Pope to hear and determine, and if one of those elected is contumacious, he can proceed in his absence. If the claims of the various persons are equal, he can decide as he pleases. This is a somewhat large interpretation of the well-known Decretal letter of Innocent III, and is no doubt based on Innocent IV.

Some of these judgments are related to the emperor alone, but others have a more general significance, and we must therefore turn to some other passages in his works. In his "Commentary" on the Decretals we have some important statements on the relations between the temporal and spiritual powers in general. The spiritual power is superior to the earthly in three points : in dignity, for the spirit is greater and more honourable than the body; in time, for it was earlier ; and in power, for it not only institutes the temporal power but also has authority to judge it, while the Pope cannot be judged by any man, except in cases of heresy. In another passage in his 'Summa' he again says that the Pope has both swords, and that he thus deposes kings, and not only creates kingdoms but transfers them. For the Pope receives from God alone the authority of the earthly and heavenly empire.

In another passage in the "Commentary" he discusses that Decretal letter of Innocent III in which, while forbidding an appeal in ordinary circumstances from the secular courts at Vercelli to the papal, he allows this in cases of a failure of justice, especially in the vacancy of the empire, and where there was no superior to whom appeal could be made. Hostiensis founds upon this the conclusion that if a king or other prince, who has no superior, dies, or is negligent in administering justice, the Pope succeeds to his jurisdiction, and this is founded not on the "jus commune", but on the "plenitudo potestatis" which the Pope possesses as the vicar of Christ. Hostiensis, however, admits that there is a difference of opinion about this.

Perhaps the most remarkable illustration of the position of Hostiensis is to be found in another passage in his 'Summa', where he discusses that well-known Decretal letter of Innocent III in which he repudiated all intention of interfering with the jurisdiction of the King of France, or with the feudal court, but claimed the right to intervene on the ground that the King of England had complained that the King of France had "sinned" against him; for questions concerning sin belonged to his jurisdiction, and especially if they involved the maintenance of peace and the sanctity of an oath. Hostiensis seems, as we understand him, to be alarmed lest the letter of Innocent III should be interpreted as meaning that the Pope did not possess both swords, that the temporal and spiritual jurisdictions are distinct, that the "Sacerdotium" and the "Imperium" proceeded from the same source, and that therefore the Pope should not interfere in temporal matters except in such special cases as when the secular judge was negligent, or when the "Imperium" was vacant. As we understand him, Hostiensis himself contends that the Pope is greater than the emperor, for Christ gave to Peter the laws both of the heavenly and the earthly empire, and he holds both the swords, although he entrusts the exercise of the temporal sword to emperors and kings. It is the proper function of the Church to maintain peace, and to cause it to be kept. He concludes by saying that all causes which involve the question of an oath, or the defect of justice, or of peace, or of sin, can be brought before the Church.

If we endeavour to put together the various aspects of the theory of Hostiensis on the relations of the temporal and spiritual powers, the first thing that seems to us obvious is that he continues the method of Innocent IV—that is, he draws out all the possible significance of phrases used by Innocent III into large general principles. It should be observed that he is quite clear that the secular power is divine in its origin and nature. There is no trace of the supposed conception that secular authority was in its own nature evil.

While, however, he conceived of it as coming from God, he was also clear that it was not only inferior to the spiritual power in dignity, but that it was derived from God through the spiritual power. For both swords belong to the Pope, and it is from him, and subject to his control, that emperors and kings wield the temporal sword. The Pope retains the right to reclaim the direct authority even in temporal matters, in virtue of the "plenitudo potestatis" which he possesses as the vicar of Christ, in such cases as the vacancy of the empire or of any kingdom, or of incompetence or defect of justice in the ruler, and in all cases of sin.

These principles apply to all political societies, but he looks upon the empire as being even more strictly subordinated to the papacy. He maintains that the Pope has the right to hear and determine all cases of disputed elections, and while he does not actually say that the emperor was a vassal of the Pope, he holds that he may properly be called an "ofificialis" and vicar of the Holy See.

How far then do these judgments of Hostiensis correspond with those of other canonical writers of the middle and end of the thirteenth century? We shall find some interesting parallels in earlier as well as later writers.

One of the earliest commentators on the Decretals was Godfrey of Trano, and while we have not found in his work any direct discussion of the relation of the papacy itself to the temporal authority, it is significant that in concluding the discussion of the first title of the second hook of the Decretals, 'De Judiciis', he lays down very emphatically the principle that in all cases of defect of justice in the secular court, the aggrieved person has the right to turn to the ecclesiastical court, and he contends that there is nothing unreasonable in this, for originally all cases whether of the clergy or the laity were taken to the priest for judgment, and the layman is only returning to his original court. Incidentally he asserts that there was no such process for lack of justice from the ecclesiastical court to the secular.

There was no doubt nothing new in this contention of Godfrey of Trano. We have pointed out elsewhere that this principle had been maintained by almost all the Canonists, but Godfrey's contention is no doubt immediately related to the claim of Innocent III, that he had the right to receive the complaint of the King of England that the King of France had transgressed against him. Innocent is careful to say that he had no intention to dispute the authority of the feudal court, but he claims the right to interfere in any case of alleged sin—this belongs to his jurisdiction. (How far this claim was effective either in the case of Innocent III or in the later and parallel case of Boniface VIII is another matter, with which we deal elsewhere.)

The contention of Hostiensis that the emperor may properly be called the officialis or vicar of the Pope may be naturally compared with a statement of a Canonist and Civilian of the first half of the thirteenth century, Roffred of Beneventum. In one of his works where he discusses the nature of the feudal relation, he maintains that the emperor—*i.e.*, Frederick II—held Sicily as a fief from the Pope, and he adds that many said the same thing about the empire. This is, as far as we have seen, the first appearance of the suggestion that the emperor was a vassal of the Pope, after the famous but ambiguous phrases of the letter of Pope Hadrian IV. to the Emperor Frederick Barbarossa in 1157. It is true that Hostiensis is careful to avoid saying that the emperor is a vassal of the Pope, but his terms are at least not very far removed from this.

Another Canonist, contemporary with Hostiensis, Bonaguida of Arezzo, in his treatise on 'Dispensationes' summarises the various aspects of the position and authority of the Pope in terms which are parallel to those of Hostiensis. The Pope, he says, is above all councils and laws, he has no superior; it is he who has on earth the fulness of power (plenitudo potestatis), he is the vicar of Christ and holds the place of God; it is he who binds and looses in heaven and on earth, to him God has committed the laws of the heavenly and the earthly kingdom; he has both swords, the spiritual and the temporal; the Pope is the successor of Peter and the vicar of Jesus Christ; it is he who confirms

and consecrates and crowns the emperor, and confers upon him the "exercise" of the temporal sword, and it is he also who deposes him, as Innocent IV had deposed Frederick.

It is, however, in the most important canonical writer of the latter part of the thirteenth century, that is, William Durandus, that the most complete parallel with the position of Hostiensis is to be found.

The Pope, he says, has both swords, he is the successor of Peter, and the vicar of Christ, he has the "plenitudo potestatis"; what he pleases has the force of law, he rules and judges all things, for the laws of the heavenly and earthly empire have been given him by God.

The Pope is the "ordinarius" of all believers, and therefore acts in the place of the emperor or of any king or prince who has no superior, in the case of a vacancy ; he admits, however, that there was some difference of opinion about this. The Pope has also power to intervene in any question of special difficulty or doubt, and in any question of peace. Rome is the "communis patria" of any "qui non habet jus revocandi forum". These are notable phrases, especially the claim that the Pope is "ordinarius" not only of the clergy but of the laity. We have seen that Innocent IV had used the phrase "iudex ordinarius". In other places again Durandus maintains that the emperor can be accused before the Pope, not only of heresy and sacrilege, but of any great crime, and that the Pope can depose the emperor or king who is convicted of any of these crimes; and that if they are not guilty but only incapable of ruling, he can give them guardians or "curatores". This last clause is founded, as the text will show, on a Decretal letter of Innocent IV, afterwards embodied in the Text. It should, however, be observed that Durandus held that the Pope also can be accused of heresy by a council, or a prince, or the whole body of the faithful. In another place again he maintains that the Pope approves and confirms the person elected to the empire, or he can reject him for just cause, and if several have been elected, he can give the empire to whomsoever he will. He consecrates and anoints and crowns the emperor, and can depose him even when he has been crowned. He mentions that some held that the emperor had the orders of a priest, while others said he was sub-deacon, but he gives his own judgment that he has no orders.

It would then seem evident that it was upon the principles and methods of Innocent IV. as a Canonist that the theory of the Canonists of the later thirteenth century, with regard to the temporal authority of the papacy, was founded; and that in their hands the theory took the form that, while the exercise of temporal authority was left to the secular ruler, it did in principle belong to the Pope, for it was derived from God through him, and he could, when need arose, reclaim it.

This chapter is, it will be observed, limited to the position of the Canonists with whom we have dealt. The character of the theory of other extreme papalist writers like Ptolemy of Lucca, if indeed he was the continuator of St Thomas' 'De Regimine Principum', or like Henry of Cremona, requires another discussion, and these theories must not be confounded with the much more cautious and restrained position of St Thomas Aquinas himself.

CHAPTER VI.
THE THEORY OF THE TEMPORAL POWER OF THE PAPACY IN VINCENT OF BEAUVAIS, PTOLEMY OF LUCCA, AND ST THOMAS AQUINAS.

We have seen the development in the Canonists of the theory that the temporal as well as the spiritual powers belonged in principle to the Pope, but we must not assume that this theory was accepted either by the ecclesiastical writers in general, or by those who represented the standpoint of the secular authorities. We must therefore examine the position of these writers, and we do so in this chapter with reference mainly to Ptolemy of Lucca and St Thomas Aquinas.

Before, however, we deal with these we may take account of some of the statements on the subject which Vincent of Beauvais thought to be sufficiently important to be included in his great encyclopaedic work.

We may begin by observing that Vincent cites, as from Gratian's Decretum, the words of Pope Gelasius in which he had said that Christ Himself separated the temporal from the spiritual office, and bad given to each its own separate function.

With this he cites a passage from a work of Hugh of St Victor which describes the Church as the "Universitas" of the faithful, which is the body of Christ, and says that the "Universitas" is composed of two orders, the clergy and the laity; two forms of life, the earthly and the heavenly; and two authorities, the secular and the spiritual; the head of the secular power is the king, the head of the spiritual power the Pope. As, however, the spiritual life is more honourable than the earthly, so the spiritual power excels the earthly in honour and dignity, and the spiritual power both institutes and judges the secular. The spiritual power was first created by God, and can only be judged by Him, and in the Old Testament the priesthood was first instituted by God, and afterwards the royal power was ordered by the priest, at the command of God.

We may possibly conjecture that Vincent was using the passage for Hugh of St Victor as a comment on or explanation of the Gelasian passage, and that, while he recognised the authority of each power, he also wished to make it clear that the spiritual power was not only superior in dignity to the temporal, but also prior to it in time, and had its place in its creation and possessed a judicial authority over it.

This interpretation of Vincent's intention is confirmed when we observe that in the same place Vincent goes on to cite that letter in which Innocent III had set out to the emperor, Alexius of Constantinople, the superiority of the ecclesiastical authority over the secular, and compared the Church to the sun and the king to the moon; and, what is much more significant, Innocent III's citation in his letter to Philip Augustus of France of that Constitution of Sirmond which allowed any party in a law-suit to transfer the case to the Court of the Bishop. In another place again Vincent cites, from a work which he calls 'Summa de Casibus', a passage which lays down the far-reaching principle that the Church not only can excommunicate and depose any ruler, either for his own heresy or for negligence in extirpating heresy, but also can depose any secular prince for general negligence and incapacity, as Pope Zacharias deposed the King of the Franks and as Innocent III deposed the Emperor Otto IV. This is obviously related to the principle set out by Innocent IV, Hostiensis, and William Durandus, but it goes a little further than Innocent and Durandus, for while they claimed that the Pope had the right in cases of incapacity and negligence to appoint a "curator" or guardian, and that the Pope "succeeds" to the prince's jurisdiction, the 'Summa de Casibus' says that the Pope can depose him.

We must, however, observe that in another place Vincent cites a passage from a work which he calls ' Summa Juris,' which says very plainly that while a constitution of the prince has no authority

in ecclesiastical matters, in secular matters and in the secular court it is valid against any canon, unless it is contrary to the "Law and the Gospel". In the ecclesiastical court the canons are valid against any secular law.

We have discussed this question about the conflict of laws in some detail in a previous volume. Vincent, in citing this passage, seems at any rate to be aware that it was not admitted by the secular lawyers that the Canon Law of the Church could over-ride the Secular Law of the State.

We cannot indeed say that Vincent's citations enable us to form a definite or confident opinion about his own position, but so far as they go, while they do not represent the judgment of the Canonists whom we have considered in the last chapter, that the temporal as well as the spiritual authority belonged to the Pope in principle, they do set out in large terms the claim to a supreme judicial authority over the secular prince.

In the latter part of the century we come to a writer who, like the Canonists with whom we have dealt, represents in the most dogmatic form the principle that the Pope is supreme in temporal as well as in spiritual matters. This is the author of the greater part of the 'De Regimine Principum' of which the first book and part of the second were written by St Thomas Aquinas, and he is now generally identified with Ptolemy of Lucca.

Before, however, we consider his treatment of the temporal authority of the Pope, it is important to observe that the author, as we have pointed out in an earlier chapter, is clear and even dogmatic in asserting that all lordship comes from God as from the first ruler. He argues that this is evident, for the nature of the end of the State is to direct the life of the citizen to virtue and to eternal felicity—that is, the vision of God. Ptolemy then, following St Augustine in the 'De Civitate Dei', contends that it was because the Romans above all other rulers pursued good ends, that they merited the empire; it was their love of their country, their zeal for justice, and their "civilis benevolentia" which deserved this. He admits, indeed, that there are other reasons on account of which God permits lordship; slavery was caused by sin, and God uses evil rulers as a punishment for the sins of the people; but the lordship which is that of counsel and of direction is natural. Whatever, then, was Ptolemy's judgment on the relation of the temporal and spiritual powers, it is evident that he conceived of the political order as having its origin in God and nature, and that there is no trace in his work of the supposed Hildebrandine tradition that it was a thing evil in its nature.

When we now turn to the question of the relation of the temporal and spiritual powers, we find that Ptolemy sets out and carefully develops the contention that since the coming of Christ temporal power properly belonged to Peter and his successors, for they were the representatives of Christ, to whom all authority belonged.

All power, he says, belonged to Christ, and he conferred this upon his vicar—that is, Peter—when he said "Thou art Peter", for this signified the lordship of Peter and his successors over all the faithful, and the Roman Pontiff may therefore be called both priest and king. After discussing the significance of the first three clauses of the saying of Christ to Peter, he interprets the words "Whatsoever thou shalt bind on earth shall be bound in Heaven" as expressing the fulness of lordship (dominii plenitudo) which Christ conferred upon Peter. For as all movement and "sensus" in the body comes from the head, so in the mystical body of Christ, it comes from the supreme Pontiff who is its head; and this applies to the temporal power as well as the spiritual, for the relation of the temporal to the spiritual is like that of the body to the soul; the body has its being, its virtues, and its operation through the soul, and thus the temporal jurisdiction has these through the spiritual jurisdiction of Peter and his successors. This, he contends, can be proved by the actions of the emperor and popes. Constantine surrendered the empire to Pope Silvester, Pope Hadrian established Charles the Great as emperor, Pope Leo did the same by Otto I. Again, Pope Zacharias deposed the King of the Franks, Innocent III took the empire from Otto IV, and Pope Honorius from Frederick II. All this they did for just causes as the shepherds of the flock, otherwise they would not have been

legitimate lords but merely tyrants. When therefore the popes act thus for the good of the whole flock, their authority is supreme over all other dominion. Ptolemy confirms this by his interpretation of the dream of Nebuchadnezzar, for after the kingdom of the Assyrians, the Persians, the Greeks, and the Romans, God, said the prophet, will establish an eternal kingdom above all others—that is, the kingdom of Christ and of the Roman Church, which holds his place.

Ptolemy's position is plain and unambiguous. All temporal as well as spiritual power belongs to the Pope as the representative of Peter and of Christ. His interpretation of the Donation of Constantine is equally interesting and significant, for he treats it not as the source of the temporal power of the Pope, but as merely a recognition of what was always there; and it is evident that this is not merely incidental, but rather that it is an intrinsic part of his whole conception. Christ, he says, was indeed the true lord and monarch of the world, and Augustus was his representative, although he did not know this. Ptolemy discusses the reasons why Christ did not at once assume that universal authority in temporal as well as spiritual matters which properly belonged to him, and contends that there were two reasons for this : the first, that he might teach all princes humility ; the second, that he might show men the difference between his lordship and that of others. Christ therefore permitted the prince of the world to rule, both in his lifetime and after his death, until the kingdom should be complete and ordered in his faithful subjects, and only then at the fitting time did he cause Constantine to yield the dominion to the vicar of Christ—that is, to Pope Sylvester, to whom indeed of right it already belonged.

The emperors who succeeded Constantine, after the death of Julian, were obedient to the Roman Church, but finally, because the Emperor of Constantinople did not defend the Roman Church against the Lombards, the Pope called in the Frank to protect it and transferred the empire from the Greeks to the Germans, and thus showed that the authority of the emperor depends upon the judgment of the Pope. He illustrates this further by a discussion of the history of the succession to the empire. With Charles the Great the empire became hereditary, and this lasted to the seventh generation. Then the Roman Church was harassed by the wicked Romans, and summoned Otto the Duke of the Saxons to its aid, and he was created emperor by Pope Leo. The empire again was hereditary in his family until Otto III. Then Gregory V created the system and method of election, and this will continue as long as the Roman Church, which has the supreme rank in authority, shall judge that it is useful to the Christian people.

The principle which is thus set out by Ptolemy of Lucca that all temporal as well as spiritual power belongs to the Pope, as the representative of Christ, is not in its essence different from that of Innocent IV and the Canonists with whose work we dealt in the last chapter, but it is stated in even more explicit and dogmatic terms. We shall see in a later chapter that the position of Ptolemy is much the same as that of Henry of Cremona and others who represented the extreme papalist view in the conflict between Boniface VIII and Philip the Fair.

We must now inquire what was the attitude of St Thomas Aquinas to these conceptions. It has sometimes been said, or at least suggested, that in substance at least he agreed with them; that is what we must consider.

We have already pointed out that St Thomas was clear that the authority of the State was derived from God, and that the function of the temporal order was to lead men to a life of virtue and to that heavenly blessedness which is the true end of life. St Thomas, that is, recognised the lofty character and the high purpose of the temporal power, but he was also clear that there was a greater and more excellent authority in the world than this. There is an important passage in his own part of the ‘De Regimine Principum’ in which he sets this out. The final end of life of the multitude gathered together in society is not the life of virtue, but is to attain through the life of virtue to the fruition of the divine, and to this end man needs a rule which is not only human but also divine. This belongs to Christ, who is not only man but God, king, and priest, and from Him is derived the royal priesthood,

and all the faithful, insomuch as they are Has members, are both kings and priests. The ministry (ministerium) of this kingdom, in order that spiritual things may be distinguished from earthly, belongs not to the earthly kings but to the priests, and above all to the chief priest, the successor of Peter, the vicar of Christ, the Roman Pontiff, to whom all kings of the Christian people ought to be subject, as to the Lord Jesus Christ Himself, for those who have the charge of the lower ends must be subject to him who has the charge of the final end, and must be directed by his authority. It was suitable that the priests of the heathen, and even of the Old Testament, should have been subject to the kings, for the purpose and promises of these systems of religion were concerned with temporal prosperity, but the priesthood of the new law is more lofty, for it leads men to a heavenly good, and therefore in the law of Christ kings must be subject to priests.

With this careful statement we must compare a very important passage in the 'Summa Theologica'. St Thomas, in discussing the question of usurped jurisdictions, maintains that the spiritual power does not commit an act of usurpation when it interferes in these temporal matters in which the secular power is subject to it, or in those which are left to it by the secular power.

These passages certainly do not suggest that St Thomas conceived of the Pope as holding the temporal power; in the first he seems clearly to mean that it is for the head of the spiritual power to guide and direct the temporal towards the final end of life, and to exercise authority over it with regard to that final end; in the second he seems carefully to limit and circumscribe its temporal authority.

St Thomas is indeed clear that the subjects of a secular ruler, who has been excommunicated on the ground of apostasy, are absolved from their oath of allegiance, and that the Church has power to excommunicate and thus to depose such a ruler. He discusses this under the terms of the question whether the prince, who apostatises from his faith, loses his authority over his subjects. After stating various arguments against this, he quotes Gregory VII as declaring that he absolved from their oath of fealty all those who owed allegiance to an excommunicated person. He then carefully states his own judgment that unbelief does not in itself affect the validity of political authority, for, as we have seen in an earlier chapter, St Thomas fully recognises its validity among non-Christian peoples. The Church has authority to punish those who have been believers and become infidels, as it may also sometimes do for other faults, and thus, as soon as a ruler has been excommunicated on the ground of apostasy, his subjects are *ipso facto* released from his rule and from their oaths of allegiance. St Thomas, that is, seems clearly to maintain the Hildebrandine principle that, at least for certain offences, the Church has the right to excommunicate and depose princes.

This, however, is not the same thing as the doctrine that the spiritual authority, in principle, also holds all temporal authority. There are only, as far as we have seen, two passages in the works of St Thomas which seem to have this meaning. The first is contained in one of his early works, the Commentary on the Sentences of Peter Lombard, and this is a very curious and interesting passage, both for what it denies and what it asserts. When, St Thomas says, an inferior and a superior authority are both derived from a supreme authority, neither is subject to the other, except in respect of those things in which it has been subjected to the other by the supreme power. This is the case with the spiritual and secular authorities, which are both derived from the divine authority. In those things which pertain to the salvation of the soul, the secular power has been subjected by God to the spiritual and must obey it. The spiritual power must, on the other hand, obey the secular in matters which belong to the "bonum civile". St Thomas is denying any general authority of the ecclesiastical over the political authority, he is clearly enforcing the traditional Gelasian principle of the distinctive character of the two powers.

He proceeds, however, to make one exception—that is, in the case of the Pope. This (i.e., the foregoing statement), he says, is true, unless perchance the secular is combined with the spiritual

authority, as in the case of the Pope, who holds the highest place in both powers, by the ordinance of him who is priest and king for ever according to the order of Melchizedek.

The other passage is contained in the work entitled 'Questiones Quodlibetales', and in it he speaks of kings as vassals of the Church.

The first of these passages is very clear in its statement that the Pope holds the supreme authority in temporal as well as spiritual matters, but it is curious in its emphatic assertion that the Church as a whole has no such authority.

It is no doubt true that the Canonists and other writers, whose position we have considered in this chapter and the previous one, deal in the main with the special jurisdiction of Peter and his successors, but Hostiensis especially does not confine himself to this, but rather develops the intrinsic superiority of the "sacerdotium" over the "imperium", and the derivation of the authority of the secular from the spiritual, as had been done before him by Gregory VII, who had associated the bishops present at the Council of Rome in 1080 with himself in the deposition of Henry IV, and by Honorius of Augsburg in the 'Summa Gloria'. The position represented in St Thomas' work on the ' Sentences ' is not unintelligible, but it is curiously paradoxical, and it is certainly not suggested by, hardly indeed reconcilable with, the terms of the important passage from the 'De Regimine Principum' which we have just cited. It is possible that the explanation may lie in the fact that the work on the 'Sentences' was written early in St Thomas' career, and that in his later years his judgment had changed, as we have already seen that it did on the question of the propriety of tyrannicide.

The statement that kings are vassals of the Church is wholly isolated, and there is nothing in his general treatment of the relation of the spiritual and temporal powers which confirms it, rather, much which seems incompatible with it.

What conclusion then are we to form as to the judgment of St Thomas Aquinas with regard to the temporal authority of the Pope? It seems to us that he clearly and fully recognised the Hildebrandine claim that the Pope had authority to excommunicate and to depose the secular ruler, at least when he departed from the faith, but that, while in the one passage which we have just considered, he claims for the Pope the supreme power both in temporal and spiritual matters, his treatment of the subject both in the 'Summa Thoologica' and in the 'De Regimine Principum' suggests that his normal and mature judgment was that the Pope had an indirect rather than a direct authority in temporal matters. It was the spiritual authority of the Pope which should direct men to their final end—that is, the knowledge and enjoyment of God; the temporal power was subject to him in the sense that it should obey the Pope in all that concerned the ordering of human life to this end. We are therefore disposed to conclude that the mature judgment of St Thomas coincided neither with that of the Canonists whose position we considered in the last chapter, nor with that of Ptolemy of Lucca, and that to claim the authority of St Thomas for these opinions is a serious error.

CHAPTER VII.
THE THEORY OF THE TEMPORAL POWER OF THE PAPACY IN THE JURISTS AND THE CONSTITUTIONAL DOCUMENTS OF THE THIRTEENTH CENTURY.

We have endeavoured in the last two chapters to set out the development in the latter part of the thirteenth century of the theory that the popes held, in principle, all temporal as well as spiritual authority, that in the last resort all secular princes were under their authority in secular as well as ecclesiastical matters. We have endeavoured to point out also, that while this theory was related to the Hildebrandine principles and policy of the eleventh century, it was substantially a new theory, and that the author of it as a developed conception was Innocent IV, while he, no doubt, founded it upon the policy and phrases, often incidental, of Innocent III. We venture to think that it is important to recognise, therefore, that in this extreme form the theory of the political authority of the papacy was not the common doctrine of the Middle Ages, but belonged in reality only to a certain period. We have also suggested that it is at least very doubtful whether St Thomas Aquinas accepted it.

We have now to consider how far it can be said that this theory was accepted by the general judgment of the time, and we begin by examining the position of the civilians and lawyers.

The most important Civilian of the middle of the thirteenth century was Odofridus. In the introduction to his 'Commentary on the Digest' he says roundly that the emperor ought to possess authority over all men, and that no one has authority over him in temporal matters. In his work on the 'Code', however, he discusses the relations of the Pope and the emperor more precisely. If, he says, the question were raised which is the greater, the Pope or the emperor, it might be said that the emperor has a greater dignity, but, on the other hand, it might be contended that the Pope is greater than the emperor, for the confirmation of the emperor belongs to him, and the emperor calls him father, while he addresses the emperor as son. Odofridus himself would put the matter in another way. There are two jurisdictions, the spiritual and the temporal, the Pope is supreme in spiritual matters, but the emperor in temporal; the Pope is therefore greater in the one, the emperor in the other. It is true, however, that he admits that the Pope intervenes in any matter when there is a question of sin, and he does this also when the empire is vacant. Odofridus seems clearly to know, and does not contradict the claim of Innocent III as recorded in the Decretals, that he had jurisdiction in all cases when sin could be alleged, and when the empire was vacant, and that the Pope had the right to confirm the emperor; but his general position is quite clear and emphatic, the temporal and the spiritual jurisdictions are distinct, and the emperor is supreme and greater than the Pope in temporal matters.

The same position is represented by a Civilian contemporary with Odofridus, Martin of Fano. He maintains that the "sacerdotium" and the "imperium" have the same divine origin, but their actions and duties and jurisdiction and dignities are divided and distinct; the Pope is supreme lord in spiritual and divine things, and the emperor in secular and human ones; and he concludes by citing from Gratian the words of Pope Gelasius on the separation of the two authorities by Christ Himself.

Another Civilian, John of Viterbo, writing apparently not earlier than the pontificate of Urban IV (1261-64), sets out a somewhat detailed discussion of the rationale and character of the two authorities. It is natural, he says, that the human race should be ruled by two systems of law and by two authorities, for men are composed of spirit and body and must be controlled by different means; but it is God who rules men by both authorities, the spiritual and the temporal. The greatest gifts of God to men are the "sacerdotium" and the "imperium", the one ministering in divine things, the other in human, but both proceeding from the same source. These represent the two swords, different from

each other in their functions and held by separate ministers. The " imperium" was established by God Himself, and to the emperor is entrusted "rerum summa"; the imperial constitution has sanctioned the principle that the Pope of Rome should be the first ofall priests. All power is ordained by God, and the electors derive their power from God. Thus the chief powers, that is the Pope and the emperor, are bound to love and honour and help each other in all things, since they both come from the same source, that is, God; but each should be content with his own province, and neither should interfere in the affairs of the other without his permission.

The position of John of Viterbo is very clearly expressed. The two authorities are derived from God, and are separate and independent; the two swords are distinct, and each held by the appropriate minister. The two powers should be helpful to each other, but neither should interfere in the affairs of the other.

With these judgments we may compare the very precise and explicit statement of Andrew of Isernia, the commentator on the Constitutions of the kingdom of Naples. His position is the more significant because he recognises explicitly that the kingdom of Naples was a fief of the Church of Rome. He refers indeed to the transference of the empire by the Pope to the Germans, but he also dogmatically says that the Pope has "nothing temporal" in the empire, except what the emperor may grant to him

It is clear that as far as the legal writers are concerned, the conception that a general temporal authority belonged to the Pope was emphatically repudiated. They held firmly to the traditional and normal mediaeval doctrine, derived from Pope Gelasius, that there were two distinct authorities, each derived from Christ, and each supreme in its own sphere.

We have cited these writers as representing principles which had a general application, though they were referring primarily to the empire. We can now observe that the principle of the independence of the temporal power is specifically asserted with regard to several of the mediaeval States.

It is specially interesting to observe the manner in which the subject is treated in the 'Assizes of Jerusalem', with respect, that is, to a State where we might naturally have expected to find traces of a special recognition of the papal authority; actually we find the very reverse. In one place Jean d'lbelin sets out the general constitutional principles of the kingdom of Jerusalem, and says that in the kingdom there are two chief lords, one spiritual, the other temporal: the Patriarch of Jerusalem is the spiritual lord, the King is the temporal lord. It has been suggested that the King of Jerusalem owed some kind of temporal allegiance to the patriarch, and that this is implied in the terms of the oath to the patriarch which he swore at the time of his election; but this is a misconception : the oath which he took is not one of fealty but of help and protection.

In another place Jean d'Ibelin says emphatically that the King of Jerusalem holds his kingdom only of God. In yet another passage we find the authority of the temporal order affirmed with a somewhat singular rigour; for Jean d'Ibelin affirms that the law based on long usage was to be maintained in preference to laws, or decrees, or decretals, that is, in preference to Roman or canon law. The statement is important, for it is clearly inconsistent with the conception that the law of the spiritual power was superior to, or could over-ride the law of, the temporal power within the sphere of the latter.

The same principle of the complete independence of the temporal power is very emphatically asserted in the law books of Alfonso X of Castile and Leon. The emperor, he says, is the vicar of God in the empire to do justice in temporal matters, as the Pope does in spiritual; and kings are the vicars of God to maintain justice in the kingdom as the emperor does in the empire. And again, the emperor or king can make laws for the people, and no other power can make them in temporal matters except by his authority. And more explicitly still, in another place, Alfonso asserts that he can make laws better than others who might have a superior, while he, by the grace of God, had no

superior in temporal things. This is peculiarly noticeable, for there had been longstanding claims on the part of the papacy to the lordship of Spain. It is clear that Alfonso X recognised nothing of the kind, and we have not found any traces of the recognition of a political authority of the popes in any of the constitutional and legal documents of Castile or Leon in the twelfth or thirteenth centuries.

With the position of France we shall deal more fully in the next chapter, for the discussion of this belongs naturally to the great conflict between Boniface VIII and Philip the Fair. We may, however, here notice a few important passages in the legal works of the thirteenth century, which belong to the period before the final conflict broke out.

In the compilation which is called the 'Etablissements de Saint Louis', it is said that there is no one to whom appeal can be made from the king's court, for the king holds of no one but God and himself. Beaumanoir deals with the question of the "two swords" in terms which certainly seem to imply that he did not recognise any claim on the part of the Church to hold both. There are, he says, two swords by which the people should be governed, the one spiritual, the other temporal; the spiritual should be given to the Church, the temporal to the princes. The spiritual is more "cruel" than the temporal, for it concerns the soul; those who hold it should be careful not to use it without good cause, as in the case of excommunication, which, he suggests, was used too lightly. The temporal sword is that which executes lawful and corporal justice upon the evildoer. When there is occasion, the one sword should help the other. In another place he deals in some detail with this question of the help which the temporal justice should render to the spiritual, and the terms in which he does this are very significant. He enumerates a number of cases which belong to the Church courts, and among them he mentions questions concerning testamentary dispositions; if the executor refuses to obey the commands of the Church, the secular justice is to help the justice of the Church by seizing the property and compelling the executor to carry out the testament. But, he adds, the secular justice does this, not at the command of the justice of the Church, but on a supplication from it, for in no case which concerns temporal justice is the secular court obliged to obey the spiritual court, but only as an act of grace. This grace, however, should not be refused by the one court to the other, when it is asked for "benignement".

It seems to be clear that Beaumanoir held that the two powers were distinct and independent of each other, and that the spiritual power had no authority over the temporal with regard to temporal matters.

The same principles are clearly expressed with regard to England by Bracton, and this is the more significant, for John had accepted the position of a vassal of the Pope. In one place he says that the king ought not to be under any man, but only under God and the law—he is the vicar of God and of Christ. In another place he says, in terms very similar to those of Beaumanoir, that there are spiritual cases in which the secular judge has no authority, but that there are also secular cases which belong to the kings and princes in which the ecclesiastical judge must not interfere, for their laws and jurisdiction are limited and separated. Only, the one should help the other; there is a great difference between the "sacerdotium" and the "regnum".

There is really no evidence that the claim that the papacy, in virtue of its nature, possessed the supreme temporal power would have been accepted by any of these countries; as far as they are concerned, the principles of Innocent IV and of Ptolemy of Lucca were evidently ignored.

The question of the conception of the relation of the spiritual and temporal powers in the Empire is much more complicated; in the course of the great conflict between Pope and Emperor men were drawn to one side or the other, notmerely by general principles, but often by political and personal considerations.

We may set out by examining the position of Eike von Repkow, the author of the 'Sachsenspiegel'. He begins with the statement that God established two swords for the protection of Christendom; the Pope has received the spiritual, and the Emperor the earthly. The Emperor is to

compel those who resist the Pope to obey, and the Pope is to help the earthly power if it needs this. The author does not seem to have any thought that the two swords both belong to the Pope.

It is true that in a later passage he says that Constantine gave to the Pope secular "gewedde", but he does not explain in what sense this is to be taken : he is careful to add that the secular authority must support the spiritual, and the reason he gives for this is noteworthy. The sentence of excommunication does indeed affect man's soul, but not his body, nor can it affect a man's legal rights, these can only be dealt with by the ban of the king. We may compare with this another passage where he says that while the Pope has authority in dealing with the marriage law, he has no power of making any laws which affect a man's "landrecht" or "lenrecht". Whatever he understood by the grant of Constantine to the Pope, it is clear that he did not understand it as meaning that the Pope possessed secular jurisdiction, or legislative authority in temporal matters. The most important concession he makes to the papal authority in the empire is that a man may not be elected as king if he is excommunicated, and even this he qualifies, for he must have been lawfully excommunicated. We may conclude that Eike von Repkow shows no trace of the view that the Pope possessed the supreme temporal power, or that it was from him that the emperor or king derived his power.

This is well brought out when we compare the 'Sachsenspiegel' with the later composition which we know as the 'Schwabenspiegel'. This work, though founded in part on the 'Sachsenspiegel', represents quite another position. It also begins with the statement that God, that is, Christ, when he returned to heaven, left two swords in the world, the one for spiritual judgment, the other for secular, but, the compiler proceeds, he left both to Peter, and therefore the Pope entrusts the one to the emperor, while he retains the other in his own hands. This is the position of those who represent the extreme papalist position, for it represents the temporal power as properly belonging to the Pope and as entrusted by him to the secular power. It is true, on the other hand, that the compiler restates the position of 'Sachsenspiegel', that while the Pope has authority in questions of marriage, he cannot make any law which interferes with the "lantreht" or "lehenreht." The difference in the tendencies of these two legal works serves as an illustration of the complex elements in the position of those who belonged to the empire.

In a former chapter we have discussed the whole question of the relation of Pope Innocent III to the election of Philip of Swabia, and of Otto IV in the German Empire, and we must not recapitulate what we said then. It is obvious that Innocent III was determined to prevent the succession of Philip, and that he claimed the right not to elect, but to declare that a candidate for election was unfit for the office of King of the Romans. It is obvious also that this claim was emphatically repudiated by the supporters of Philip. They denounced the interference of the Papal See as a violation of all tradition and order; indeed they went so far as to say that while the election of the Pope had originally required the imperial assent and the emperors had resigned their rights, the papacy had never possessed any authority in the election of the King of the Romans. It is clear, on the other hand, that the supporters of Otto IV asked for the "confirmation" of his election by the Pope, and that Otto called himself King of the Eomans by the grace of God and of the Pope; and, what is perhaps more remarkable, even Frederick II more than once called himself King of the Romans, by the grace of God and the Pope.

We have also dealt with the question of the long conflict between the popes and Frederick II, and the circumstances of his deposition by Innocent IV; it is not surprising to find Innocent IV making a new and far-reaching claim to authority to issue his commands to the electors as to the person whom they should elect.

He wrote in 1246 to the archbishops and princes who had the right of election, requesting (or rather commanding) them to elect the Landgraf of Thuringia. It was a comparatively small matter that William of Holland should speak in 1252 of his having been elected King of the Romans by the

princes, and confirmed by the Pope, or that Pope Clement IV, in 1266, should have strictly forbidden the election of Conradin.

All this represents the extreme limits to which the attempt to assert the political authority of the papacy over the empire was pressed in the height of the great struggle with the last of the Hohenstauffen, and of the concessions made to the papacy by the lay opponents of the Hohenstauffen. But we must not imagine that these claims were universally accepted or even acquiesced in. We have already cited the terms in which Frederick II. appealed to Europe against Innocent IV. He repudiated the claim of Innocent to the authority to depose kings and emperors : the emperor, he maintained, had no temporal superior. And, as we pointed out, it would appear that St Louis himself continued to address Frederick as emperor, in spite of the sentence of deposition. Manfred, in his denunciation of the action of the Pope in 1265, represents him as claiming both authorities, the papal and the imperial, and as alleging for this not only the authority of Christ but also the Donation of Constantine, but he confidently asserts that the Donation could have no validity with respect to the emperors after Constantine.

It would also appear that among the popes who succeeded Innocent IV, neither Urban IV nor Clement IV seemed to feel that they could insist upon any supposed papal right to decide in the case of a disputed election. Richard of Cornwall and Alfonso of Castile each claimed that they had been lawfully elected, and refused, as both Urban and Clement say, to submit their claims to the papal judgment. These Popes both endeavoured to persuade Richard and Alfonso to send representatives to the papal court with authority to come to terms, but clearly refrained from urging that they had themselves the right to decide, unless the parties were willing to accept a papal decision.

At last, after some twenty years of confusion which followed the death of Frederick II, Rudolph of Hapsburg was elected and recognised as emperor, and it is important to observe under what terms the relations between the emperor and the papacy were referred to.

It is in the first place very noticeable that neither the German princes nor Rudolph himself, in notifying his election to Pope Gregory in 1273, asked for his confirmation. They announce his election and coronation as King of the Romans at Aix-la-Chapelle; they assure the Pope that he is a man well fitted for the empire, both in his religious character and his political position, and they ask him to receive him favourably and to call him to the imperial dignity. It is true that the King of Bohemia wrote to the Pope and protested against the election, but it would not appear that this was taken very seriously by any one.

Gregory X, however, as late as January 1274, addressed Rudolph as King of the Romans elect, and it was not till September 1274 that he thought it proper to address him as king. He intimates to Rudolph that for sufficient reasons he had hitherto not given him the designation of king, but now, after due deliberation with his brethren (i.e., the cardinals) and by their advice, he "names" (nominamus) him king, and tells him to make preparation for the imperial coronation at an early date.

It is not very easy to determine how much exactly this implies. Rudolph, writing to Pope Innocent V on the latter's accession in 1276, used language which might be taken as implying that it was Gregory who had established him on his throne; and, writing to Pope John XXI in September of the same year, says that he placed all things under his control and desired to have him as ruler in the kingdom. With these phrases we may compare some words of the 'Privilegium' of 1279, in which Rudolph recognised, in general terms, the great benefits which his predecessors had received from the Roman Church, and especially that it was the Church which had transferred the empire from the Greeks to the Germans. The German princes, in confirming this 'Privilegium' in the same year, also recognised that it was the Roman Church which had conferred the supreme temporal authority in the world on Germany, and established the princes as the electors of the emperor; and they speak of the

emperor as that lesser luminary which was illuminated by the greater—that is, the vicar of Christ,—and say that the emperor is to draw the material sword at his command (ad ipsius nutum).

These phrases go further than any others used by Rudolph and the princes towards admitting the authority of the Pope in temporal matters, but it should be observed that Rudolph also wrote in terms which suggest very clearly the principle of the distinction of the two powers. The 'Privilegium' of 1279, to which we have just referred, begins with a statement that the sacred authority of the "Pontifex" and the royal power are the greatest gifts of God, and that as Christ exercised the two powers, each is derived from him. In a letter of 1286, in which he requested the Archbishop of Cologne to excommunicate the Count of Cleves, who had been for some time under the ban of the empire, he begins by citing the Gelasian phrases that there are two powers by which the world is ruled, the pontifical authority and the royal, which are separate and distinct, and urges that they should mutually aid each other, and that the sword of the one should constrain those who resist the jurisdiction of the other.

It is also noteworthy that Pope Gregory X, writing to Rudolph in 1275 about a date for the imperial coronation, also speaks in terms which recognise very explicitly the distinctive character and the divine origin of both powers. The civil wisdom, he writes, has rightly said that the "sacerdotium" and the "imperium" do not greatly differ. They are the two greatest gifts of God, and were instituted for the perfect government of the world, and need each other's help : the one should minister in spiritual things, the other should rule over human affairs. They were instituted inseparably for one and the same final cause, in spite of the diversity of their ministries.

When we endeavour to sum up the impression which is left upon us, after considering the materials with which we have dealt in this chapter, it seems to us to be clear that the conception that the papacy possessed, even in principle, a supreme temporal authority, was, for the most part, emphatically repudiated. The position of the Empire was, no doubt, somewhat different from that of other European countries, but even there, except in the 'Schwabenspiegel', and even after the destruction of the Hohenstauffen, while the Popes sometimes claim a special authority with regard to the election of the German King, it cannot be said that there was any acceptance of the extreme claims of the later Canonists. And outside of the Empire there was no recognition at all, but rather the affirmation of the contrary principle that the temporal and the spiritual powers were separate and distinct.

It is, however, true that these claims had been made, not indeed officially and authoritatively, but by Canonists and some ecclesiastical writers. We must now therefore consider whether, or how far, these claims lie behind that great conflict between the papacy and the secular power, in which Boniface VIII and Philip the Fair of France were the protagonists.

CHAPTER VIII.
BONIFACE VIII AND PHILIP THE FAIR.

We have arrived at the last stage of the great conflict of the Middle Ages between the spiritual and temporal powers. It is true that the literary controversy continued for some time, and we hope in another volume to deal with this, for it had some practical importance, especially with relation to the empire. In fact, however, the tragic end of Boniface VIII marks the close, for all practical purposes, of the attempt to claim on behalf of the papacy a universal temporal authority. In fact, if the papacy had seemed to triumph in the destruction of the Hohenstauffen, the political authority of the mediaeval papacy was also destroyed within fifty years, when it came into conflict with the national monarchy of France.

We are not writing a history of the pontificate of Boniface VIII, and we confine ourselves to the attempt to set out briefly the progress of the struggle between him and Philip the Fair, as it can be traced in the documents, letters, and pamphlets in which are stated and criticised the claims of Boniface and his supporters.

Among the first public actions of his pontificate was the attempt to impose peace on the cities of Italy and the northern nations. In May 1295 he commanded various cities of Lombardy, Venice, and Genoa to send representatives to Borne, where they were to arrange the terms of peace, and he commanded this under the threat of excommunication. In the same month he wrote to the Kings of France and England announcing to them that he was sending legates who should endeavour to arrange peace between them, and at the same time he commanded England, France, and Germany to accept a truce for a year, under pain of excommunication. In September 1296, in the Bull "Ineffabilis Amoris", he urged on Philip the Fair of France that the questions at issue between him and England and Germany were questions of sin, and that these belonged to the jurisdiction of the Holy See.

This claim of Boniface VIII was, it seems, at once repudiated by Philip the Fair, as we see from the letter of the papal legate of 20th April 1297. In this letter the legate gives an account of the interview between himself and Philip with regard to a truce between him and the King of England. When he was about to present the Pope's letter, and before the letter was read, Philip caused a protest to be made, in which it was emphatically declared that the temporal rule of the kingdom belonged to himself alone, and to no one else, that he recognised no superior to himself in his kingdom, and that he would not submit himself to any one in matters belonging to the temporal rule of the kingdom.

It is evident that Boniface had to give way upon the matter, for, in a letter of July 1298 to Philip, Boniface says plainly that while Philip of France and Edward of England had committed some part of the matter in dispute between them to his arbitration, this was only done on the understanding that he was acting not as Pope, but as a private person, Benedict Gaietani, and he promises that he would not deal with any part of the matter in dispute other than that which had been mentioned, without Philip's consent to be intimated in "patent letters."

These letters, indeed, are not in the Register of Boniface VIII, but the statement that Boniface was accepted as arbitrator only on the understanding that he was acting as a private person, is confirmed by the terms of several letters in the Register.

It was in another matter that the first really important conflict between him and the temporal power began. It was in February 1296 that Boniface issued the famous Bull, "Clericis Laicos", in which, after complaining bitterly of the attempts of the laity to impose heavy burdens upon the clergy, he absolutely forbade the clergy to pay "collect as vel tallias, decimam, vicesimam seu centesimam suorum et ecclesiarum proventuum vel bonorum" to the laity without the permission of the Holy See, and declared that those who paid such exactions, and all emperors, kings, or other

secular authorities who should impose such exactions, would incur, “eo ipso”, the sentence of excommunication.

The bull produced a violent opposition in England and France. In England, Archbishop Winchelsey, at the Parliament held in November 1296, maintained that the clergy could not, in view of the papal prohibition, grant the aid which the king demanded. The king replied by putting the clergy out of the royal protection, and the clergy were compelled to give way, the archbishop recommending the clergy to act each on his own individual responsibility. In France the opposition was equally determined, and Boniface himself in the course of a year had to give way. In September 1296 he assured Philip that the Bull “Clericis Laicos ” did not forbid the clergy to grant him aids for the defence and other necessities of the kingdom, but only forbade them to do this without the papal permission, his object being to protect the clergy against intolerable exactions ; and he added that the bull had no reference to the obligations and aids which the clergy were bound to render in respect of their feudal tenures. In February and March 1297, in response to the request of the archbishops and bishops of France, he gave them permission to make a reasonable subvention to the King of France, provided it was made freely and without coercion; they were to inform the Pope of the amount granted, that he might see whether it was moderate. The grant was to be for that year only, and was not to be repeated without the renewed permission of the Pope. In March and May 1297 we find Boniface authorising a contribution of one-tenth to the king by all the ecclesiastical persons and bodies in France. In August 1297 he granted the first fruits of all ecclesiastical dignities in France, except those of archbishops, bishops, and abbots, to Philip during the time of the war. He had, however, already, in July 1297 in a letter addressed to the bishops, clergy, nobles, and others in France, substantially withdrawn the prohibition of the “Clericis Laicos”. His decree, he says, had been misinterpreted; it was not intended to prohibit a voluntary grant by the bishops or ecclesiastical persons, even if this were demanded by Philip or his successors, or other temporal lords. The decree had no reference to feudal dues and other customary services to the crown; and he adds that it should not apply to the case of the imminent danger or necessity of the kingdom. The king, therefore, might demand and the clergy might grant an aid or contribution for the defence of the realm without consulting the Pope, notwithstanding the terms of the decree (“Clericis Laicos”) or any privilege granted by the Apostolic See. He assures them that he had had no intention by this decree of destroying any of the laws, liberties, privileges, or customs of the king or kingdom.

It would seem evident that Boniface had been worsted in his second conflict with the temporal powers, and had to withdraw his claim.

It is with these claims of Boniface to forbid the taxation of the clergy that the unknown author of the tract entitled ‘Disputatio inter Clericum et Militem’ seems specially to deal; and, though it cannot be dated with any precision, it seems probable that it belongs to the years from 1296 to 1298.

The tract is noteworthy for its explicit and reasoned repudiation of the claim of the supremacy of Church Law and the Holy See over Secular Law and secular authorities. It is in the form of a dialogue between a clerk and a knight, and begins with a complaint on the part of the clerk that the Church and its liberty v as oppressed by financial exactions and disregard of its laws. The knight asks what he means by law (jus). The clerk replies that he means the decrees of the Fathers and the statutes of the Eoman Pontiff. The knight replies roundly that these laws, so far as they refer to temporal matters, may be law to the clergy, but have no authority over the laity, for no one can make laws where he has no “dominium”; and as the princes have no authority to make law on spiritual matters, the clergy have none to do this in temporal matters.

The clerk then argues that Christ is Lord of all, and Peter is his vicar: how can they refuse to recognise that the vicar of Christ has the same authority as Christ? The knight replies by saying that he had heard that there were two “tempora” in Christ, one of humility, the other of power. Peter was Christ’s vicar, “pro statu humilitatis, non pro statu glorie et majestatis”. Christ said that his kingdom

was not of this world, and refused to act as a judge. Christ in the world neither exercised the temporal authority nor committed it to Peter. The clerk then urges the authority of the Church in matters of sin, and therefore of justice. The knight replies that the authority of judging according to the law, in questions of justice and injustice, belongs to him who has authority to make the laws. The clerk contends that temporal things should serve the spiritual, and that the spiritual power should rule the temporal. The knight replies that he quite recognises that spiritual persons should receive such things as they need for their support, but this does not mean that they have authority in temporal matters. He then turns upon the clerk and warns him that the temporal power is concerned with the use which the clergy make of that which is given them for pious purposes. The clerk complains that the kings have been annulling the privileges which had been conferred upon the Church by law, and the knight argues that this had been justified by necessity. When finally the clerk contends that the emperor might have such powers, but not a king, the knight describes this as flat blasphemy, for the King of France is in every respect of the same dignity and authority as the emperor.

Another tract which seems to belong to this time argues with similar determination for the principle that the king has the right to demand contributions from the clergy towards the necessities of the country. It begins with the assertion that the Church consists not only of the clergy but of the laity, and that the clergy must not speak as though the liberty of the Church meant only the liberty of the clergy. There are, indeed, special liberties of the clergy granted by the popes, with the goodwill and permission of the secular princes, but these liberties cannot take away the authority of kings in the government and defence of their kingdoms. Those members of the body, whether clergy or laity, noble or ignoble, who refuse their help to the head—that is, the king—show that they are useless members. It is a matter of astonishment that the vicar of Christ should forbid (men) to pay tribute to Caesar, and to render assistance to their king and kingdom against an unjust attack.

It is then clear, as we have said, that Boniface VIII had been compelled to withdraw from the two positions which he had taken up: the claim that he had the right to intervene authoritatively in the conflicts between the northern countries, and the claim to forbid the taxation of the clergy : the Bull “Noveritis Nos” does represent a very complete withdrawal.

It is not our part here to describe the history of the events between 1297 and 1301, when the relations between Boniface VIII and Philip the Fair again became openly hostile. We find Boniface VIII complaining in January 1299 that his grant of the first fruits had been misinterpreted and misused, and in April of the same year that Philip would not surrender the “Regalia” of the diocese of Rheims, which he had occupied during its vacancy.

It was in December 1301 that the storm broke. Three letters, or bulls, contain the record of this. On 4th December Boniface had issued the Bull, “Salvator Mundi”, by which he suspended, at the discretion of the Holy See, all the special “privilegia” and favours which he had conferred upon Philip, on the ground that they had been abused to the great injury of the churches and ecclesiastics of the kingdom of France.

On 5th December Boniface wrote to Philip that he had heard that he had caused the Bishop of Pamiers to be brought before him, and had committed him to the custody of the Archbishop of Narbonne. He therefore asks and exhorts and commands Philip to set the bishop at liberty, and to permit him to come to Rome, and warns him that unless he can show some reasonable cause for his action, he must be held to have incurred the sentence imposed by the canons on those who laid their hands on a bishop.

On the same day Boniface issued the Bull “Asculta Fili”, in which he enumerated his complaints against Philip, and asserted his authority in very strong terms. He begins with the assertion that God had placed him over all kings and kingdoms, with authority to destroy and to build up, and he warns Philip not to allow any one to persuade him that he had no superior, and that he was

not subject to the head of the Ecclesiastical Hierarchy. He who should pertinaciously assert this was an infidel and outside of the fold of the good Shepherd.

The principal complaints which he made against the conduct of Philip were that he was oppressing his subjects, the clergy, the counts and nobles, the communities and the whole people of his kingdom; that he prevented the Holy See from exercising its legal rights with regard to vacant dignities, benefices, canonries, and prebends; that he compelled prelates and other ecclesiastical persons to appear in his courts, in regard to personal questions, rights, and goods, which were not held from him by feudal tenure, while laymen had no authority in such cases; that he did not permit the free exercise of the spiritual sword against those who injured the clergy, or the exercise of ecclesiastical jurisdiction in monasteries of which he claimed to hold the guardianship.

After enumerating other complaints about abuses against which he had made constant remonstrance in vain, he announced that he had therefore summoned the archbishops, bishops, abbots, and some other ecclesiastical persons from France that he might consult with them in November of the following year, and determine what should be done for the amendment of these things, and the good of the kingdom. He invites Philip to send some faithful men who knew him well, to take part in the consultation, but warns him that they will proceed without his representatives if they did not come.

These claims of Pope Boniface met with the most violent resistance. The claim of authority was indeed expressed in the bull in sufficiently strong terms, but it was apparently almost immediately represented as being more extreme than it actually was. A spurious form of the bull was produced, in which Boniface VIII was represented as having claimed that the king was subject to him in temporal as well as spiritual things. Boniface was charged with heresy, in a statement attributed to Pierre Dubois. The author contends that the Pope was endeavouring to take from Philip those rights of supreme jurisdiction and freedom from all other authority in temporal matters which he had possessed for a period of more than a thousand years. If the popes claimed that they had at one time possessed temporal authority over the Kings of France, they had lost them by prescription. He contends also that if the Donation of Constantine had any validity, which he doubts, it could be revoked by the emperor.

In February 1302 Philip summoned what we know as the first meeting of the States General of France, and the terms in which he called them together are very noteworthy. He announces his desire to take counsel with the prelates, barons, and his other loyal subjects on certain difficult matters which concerned the liberty of himself, of the churches, and of all the inhabitants of the kingdom. Unfortunately the proceedings of the meeting of the States General are only known to us in the letters addressed by the clergy to Boniface VIII, and by the nobles to the cardinals, but these are sufficient for our present purpose. They both relate how the king declared to them that in his letter Boniface had claimed that the kingdom of France was held from him, while the King of France had always, in temporal matters, been subject to God only. They were equally disturbed by the fact that Boniface had, as we have seen, summoned the clergy to consult with him at Borne as to the alleged oppression of the clergy and people of France by the king. The clergy implored the Pope to revoke his summons, while the nobles addressed themselves to the cardinals, and requested them to take counsel how these ill-considered and irregular proceedings might be turned to a good end.

It is evident that the real or pretended claim of Boniface VIII to temporal sovereignty over the King of France was repudiated at once not only by the laity, but by the clergy in France, but it is important to see how their actions and declarations were met in Rome. The cardinals replied to the nobles by positively asserting that the Pope had never written to the king that he was superior to him "temporally", and that the Archdeacon of Narbonne, who had carried the Pope's letter, had made no such statement by word or letter; the statement of Peter Floto to this effect was therefore false.

We have also emphatic statements made by the Cardinal of Porto and by Boniface himself in a Consistory held at Borne, presumably in the summer of 1302. The first repudiates the allegation that the Pope had said in his letter that the King of France held his kingdom from the Church, but he sets out a somewhat far-reaching statement about the papal authority. It is obvious, he says, that the Pope judges every temporal matter, if it is related to a question of sin; he admits, indeed, that while spiritual jurisdiction belongs to the Pope, temporal jurisdiction belongs to the emperor and kings; but he adds that one must consider the question of temporal jurisdiction not only from the standpoint of action and custom, but also from that of law. By strict law (de jure) temporal jurisdiction belongs to the supreme Pontiff, the vicar of Christ and of Peter, but as far as its exercise is concerned it does not belong to him, and therefore the King of France has nothing to complain of.

Boniface VIII, after a violent invective against Peter Floto, denounced his falsification or perversion of the letter which he had written to the king, and his assertion that Boniface had bidden the king to acknowledge that he held his kingdom from him. Forty years, he said, he had been learned in the law, and knew very well that there were two powers established by God; he had no intention to usurp the jurisdiction of the king, but the king must admit that he and all other Christian men were subject to him in any matter where sin was concerned.

It would then seem to be plain that whatever may have been Boniface's real intention, and whatever he may have meant in the Bull, "Asculta Fili", its actual result had been that the whole French people as represented in the States General, clergy, nobles, and commons, had emphatically repudiated the notion that the Pope possessed any temporal authority in France, and the cardinals positively asserted that the Pope had made no such claim. The Cardinal of Porto and Boniface seem to concur, but it was significant that the former maintained that the Pope did hold temporal as well as spiritual authority, "de jure", and that Boniface maintained that all matters which were related to any question of sin were under his jurisdiction.

Boniface had not yet said his last word, and in the Bull "Unam Sanctam", issued in November 1302, he set out the relations of the spiritual and temporal powers in more explicit terms than in the Bull "Asculta Fili".

He begins by describing the unity of the Church, and maintains that there is only one Head of the Church—that is, Christ—and the vicar of Christ—that is, Peter and his successors: those who, like the Greeks, say that they are not under Peter, are not Christ's sheep. There are two swords, the spiritual and the temporal, but these are both in the power of St Peter and the Church, the one to be used by the priest, the other by the king, but at the command ("ad nutum") of the priest, for the one sword must be under the other, and the temporal authority must be subject to the spiritual. The spiritual power is superior in dignity to the temporal, and it has therefore authority to "institute" the temporal, and to judge it if it is not good, and thus is fulfilled the prophecy of Jeremiah: "Behold, I set thee today over nations and kingdoms". Therefore, if the earthly power goes astray, it is judged by the spiritual, but the spiritual can only be judged by God, and not by man. This authority, that is, of the Pope, although it is given to a man, and exercised by a man, is a divine authority; he that resists it, resists the ordinance of God; it is necessary to salvation to be subject to the Boman Pontiff.

What was then the actual position of Boniface VIII as it is represented in the Bulls "Asculta Fili" and "Unam Sanctam"? The answer is not quite easy. If we compare his language with that of the Canonists, which we have considered in a previous chapter, it may at first sight seem to be the same; he maintains that both swords belong to the spiritual power, and that the spiritual power both instituted and can judge it, and in the Bull "Asculta Fili" he asserts that he is the "Superior" of the King of France. These phrases are capable of being interpreted as implying the same principles of those of Hostiensis, but they do not necessarily do this. His language is at least much more guarded than that of the extreme papalist tracts which we are about to examine, and that of Ptolemy of Lucca with which we have already dealt.

CHAPTER IX.
BONIFACE VII. AND PHILIP THE FAIR. "CONTROVERSIAL LITERATURE"
I

The conflict between Philip and Boniface produced a significant pamphlet literature, both in support and in criticism of Boniface's position, and it is in these pamphlets that we have the most highly developed statement of the extreme papal position, and the most explicit repudiation of that position.

The first work which we must examine is a fragment of an anonymous pamphlet printed by Dr R. Scholz. This work may, indeed, belong to an earlier date—to the years 1296-7,— for it refers more than once to the dispute about the taxation of the clergy and the Bull "Clericis Laicos". If, however, this was the time and occasion of the tract, it discusses the principles of the relations of the Temporal and Spiritual Powers under terms which anticipate the conflict of 1302. The authorship is unknown, but Dr Scholz is inclined to think that it may be by Henry of Cremona, with whose work, 'De Potestate Papae', we shall presently deal.

The writer asserts that it was heresy to say that papal constitutions with regard to temporal possessions in the various kingdoms and other States had no authority over the laity, for Jesus Christ, even as man, possessed the fulness of power in temporal and spiritual things, and He committed the fulness of power to Peter, whom he established as head of the Church militant. The Roman Pontiff is the vicar of God, and has authority over kings and kingdoms; he transferred the empire from the Greeks to the Germans, he deposed the king of the Franks and the Emperor Frederick II. To say that the Pope has not the fulness of power in spiritual and temporal things would be to resist the divine ordinance : there are, indeed, divers orders and powers, ecclesiastical and secular, but in the last resort it is the supreme Pontiff in whom they are all united. To speak of two heads of the one body of Christ is to speak of a monster.

These passages represent the main argument of the tract in the clearest way, but it receives an additional significance when we observe that the author finds himself compelled to attempt to explain away the Gelasian principle of the two powers. Secular princes, he contends, should not imagine that, because it had been written that Christ separated the functions (officia) of the two powers, the Pope had not both powers. For what was written was that the functions were distinct, not that the powers were divided, for both the powers reside in the Pope, who has authority over the temporal as well as the spiritual sword, although the actual use of the temporal sword belongs to the secular prince. Or alternately it might be argued that this distinction was true of other prelates, but not of the Pope.

He goes on to argue that, even if it were true that the two powers were different and distinct, that would not mean that they were equal; the temporal would be under the spiritual, otherwise the order of the universe and of the ecclesiastical monarchy and of the divine wisdom would be destroyed. It is in virtue of this superiority that the Pope frequently judges the temporal matters of emperors and kings during a vacancy, or when they have committed some grave fault for which they ought to be deprived of the empire or kingdom, or some other fault.

He then deals with the subject of the authority of the Pope over the temporalities of the Church, and contends that the Bull "Clericis Laicos" was lawfully promulgated, for whatever is given to God is holy of holies to Him. It is mere blasphemy to say that the Bull was unjust or unrighteous. It is interesting, however, to observe that even this writer admits that the laity have the right to demand contributions and services from the clergy with respect to the property and churches which they held by feudal tenure.

The whole contention of the treatise is summed up when he says that the laity, who say that the Pope has no authority over temporal matters, should be afraid lest they fall into heresy. It is nothing less than sacrilege to dispute the judgment or constitution of the supreme Pontiff, for he is the vicar of God.

The position of the writer is clear and dogmatic; all power, both temporal and spiritual, belongs to the Pope, who is the real monarch of the world. It is the position of Ptolemy of Lucca. How far in the part of the work which has been lost he developed his argument upon the same lines as Ptolemy, we cannot say; as we shall see at once, this was done by Henry of Cremona.

One of the most important pamphlets of this time on the extreme papal side is a work of Henry of Cremona, entitled 'De Potestate Papae'. The purpose of his work, says the writer, was to correct the error of those who denied that the Pope had jurisdiction in all the world in temporal matters. Many had dealt with the matter, but especially in these days Pope Boniface VIII, whose lawful action and words had been complained of by some.

He then sets out the evidence of Holy Scripture. After giving an account of the rule of the Patriarchs and of David, he says that till the coming of Christ the government was in the hands of the priests, or of kings instituted by them. Christ Himself was both king and priest, and he cites various passages from the Psalms and the New Testament in proof of this. After His resurrection Christ declared that all power was given to Him in heaven and earth, and it was this power which He gave to His vicar Peter. Christ was therefore Lord in temporal things, and gave His lordship to Peter and his successors, and the Pope is therefore lord in all things. This may also be established m another way. It is confessed by all men that the Pope has authority over all souls, but the body is under the soul, and therefore under the power of the Pope.

After this sweeping assertion of a universal supremacy, it seems almost an anti-climax that he should maintain that the Pope had supreme authority over the empire. He alleges in proof of this the fact that the Pope transferred his empire from the Greeks to the Germans, that it was the Pope who had deposed the king of the Franks and the Emperor Frederick, and that the person elected to the empire could not administer the goods of the empire without the papal confirmation. He maintains that the Church had authority to deal with all causes.

He then returns to the general question, and restates his first position in more detail. It is maintained, he says, that the "Imperium" came from God as well as the "Sacerdotium", and he admits that this is true, but they come from God not divided but united. And if it were urged that the "Imperium" existed before the "Sacerdotium", this he says was false, for the "Sacerdotium" did not begin with Peter; the Levitical "Sacerdotium", which was ordained by God, was transferred to him. Again, if it were maintained that the Church had no such temporal authority before Constantine, this was untrue. It was only because the Church lacked power, not right, that it did not exercise the authority, and therefore God inspired Constantine to confess that he held his power from the Church, and to surrender it to the Church. If the emperors had any lawful rights, they had lost them by their sins, especially in slaying the faithful. Henry of Cremona was compelled to endeavour to explain away the Gelasian principle of the two independent authorities in the world, and especially the admission by the Popes that they had no intention of interfering with the temporal jurisdiction of others. He argues that these things were said out of the humility of their minds, or that the Church did not wish to recall the authority it had conferred upon others; the popes did not mean that they could not do so. He concludes with the assertion that the laws which were made by the emperor were made by him under the authority of the Church, and could be corrected and annulled by the Church.

It is clear that Henry of Cremona is asserting, only with greater fulness, the principles represented by the anonymous pamphlet which we have before considered, and a comparison between his work and that of Ptolemy of Lucca shows that he is substantially, and even in detail, in agreement with him. These writers are clear and emphatic in asserting that all authority, the temporal

just as much as the spiritual, belonged to the Pope; that it was in the hands of the secular rulers just in so far as the Pope entrusted it to them, and that it could at any time for sufficient reason be resumed.

Another of the most important political treatises of the time is the 'De Ecclesiastica Potestate', written by that Egidius Colonna to whose work, 'De Regimine Principum', we have frequently referred in the earlier part of this volume. The 'De Regimine Principum' was written before 1285, while the treatise, 'De Ecclesiastica Potestate', as is suggested by Dr Scholz, was written in 1301, about the same time as Boniface VIII's Bull, "Ausculta Fili", and therefore before the Bull "Unam Sanctam". Some twenty years had elapsed, and it is therefore intelligible that the standpoint of the author might have considerably changed. It must, however, be confessed that the development is arresting, and even startling. The earlier work is significant especially, not merely for its reproduction of much in Aristotle's politics, especially the principle that the State is a natural institution, but also for its abnormal assertion of the principle that the monarch should be above the law. The later work is almost wholly occupied with the superiority of the Spiritual over the Temporal Power, in terms which are not only extreme, but even in some respects contradict the judgment of the most important ecclesiastical writers.

The spiritual power, Egidius says, establishes and judges the temporal, and there can be no true order unless the temporal sword is under the authority of the spiritual. Those who suggest that the secular authorities are under the authority of the Church only in spiritual, and not in temporal, matters are in error. For if this were the case, if the temporal sword were not under the spiritual, there would be no true order. The vicar of Christ must, therefore, be held to possess lordship (dominium) in temporal matters. In another place Egidius expresses the same principle in slightly different terms. The Church holds both swords, princes possess only the use or exercise of the material sword, and are "sub famulatu et obsequio" of the Church. Again, to the spiritual sword has been given all power in heaven and earth; the Church has both swords, Peter has the keys of the earthly as well as of the heavenly kingdom, the ecclesiastical power can do whatever the earthly power can do, there is no power in the material sword which is not in the spiritual. These are sufficiently drastic statements of the principle that all temporal as well as spiritual authority belongs to the Church. Egidius, however, sets out a much more extreme contention than this. Tf, he says, it is argued that not every royal power is instituted by the priest, he would reply that such an authority is not a rightful authority, such a kingdom is little better than a band of robbers. The material sword, he says in another place, has its power from the supreme Pontiff, for all power in the Church militant is derived from him, no one can justly hold any power or be justly lord of anything except by means of the Church—that is, unless he has been spiritually regenerated and sacramentally absolved by the Church.

Here is, indeed, a doctrine of an almost revolutionary nature, difficult to reconcile with Egidius' own conception of the State as set out in his 'De Regimine Principum', and in flat contradiction to the doctrine both of St Thomas Aquinas and of Innocent IV. We have set out their principles on this question in the first part of this volume, and we need only here remind ourselves that Innocent IV asserted that lordship, possessions, and jurisdictions are lawful and blameless among the unbelievers, and therefore neither the Pope nor other Christian men have any right to destroy them. St Thomas Aquinas maintained that dominion and "praelatio" were created by human law, while the distinction between believers and unbelievers belongs to the divine law, and therefore the divine law, which is of grace, does not destroy the human laws, which arise from natural reason. Egidius himself in his earlier work had maintained that the State was a natural institution whose function it was to enable men to live well and virtuously, and that those men who lived outside of it were either below or above the normal level of humanity.

If we endeavour to understand how it was that Egidius in the work with which we are now dealing should run counter to his own earlier doctrine and should contradict the principles both of St Thomas and Innocent IV, we may find a partial explanation in the fact that in another chapter he

cites St Augustine as maintaining that there can be no true justice in a community of which Christ is not the founder and ruler, and that he (Egidius) concludes that after the passion of Christ there could he no true commonwealth where men do not revere the Church, and where Christ is not founder and ruler.

Egidius' reference to St Augustine is indeed not very happy or well considered; it is true that St Augustine does maintain that there is no true justice in a commonwealth where men do not worship God, but he does not derive from this the conclusion that there was no commonwealth among the pagans, but only the conclusion that tbe conception of justice must be omitted from the definition of the State. As we have pointed out in a former volume, this unhappy suggestion of St Augustine, while it was not unknown in the Middle Ages, had no influence upon them; they were too firmly grounded in their belief in the moral function and the divine origin of the State, as founded upon justice. It is curious that Egidius should have departed so far from the normal mediaeval conception. We shall see presently that another papalist pamphleteer of the time sets aside this extreme view, probably referring to Egidius, and suggests that the temporal authority is legitimate but imperfect unless it is derived from the spiritual.

So far we have examined Egidius' conception of the nature of political authority, and have seen that he maintained that in principle it belonged to the head of the spiritual power—that is, the Pope; and that it could never exist legitimately except as derived from that power, or be held by any person who was not sacramentally regenerated and absolved by it. It will be observed, however, that in one of the passages just cited there occur some words which have yet another significance. No one, he says in this passage, can justly have authority or be "lord" of anything except through the Church—that is, unless he is regenerated and absolved.

Egidius is setting out a new theory, not only of government, but of property; it is, indeed, with this subject that the second book of the treatise is really concerned. We must examine this more closely. It is clear, he says, that all temporal things are under the "dominium" of the Church, even if not in fact, yet in law (de jure), they are subject to the supreme Pontiff. In a passage of which we have already cited the first words, Egidius says that if earthly princes are "sub famulatu" of the ecclesiastical power, it follows that temporal things, which are ruled over by the earthly power, are under the "dominium" of the Church.

A little farther on Egidius justifies his position in different terms. He maintains that the Church has "dominium superius" in temporal things, others only "dominium inferius", for the Church has "dominium universale", others only "dominium particulare", and "particularia" are contained in "universalia."

This, however, is not all that he says about property. As we have seen, he maintained that no man could justly hold political authority unless it were derived from the Church, and he maintains the same principle about property. There is no lordship, Egidius says, over temporal things or persons, unless it is under the Church and instituted by the Church. And again, he who is not subject to God possesses whatever he has unjustly, and justly loses it. These are drastic statements, but their meaning is set out even more significantly in another passage.

We are compelled, he says, to believe that the temporal lord is, because of original sin, bom a child of wrath, and he becomes a child of wrath when he commits actual sin. He is, therefore, alien to God, and cannot justly be lord of anything. It is only when the Church delivers him from original sin by regeneration and from actual sin by absolution that he can become the just lord of his property. It is therefore the Church which has made him the just lord of his property, and it is right that this property should be under the Church from whom he holds his lordship.

These contentions of Egidius Colonna about the nature of property are very remarkable. He maintains, first, that a universal lordship over all property is vested in the Church. We shall presently see that James of Viterbo sets out a position which is almost the same. What the antecedents of this

contention may be, we confess we find it very difficult to say. Egidius Colonna at one moment seems to suggest that it is a conclusion derived from the principle that the secular prince is subject to the authority of the Church, and that the temporal property which is under his control must be under the "dominium" of the Church. James of Viterbo seems to suggest the same line of reasoning.

Egidius' second contention, that no one can be properly said to hold any property unless he is in communion with the Church by baptism and absolution, may possibly be related to certain conceptions of St Augustine. We have put together in the first volume some of the more important passages in his works which deal with property, and we must refer the reader to these. Among other things, St Augustine says that by the divine law all things belong to God and to the righteous, and it is possible that something of the kind is in the mind of Egidius, but he does not make any reference to St Augustine in this connection. It may also be suggested that the doctrine of Egidius is related to the mediaeval conception of excommunication. We have pointed out in the last volume that some at least of the supporters of Hildebrand maintained that the sentence of excommunication in itself put an end to the relation of subject and ruler, that an excommunicated person ceased to have any political authority. It may be suggested that it was not wholly unreasonable that this conception should be extended from the political "dominium" to the "dominium" over property. This, however, is merely conjecture.

In a later volume we shall have to consider what relation there may be between this conception of Egidius Colonna and James of Viterbo, and the principles which are set out by Wycliffe in his treatise, 'De Dominio Civili'. In the meanwhile, they are important to us as representing some of the most extreme positions of the supporters of Boniface VIII.

There is yet another interesting and important treatise which sets out the extreme view of the temporal authority of the Papacy—that is, the 'De Regimine Christiano' written by James of Viterbo, and, as seems probable, about the year 1301-2. The author was, like Egidius Romanus, an Augustinian, and studied for many years in Paris, and in 1302 was made first Archbishop of Benevento, and then Archbishop of Naples. This work consists of two parts, the first, "De regni ecclesiastici gloria", the second, "De potentia Christi regis et sui Vicarii". We are here concerned mainly with the second, but the first contains an interesting discussion of the nature of the Church, especially as a kingdom.

Christ, he says in the last words of the first chapter of the second part, is king not only of the heavenly and eternal kingdom, but also of the earthly and temporal, and this authority Christ has for man's benefit left to some men by whom his Church should be ruled. He then raises the question whether these powers, the Temporal and the Spiritual, were given by Christ to one person, or to different people, as in the times of the Old Testament. He admits that the latter view seems reasonable, but a closer consideration leads to another conclusion; and he refuses to accept the suggestion that the vicar of Christ had received the royal authority by a grant from earthly powers, or that the Roman Pontiff holds the imperial power by the grant of Constantine.

In discussing this he first points out certain ambiguities in the terms, sacerdotal and royal. The sacerdotal office is itself a royal one, for judgment is a royal function, and, on the other hand, there is a sense in which all the faithful, lay as well as clerical, are priests. He develops this conception of the spiritually regal nature of the prelates of the Church at some length, and then points out that this royal authority finds its head in the Bishop of Rome, the successor of Peter, and the vicar of Christ.

There is, then, a Spiritual royal Power as well as a Secular, and he turns to the question of the resemblance (convenientia) and the difference between them. It must be again noticed carefully how far James of Viterbo is from the supposed Hildebrandine doctrine that the secular power is evil, for he urges that the two powers are alike, in that they both come from God and have the same end—that is, the felicity, *beatitudo*, of men. When, however, he has thus pointed out the resemblance, he goes on to point out how great is the difference between them. The Spiritual Power is greater in dignity

than the Temporal; the Spiritual Power is greater "secundum causalitatem", for it institutes the Temporal Power. He is aware that some contend that the Temporal Power is from God only, and in no way from the Spiritual, while others maintain that unless the Temporal Power was instituted by the Spiritual, it was illegitimate and unjust; but he contends that there is another view which is more reasonable—namely, that the Temporal Power is derived from nature, and therefore from God, but that it is imperfect unless it is also derived from the Spiritual Power. Grace does not destroy nature, but perfects it. The human authority which exists among the unbelievers is lawful, but incomplete (informis), and thus the Temporal authority which exists among believers is not perfect until it is approved and ratified by the Spiritual Power.

This may be put in another way. That a man should be over men is according to human law, which is derived from nature, but that a believer should be set over his fellow-believers is according to the divine law, which arises from grace; and, since the divine law is in the charge of the vicar of Christ (est apud Christi vicarium), the institution of believing kings and other temporal powers over the faithful belongs to him. The temporal prince who is in the Church holds his power over men by human law, but over the faithful by divine law. The Temporal Power is instituted, approved, and ratified by the Spiritual, and thus the laws of the Temporal Power must be approved by the Spiritual.

Having thus shown to his own satisfaction that the perfect Temporal Power was instituted by and derived from the Spiritual, he next contends that the Spiritual Power has also the right to judge it and to impose upon it punishment, both spiritual and temporal, and can go so far as to deprive it of authority—that is, as he is careful to explain, to deprive the man of his temporal power, not to destroy the Temporal Power itself. This authority belongs, as far as excommunication is concerned, to the bishop, but the full authority of all sorts and over all princes belongs to the Pope.

The third aspect of the superiority of the Spiritual Power is that it is its function to direct and command it. For as in the arts that art which is concerned with the final and principal end controls the lesser, so the Spiritual Power which is concerned with the final end of men must control and command the Temporal Power, which is concerned with the lesser end, and therefore the Spiritual Power has authority over the Temporal, and the Temporal Power is by the divine law in all things subject to the Spiritual.

When the writer has thus considered the comparison of the Temporal and Spiritual Powers with respect to dignity and "causalitas", he turns to the comparison of them "Secundum continentiam", and he maintains that the Temporal Power, which is related to the Spiritual as the inferior to the superior, and as that which is caused to that which causes, is contained in (continetur) the Spiritual Power, and that therefore it is said that the laws of the celestial as well as of the earthly empire were given by Christ to Peter, for Peter and each of his successors, in whom the fulness of the Spiritual Power dwells, possesses beforehand (prehabet) the Temporal Power in a greater and more dignified form than the Temporal prince. He explains his phrase when he adds that the Pope does not carry out the functions of the Temporal Power immediately, except in some cases, but he does this by his commands and directions. This is what is meant when it is said that the Temporal Power pre-exists in the Spiritual. All temporal princes, therefore, must obey him as they would the Lord Jesus Christ, and must acknowledge him as their superior and their head, and if the chief Pontiff commands one thing and the temporal prince another, men must obey the Pontiff.

In the following chapters, among other matters, he discusses the question in what sense it can be said that the Pope holds the Temporal Power, not only by the Divine Law, but by the human law—namely, by the Donation of Constantine, and he contends that the Donation might be interpreted either simply as a recognition of that which was already the Divine Law, or as a means by which the vicar of Christ might more freely exercise the authority which he already possessed by the Divine Law; or it might be said that in consequence of the Donation the Pope might intervene more

immediately in temporal matters, as can be seen from the fact that when the empire is vacant the Pope exercises an immediate temporal jurisdiction.

James of Viterbo has thus arrived at his main conclusion, and he only sets it out again in other terms when, in the ninth chapter, he says that the Pope is superior in dignity and causality (causalitate) to every temporal power, and that it may be rightly said that in the chief Pontiff there pre-exists the fulness of the pontifical and of the royal power. Or again, it is therefore right to say that the vicar of Christ has the fulness of power, for all that governing authority which was given by Christ to the Church, sacerdotal and royal, spiritual and temporal, is in the chief Pontiff, the vicar of Christ.

The method of his argument is not the same as that of Egidius Colonna or Henry of Cremona or Ptolemy of Lucca, but the conclusion is the same—that is, that properly all authority, temporal, political, as well as spiritual, belonged to the Pope ; that it was only by his grant or acquiescence that the secular ruler possessed and exercised his political authority, and only on the condition that he obeyed the commands of the Pope.

There is one other important and interesting aspect of this work—namely, that the author maintains that the authority of the Spiritual Power extends over temporal things (possessions) inasmuch as they are to be ordered to the end of men's salvation, and he urges that the fact that the secular prince and his subjects pay tribute—that is, tithe—to the Spiritual Power, proves that the Spiritual Power is set over princes even with regard to temporal things (possessions).

He goes on to maintain that, according to the Divine Law, no one justly and legitimately holds any temporal possession if he does not freely submit himself to God, and make a right use of it. Sinners and infidels who withdraw themselves from the lordship of God, and use these temporal things perversely, hold them unworthily and unjustly according to the Divine Law, whatever may be the case with human law. This is the meaning of the saying of St Augustine that by the Divine Law all things belong to the just. No man is subject to God who is not subject to the Ecclesiastical Laws, and therefore no one justly possesses any temporal thing unless he submits himself with regard to it to the Spiritual Power.

It is obvious that this is related to the doctrine of the tenure of property which is maintained by Egidius Colonna, which we have already discussed.

The same principles as those of Henry of Cremona, Ptolemy of Lucca, and James of Viterbo are again expressed in a tract which has been ascribed to Augustinus Triumphus, and which may belong to this time. His conclusions are the same as those of Henry of Cremona, but the arguments which he brings forward in support of them are somewhat different. He begins with the audacious statement that it is clear and obvious that all power, both spiritual and temporal, has come to the prelates of the Church, and to the secular princes, from Christ, but through Peter and his successors, whose power the Eoman Pontiff represents.

Then follows an interesting discussion of the question about the derivation of the power of the ecclesiastical prelates from the Pope, in which he finally affirms that the power of orders comes to them from Christ, and cannot be taken from them, but the power of jurisdiction comes to them from the Pope, who can annul it. With this we cannot here deal.

Returning, then, to the subject of the relation of the Spiritual to the Temporal Power, he contends that the ultimate "causa et principium" of corporal things must be spiritual. In all arts the superior authority is that which directs, and it is the spiritual which directs the temporal; the Pope, therefore, must have authority over kingdoms and secular powers, and their laws and statutes have no authority unless they are confirmed by him. The spiritual power which resides in the Pope is always in its nature right (recta), while the temporal power is sometimes perverted (obliqua), and therefore the temporal must be instructed and controlled and judged by the spiritual. (The individual Pope, he admits, may not always be right.)

Both powers, therefore, the Spiritual and the Temporal, reside in the Pope, for he is the representative of Christ, who said, “All power is given to me in heaven and in earth”; the Spiritual Power both in respect of authority and of its exercise, the temporal in respect of authority, while he commits the exercise of it to kings and princes as his instruments. Both Powers, therefore, the Temporal and the Spiritual, reside in the Pope, and are derived from him, as the one head of the universal Church, to the clergy and the laity, and as they are conferred by him, can by him be taken away.

CHAPTER X.
BONIFACE VIII AND PHILIP THE FAIR. "CONTROVERSIAL LITERATURE" II.

We have in the last chapter examined a number of pamphlets or tracts in some detail, which seem, with the work of Ptolemy of Lucca and the Canonists with whom we have dealt in earlier chapters, to represent in its most extreme and explicit form the claim that the Papacy possessed in principle all Temporal as well as all Spiritual authority. How far it can be said that they were drawing out in explicit and dogmatic terms, the principles set forward by Boniface VIII in the Bulls "Ausculta Fili" and "Unam Sanctam" is a matter which is open to question. Boniface was at least more guarded and more general. There is, however, no doubt that the claims, whether as stated by Boniface or by these other writers, were at once repudiated by the secular power in France and by its literary representatives. We have already referred to some tracts which illustrate this, but we must examine a little more closely some of them which seem to illustrate the confidence with which the claim that the papal See possessed a universal temporal jurisdiction w as repudiated, and some aspects of their argumentative processes.

It seems to us that the most comprehensive and also the most really effective of these tracts or pamphlets w as the work of John of Paris, entitled 'Tractatus de pot estate regia et papali', but there are two smaller works which we must first consider briefly, the 'Quaestio in Utramque Partem' and the 'Quaestio de Potestate Papae'.

The first of these, the 'Quaestio in Utramque Partem', was at one time attributed to Egidius Colonna, but this attribution is not really compatible with his authorship of the work 'De Ecclesiastica Potestate', which we have already considered; there seems, however, no reason to doubt that it belongs to this time. The writer sets out to show by a series of arguments drawn from philosophy, from the Holy Scriptures, from the Canon Law, and from the Civil Law, that the Pope had not any universal Temporal lordship. He proceeds to contend that the Temporal as well as the Spiritual Power is derived directly from God; that the two Powers are distinct and divided, and he quotes the Gelasian statement that it was Christ Himself who divided them; that Christ exercised no Temporal authority, and when he created the Spiritual Power, gave it no Temporal authority, and that it is only in Spiritual matters that the Temporal is subject to the Spiritual authority.

He insists very emphatically that the King of France holds his authority from no one except God Himself, neither from the Pope nor from the emperor. He then cites a number of arguments by which it was intended to prove that the Pope possessed a universal Temporal authority, and refutes them one by one. As we shall see, the same kind of enumeration reappears both in the 'Quaestio de Potestate Papae' and in John of Paris, and there is nothing very distinctive or important in this part of the work; but it is worth while to observe that when he comes to the Donation of Constantine, he does not dispute its authenticity, but urges that the jurists maintained that it was invalid; the emperor could not alienate a large part of the empire. If he did, his action was not binding upon his successors; and he adds that even if it were valid it would have no reference to France, for the Franks were never subjects of the empire. It is also noteworthy that the author contradicts the assertion that Pope Zacharias had deposed the last of the Merovingian kings. This, he contends, was done by the barons; the Pope was only consulted by them about the propriety of their action.

The 'Quaestio de Potestate Papae' contains an interesting summary of the arguments for the Temporal authority of the Pope, of arguments against this, and a detailed refutation of the first. This would be of considerable interest if these arguments were not more completely stated and considered in the work of John of Paris, and it is to this that we turn.

John of Paris begins by setting out in his preface that there are two errors about the authority of the Church : the first, that of those whom he calls the Waldensians, that it is contrary to the nature of the Church that it should have any lordship in temporal things or possess temporal riches; the second, which he calls that of Herod, who, when he heard that Christ was bom, thought that he was an earthly king. This latter is the error of those who maintain that the Pope, inasmuch as he is in the place of Christ, possesses the lordship of secular authority and property, and that the secular prince holds his authority from the Pope. John maintains that these views were both wrong; it is right that the prelates of the Church should hold temporal lordship and property, but they hold these by the authority and grant of the secular prince. It is the second question which John discusses in his treatise; but his argument also leads him to further and highly significant questions, which anticipate the development of the Conciliar movement.

He begins with the Aristotelian principle that the State is a natural institution, which exists for the benefit of the whole community; but he also asserts the necessary place of the Church in human life, for it is its function to lead men to an end which is beyond nature. He maintains that there must be one head in spiritual matters, and that it was Christ Himself, and not any Conciliar authority, which conferred this position upon Peter and his successors; but he repudiates the conception that God has appointed one head over men in temporal matters. He is prepared to admit that the dignity of the priest is greater than that of the prince ; but this does not mean that the priest is greater than the prince in all things, and that the authority of the prince is derived from the priest, for the authority of both is derived from the divine power itself. The priest, therefore, is greater than the prince in spiritual matters, and the prince is greater than the priest in temporal matters.

At this point John digresses to discuss the question, in what sense the Pope has authority over the property of the Church. He is “generalis dispensator ... bonorum ecclesiasticorum”, but not “dominus eorum”. It is the universal Church which is lord and proprietor of these properties “generaliter”, and the separate communities and churches have “dominium” in those things which belong to them. If, therefore, the Pope deals arbitrarily with Church property, he is bound to make restitution, and he may even be deposed if, when he is admonished of his fault, he does not amend. We return later to the question of deposition.

John returns to the main question, and contends that even if Christ held both Temporal and Spiritual Power, He did not commit them both to Peter and his successors; on the contrary, he gave to Peter the Spiritual, and to Caesar the Temporal. The two Powers, as the Popes had said (referring to Gelasius), are distinct. The one cannot be conceived of as drawn from the other, but each, the secular as well as the spiritual, is derived immediately from God. Thus the Pope does not hold both swords, nor does he possess any jurisdiction in temporal matters, unless it is granted to him by the prince, and John maintains that if it were contended that Constantine gave the Church authority (imperium) in Italy, and consequently temporal jurisdiction, this would imply that the Church did not already possess that power. We shall return later to John’s treatment of the Donation of Constantine.

He is equally emphatic in repudiating the suggestion that the Pope holds the Temporal Power from God, “secundum primam auctoritatem”, but does not possess the power to exercise it; while the emperor has the power to exercise it, not from the Pope, but from God Himself. The royal power, he maintains, both in its own nature and in its exercise, was earlier than the papal; there were kings of France before there were Christians in France, therefore the royal power is in no sense derived from the Pope, but from God, and from the people who elect the king or his family. It is interesting to observe that he holds that the power even of the bishop was not derived from God through the Pope, but immediately from God and from the people who elect him or give their consent to the election. It was not Peter who sent out the other apostles, whose successors are the bishops, or the seventy-two disciples, whose successors are the presbyters, but Christ Himself. The doctrine that the Pope holds the power of the Temporal sword from God cannot be proved by the Scriptures, and the words of St

Bernard, to which some appealed, had no great authority, and in any case were really inconsistent with this contention, for if the emperor should not choose to act according to the Pope's will, the Pope could do nothing more.

The doctrine that all Temporal Power is ultimately derived from the Spiritual, and is subject to it, having been thus discussed in general terms and shown to be false, in the opinion of the author, he proceeds in the next chapters of the treatise to consider a number of detailed arguments for this, and replies to each in turn. We need not recapitulate all of these, but the discussion of some of them is highly important and penetrating. In the thirteenth chapter, John of Paris introduces the matter by asking what exactly were the powers which the apostles and disciples received from Christ, and he summarises these as being—the power to consecrate the sacraments, the power of administering the sacraments, the authority to preach, the judicial authority in spiritual offences, the ordering of the ministry, and the authority to receive what was necessary for their maintenance.

It is, he says, with regard to the fourth of these, the judicial authority in cases of spiritual offences, that the question of the relations of the Spiritual and Temporal Powers arises. The ecclesiastical judge has authority in these cases, and if his authority is resisted, he has the power of excommunication, but that is all the authority which, strictly, he possesses. He admits that if the temporal prince is a heretic and incorrigible, the Pope may take such action by excommunicating those who obey him that the people may be led to depose him, but it is the people properly who depose, the Pope does so only "per accidens". This is followed by the contention that if the Pope is criminal and scandalises the Church and is incorrigible, the prince can indirectly excommunicate him and depose him "per accidens"—that is, by means of the cardinals, and can forbid the people to obey him. Each authority, therefore, has the same kind of power over the other.

If the prince offend in temporal matters, the Pope has no authority in the first place; it is for the barons to deal with him, but they may invite the help of the Church. If the Pope transgresses in temporal matters, the prince has authority to warn him, and if necessary to punish him, and the author cites the action of the emperor Henry III, at Sutri. If the Pope offends in spiritual matters, it is for the cardinals to take action, but if he is incorrigible, and their power is not sufficient, they can call the Temporal Power to their help, and the emperor at their request can proceed against the Pope; and he cites the alleged case of Constantine II. and the deposition of John XII. The ecclesiastical power, therefore, is spiritual, and the prince is not in virtue of that power subject to the Pope, except in that sense which has been stated above.

John then proceeds to discuss in detail the many arguments for the temporal authority of the Pope. These had been summarily stated in the twelfth chapter. We only deal with the discussion of them when it seems specially important.

The arguments founded on the analogy of the sun and the moon and the interpretation of the words of Scripture relating to the two swords he sets aside summarily on the ground that these are merely allegories, and he cites Dionysius, the Areopagite himself, as saying, "Mystica autem theologia non est argumentativa nisi accipiatur probatio ex alia Scriptura". He also summarily sets aside the argument based on the words of Peter Damian, which he cites as from Pope Nicolas, that Christ had committed to Peter "the laws both of the heavenly and earthly empire", on the ground that a statement of a Pope about his own power, unsupported by the authority of Holy Scripture or canonical authority, vas not very good evidence. The contention that Pope Zacharias had deposed the King of the Franks he also sets aside. He points out that there were various accounts of the incident in the Chronicles, and that it might be better to say that Pope Zacharias consented to the deposition, and that even if it were true that he had deposed the king, it was not very conclusive, for cases could be found where the emperor had seemed to exercise ecclesiastical authority. No important conclusion should be based on isolated cases.

More important, however, than these is his discussion of the argument based upon the principle that material things (corporalia) are ruled by the spiritual. The contention based on this is, he says, ill-founded, for it assumes that the royal authority is material and not spiritual, and has the care of bodies only, not of souls. This is false, for its end is to set forward the common good of the citizens—that is, above all, a life which is according to virtue. Aristotle thus maintains in the Ethics that the purpose of the legislator is to make man good, and to lead him to virtue, and in the Politics he says that as the soul is better than the body, the legislator is better than the physician, for the legislator cares for the souls of men, the physician for their bodies.

He deals curtly with the argument that it was the Pope who made laws, and that the prince could not make or administer laws unless they were approved by the Pope. This is false, and he first cites from Gratian a declaration of Pope Leo IV to the Emperor Lothair, in which he declared his intention to keep and observe the imperial "capitula" and commands. He then dogmatically asserts that the Pope has no authority to abrogate any laws except those which belong to his own jurisdiction, and that to maintain that the Pope makes laws for the prince, or that the laws of the prince require the Pope's approbation, is to destroy the whole nature of authority, whether this is regal or political—that is, whether the prince governs according to laws which he makes himself or according to laws which are made by the citizens.

In another chapter he deals with the suggestion that kingship is essentially evil, because it was written in the Scriptures that God gave the Hebrews a king in his wrath. He explains that this did not mean that kingship was in its own nature evil and displeasing to God, but that God had chosen this people as His own, and had given them a form of Government better than the pure monarchy. For though, as John understood him, Aristotle had said that the monarchy of the virtuous man was the best of the pure forms of government, yet the best form of all is one in which the aristocratic and democratic elements are combined with the monarchical; it was a government of this kind which God had given to Israel under Moses and Joshua. (This conception of the best kind of government is interesting in the development of political ideas, and we have dealt with it in a former chapter.) It is noteworthy that John goes on to suggest that it would be well if the same principle were applied to the government of the Church. The anticipation of the Conciliar movement is evident.

Finally, he repudiates the contention that the Pope could require the acceptance of his claims under the penalty of excommunication. The Christian faith is catholic and universal, and the Pope cannot establish an article as belonging to the faith without a general council, for the world is greater than Eome and the Pope, and a council is greater than the Pope alone.

John's treatment of the Donation of Constantine is highly important, and deserves a place by itself. We have already observed that in the tenth chapter John of Paris had argued that the contention that the Pope held all Temporal as well as Spiritual Power from Christ Himself was not consistent with the contention that it was Constantine who bestowed universal authority upon him. It is in the twenty-second chapter, however, that he proceeds to a formal discussion of the nature and validity of the Donation. He does not suggest that it was spurious, but he argues that its nature had been misrepresented, that in any case it had no relation to France, and that it was legally invalid. It is sometimes, he says, maintained that Constantine transferred to Pope Sylvester the Western empire and the imperial insignia, and therefore some held that in virtue of the Donation the Pope was emperor and lord of the world, and could create and depose kings as the emperor could. This, he says, is not in accordance with the historians, or the terms of the Donation. What Constantine transferred to the Pope was a certain territory—namely, Italy, and some other provinces, in which France was not included, and he transferred his empire to the Greeks and built the new Rome. The Pope has therefore no political authority over the King of France, first, because the Donation only had reference to a limited territory in which France was not included; secondly, because the Donation was really, according to the jurists, invalid for various reasons; thirdly, because even if it

were valid and affected the whole empire, the Franks were never under the domination of the Roman empire.

It is plain that the Donation of Constantine did not appear to John of Paris of much importance. He interpreted it in accordance with what was probably its original significance, as a grant of authority in Italy and some other provinces, and flatly denied that it had a general or universal significance, and he argued that it was at least very doubtful if it had any legal validity.

John of Paris had thus established to his own satisfaction that the doctrine that the Papacy held the supreme Temporal as well as Spiritual Power was indefensible. The arguments which we have considered were, however, expressed in general terms, or at least without any direct reference to the circumstances of the time. In the concluding chapter he turns to the question of the action which might legitimately be taken against the Pope, and he is clearly considering the situation which had arisen with regard to the relations of Boniface VIII and Philip the Fair.

If any dispute arise, he says, about the election of a Pope, and if, in the judgment of the learned and other persons who are concerned, there had been some unlawful action, the Pope was to be admonished to retire. If he would not do this, an appeal might be made to a general council; and if he resisted with violence, the secular arm should be called in to remove him from the Holy See, as was done in the case of Benedict IX and Cadalous and Constantine II. If the Pope maintains any doctrine which is contrary to the faith of the Church, he is already judged. If the Pope were suspected of some fault which, however, was not clear and manifest, he could not be judged, and even if the fault were clear and manifest, as, for instance, incontinence or homicide, he could not be judged by any one, "per modum auctoritatis", he could not be cited or excommunicated, for he had no superior.

What was to he done, however, if the Pope, without a general council, declared a man to be a heretic for holding a view about which there were "opiniones" (different opinions), or if he were to declare a man to be a heretic because he asserted that the King of France, or some other person in his position, was not subject (*i.e.*, to the Pope). John replies that, in the first place, the words of the Pope are always to be interpreted as far as possible in a good sense, and this applies to such a statement; the Pope might be taken to mean that the King of France was subject to him in matters concerning sin, and therefore such a claim should be endured as far as was possible without danger to justice and truth.

If, however, there were danger to the commonwealth in delay, and the Pope used his spiritual sword to the disturbance of the people, and there was no hope that he would desist, the Church should proceed against him, and the prince might resist the violence of the sword of the Pope with his own sword. In doing this he was acting not against the Pope, but against the enemy of himself and of the commonwealth, not against the Church, but for it. John concludes by referring again to the traditional deposition of Pope Constantine by the people, and the supposed deposition of Benedict IX, and the others by Henry II.

Finally, he again discusses the question whether the Pope could resign, or could be deposed. He maintains that the Pope could undoubtedly resign, and that he could be deposed by a general council. He gives it as his own opinion that the College of Cardinals could depose him; they act in the place of the Church when they elect him, and it would seem that in the same way they could depose him. He also quotes a gloss on the famous passage in Gralian, 'Si Papa', which extends the grounds of the deposition of the Pope from heresy to any other grave vice which he will not correct, even when he has been admonished.

This treatise of John of Paris deals more comprehensively than any other with the whole question of the Temporal Power of the Pope, and he emphatically repudiates all the contentions on which it had been founded. He reasserts the Gelasian tradition that Christ divided the two powers; he brushes aside arguments based on allegorical phrases as based on a misconception of the place of allegory; he criticises the historical arguments; he treats the Donation of Constantine as invalid and

irrelevant to the case of France; he sets aside the argument that the Temporal Power only deals with material things, and should therefore be controlled by the Spiritual, for he maintains that the Temporal Power also deals with the concerns of the soul; and he flatly asserts that the Pope has no more power to depose the king than the king has to depose the Pope. The king is entitled to defend himself and his State against the violence of the Pope by the use of his material power. He is in favour of a constitutional Government for the State, and recommends it also for the Church; and finally, he is clear that the Pope can be, in certain cases at least, deposed by a general council. The work is interesting to the historian, apart from the question of its intrinsic merits, for it serves to represent the confident and thorough-going temper in which the French king and his advisers met the claims of Boniface VIII.

In the course of the conflict between Boniface VIII and Philip the Fair, the assertion of the Temporal authority of the Papacy had been pushed to its furthest point. It may, indeed, be said that the principles developed by Innocent IV and the Canonists who followed him were clear and emphatic; that the Temporal Power, properly speaking, belongs to the Spiritual, and is derived from it; and that Boniface was only reasserting these principles in the Bull "Unam Sanctam", and that even Henry of Cremona and Egidius Colonna and James of Viterbo were only dealing with the same position in detail. No doubt, however, it was the fact that these claims were now related to an actual and violent dispute between the King of France and the Papacy which gave them a new significance. They might hitherto have been regarded as matters of merely academic interest, but they had now become of practical importance. As such, they were immediately and unhesitatingly repudiated by the Temporal Power, as represented by the King of France and by those who spoke for France.

It is not within the scope of this work to deal with the last stages of the conflict between Boniface VIII. and Philip the Fair. It is enough for our purpose to observe that with the death of Boniface the claim that the Spiritual Power also possessed the Temporal ceased to have any great practical meaning. It is, indeed, true that during the earlier part of the fourteenth century those claims were sometimes expressed in the most dogmatic terms, but they had no longer the same significance.

We have in this and the previous volumes endeavoured to give some reasoned account of the principles of the relations between the Temporal and the Spiritual Powers from the time of the conversion of Constantine down to the fall of Boniface VIII, and have endeavoured to do this in some relation to the actual circumstances of these centuries. We have already said, and we should like to repeat it with some emphasis, that in our judgment these relations and the frequent conflicts between the two Powers had very little intrinsic relation to the development of the general political principles of the Middle Ages. These principles, the supremacy of law, the community as the source of political authority, the limited authority of the ruler, and the contractual nature of the relations between the ruler and the community, were not save incidentally related to tho disputes between the two Powers.

This does not, however, mean that these disputes were unimportant, or that the principle which lay behind them was insignificant. On the contrary, we should not hesitate to say that the two principles in which we most clearly recognise the difference between the ancient world and the modern are, first, the recognition of the essential equality of men in virtue of their common powers of reason and morality, and secondly, the principle which arises out of this, the necessary freedom of the moral and spiritual life. Men must he free because they are equal, they are equal and free because the moral and spiritual personality of one cannot be measured against that of another, and must not be coerced by it.

It is no doubt true that the Spiritual Power in the Middle Ages had little sense of the liberty of human personality as against itself, but at least it did assert the freedom of the moral and spiritual elements in human society as against the Temporal Power; and in doing this the Church prepared the

way for the great movement of the modem world against its own use of the coercive power of the State.

It is, then, this fact, that the conflicts of the Temporal and Spiritual Powers in the Middle Ages are forms of the secular process of the liberation of humanity, which gives them their significance. It was fortunate for mediaval and modem society that the Western Church as represented by Pope Gelasius I. had, as early as the fifth century, formulated in such clear terms the principle of the autonomy of the two great Powers. To that principle the Middle Ages were, on the whole, faithful. It is no doubt true that the translation of this dualistic principle into the terms of the common life proved immensely difficult, but the difficulty has no more been completely overcome by us than by the men of the Middle Ages.

It was no great wonder if the reforming kings and emperors sometimes laid violent hands upon those who represented, but in evil fashion, the Spiritual Power. It was no great wonder if Hildebrand, in his persistent determination to secure the reformation and the liberty of the spiritual life, should have pressed the spiritual authority to a point where it came into conflict with the equally necessary freedom of the Temporal Power. Men are but mortal, and they are not to be over severely blamed if, in the ardent pursuit of some great end, they sometimes forget the infinite complexity of life.

It is possible to suggest that Hildebrand and Innocent III. may have sometimes dreamed of a theocracy, may have at least thought of a world directed and, if need be, ruled by the representative of the Spiritual Power. But, if they did so, it was but a dream, not necessarily an ignoble dream, but it had no relation to the actual character of mediaeval society, or to its normal principles. The notion that mediaeval society tended to something like a theocracy is, indeed, not now maintained by any serious student, but it is to be regretted that it still lingers in the popular mind. We have said enough, we hope, to make it clear that if at any time the Spiritual Power seemed to make the claim to a supreme Temporal authority, the claim was repudiated; and when, as in the thirteenth century, a theoretical principle was converted into something which at least resembled a practical policy, the Papacy, which seemed to be pursuing such a policy, was broken, as far as its political power was concerned.

The Middle Ages remained faithful to the Gelasian principle, that each Power, the Temporal and the Spiritual, derives its authority from God, and that neither Power has authority over the other in matters which belong to its own sphere.

PART III.
THE PRINCIPAL ELEMENTS IN THE POLITICAL THEORY OF THE MIDDLE AGES.

CHAPTER I.
THE INHERITANCE FROM THE ANCIENT WORLD.

From the first century of the Christian era until the later years of the eighteenth century, political theory presents itself to us as dominated in form by the conception that the great institutions of society, and especially the institution of government, were artificial or conventional, not "natural" or primitive. The writers of the seventeenth, and even most of the writers of the eighteenth, century continually contrast the original "state of nature" with the conditions of organised society, which they conceived of as being the result of some more or less deliberate creation of the human will. This conception, which was also the normal conception of the Middle Ages, can be traced back to the Christian Fathers and the Roman Jurists, and appears to have come to them from some at least of the post-Aristotelian philosophers. Seneca, in one well-known letter, attributes it to Posidonius, and we may infer from the fact that it was common to the Fathers and to many, at least, of the Jurists, that it was a generally received opinion in the later centuries of the ancient world.

It is true that in the middle of the thirteenth century St Thomas Aquinas rediscovered the Aristotelian politics, and as we have seen in this volume, recognised that the organised society of the State was a "natural" institution—"natural" in the sense that it had always formed an integral part of human life, and was the normal instrument of human progress. It is, however, also clear that the recovery of the Aristotelian conception was not permanent, that by the seventeenth century it had again given place to the post-Aristotelian, and it was not till Montesquieu and Rousseau's 'Contrat Social' that the Aristotelian conception really came back to dominate political theory, as it has done ever since. It would appear that the post-Aristotelian conception was too firmly fixed in men's minds to be removed even by the great authority of St Thomas Aquinas.

The great institutions of human society were then conceived of as being artificial or conventional. It is important also to understand that this transition from a natural to a conventional condition of human life was conceived of as being the result of a great and primitive catastrophe, for it was the result of the appearance of evil in the world. It was not only the Christian Fathers, but also Stoics like Posidonius and Seneca who thought of man as having been originally good or at least innocent. The tradition of a Golden Age, a condition before men fell from their primaeval innocence, was common to some philosophers as well as to the Christian writers. This is the origin of that curious ambiguity in mediaeval writers regarding the nature of human institutions which has caused so much confusion to the unwary. For sometimes these writers speak of government as though it had a sinful origin, and modern historical critics have not infrequently misconstrued this, not observing that these mediaeval writers at other times speak of it as a divine institution. We have endeavoured in the course of this work to clear up this ambiguity, and we hope that we have said enough to correct the mistaken interpretation which has been sometimes imposed upon the words of St Augustine and Hildebrand. To the mediaeval world, as well as to the Fathers and to Posidonius, the coercive authority of man over man was the result of sin; but it was also a remedy for sin—to the Christian theologians a divinely appointed remedy—an institution arising no doubt out of sinful conditions and

desires, but also a means by which the sinful tendencies of human nature might be restrained and controlled, and by which the partially perverted nature of man might be directed to good ends.

This conception that political society and its institutions are conventional and not "natural" furnished the framework or formal system of political theory in the Middle Ages; but there was a much more important difference between the political theory of Aristotle and that of the Middle Ages. This is found in the highly developed doctrine of the equality and freedom of the individual man; indeed, we are still of the same mind as we were when, in the first volume, we ventured to say that it is here that we find the real dividing line between ancient and modem political theory.

This is no doubt only one form of that great development of the conception of the individual personality which underlies the whole mediaeval and modem conception of human life, and it is not our part here to attempt to deal with this, except so far as is necessary for the understanding of the changes in political theory; but for this purpose we must deni with the subject, however briefly.

The conception of individual personality and its relations to society is not indeed a simple thing. When we are modest and reasonable, we recognise that we can no more define this today in easy terms than men could have done formerly. We are, indeed, really more conscious of the extreme complexity of these relations than men were in the past. The freedom of the individual, and the authority of society, these are principles which we recognise as fundamental, but their relations to each other we are unable to define. The generous assertion of the necessary liberty of the individual man by John Stuart Mill has a profound truth and value, but it does not carry us very far. The ideas of authority and of liberty baffle all attempts at definition, and the historian, at least, must content himself with tracing some of the stages through which these ideas have passed, and the successive apprehension of the significance of each.

It seems reasonable to say that we can recognise that at certain times one or other of these ideas seems to have developed more or less rapidly, and to have changed the conception of human society, and we can recognise such a period in the centuries between Aristotle and the Christian era. It may seem too much to say, and yet we do not wholly overstate the truth if we say, that during these centuries the primitive conception of the group as the fundamental unit of human life gave place to the modem conception of the individual as the unit. It would he unbecoming of the mediaeval and modem historian to speak dogmatically in regard to that which lies in the province of the anthropologist, hut it is, as we understand it, true to say that in the primitive and even the barbarian worlds, the individual was only very partially recognised. It is the solidarity of the group which is their characteristic.

We can see this under many forms, above all in the high degree in which moral responsibility and religion are conceived of as qualities of the group, of the family, the tribe or even the state, rather than of the individual. We can perhaps find the most obvious example of this in the development of the Hebrew religion. The contrast is familiar to us between the assumption of the moral and religious responsibility of the continuous family group, which is expressed in the words of the Second Commandment: "I, the Lord thy God, am a jealous God, visiting the iniquity of the fathers upon the children", and the indignant repudiation of this by Ezekiel (XVIII. 20), when he says : "The soul that sinneth, it shall die : the son shall not hear the iniquity of the father, neither shall the father hear the iniquity of the son". It is not always, however, sufficiently observed that this is one expression of the transition from the group conception of life to the individual conception, but the fact is obvious. This is no doubt earlier than the period of which we are speaking, but it is an anticipation of what was fully developed in that period.

The development of the individualist idea of life was indeed not merely rapid, but was exaggerated. When Aristotle says that the isolated individual is not self-sufficing or that "he who is unable to live in society, or who has no need, because he is sufficient for himself, must be either a beast or a god", we feel the profound truth of his judgment. When says that no one can either injure

or benefit the wise man, there is nothing which the wise man would care to receive; that, just as the divine order can neither be helped nor injured, so is it with the wise man; that the wise man is, except for his mortality, like to God Himself; we feel that he is immensely overstating the self-sufficiency of even the wisest man. Both Seneca and Ezekiel are immensely overstating their case; the wisest and best man is not self-sufficient, the children do still suffer for the evil of the fathers; and yet they are expressing a new sense of the meaning of personality.

It is, however, with some such considerations in our minds that we must approach the question of the significance of the dogmatic assertion of the "natural" equality and freedom of the individual man, which is asserted by Cicero and Seneca, by the Roman Jurists of the 'Digest' and by the Christian Fathers. It may be doubted whether any change in political theory has ever been so remarkable as that which is represented by this dogmatic contradiction of the Aristotelian conception of the inequality of men. For these writers do not merely suggest a doubt, they dogmatically contradict. "Omnes namque natura sequales sumus", said Gregory the Great, and he was only repeating what he had learned from the Jurists, while they in their turn were no doubt only repeating the generally accepted doctrine of the post-Aristotelian philosophy. If, however, the contradiction of the Aristotelian conception was remarkable, the ground alleged for it is almost more so. Men are alike and equal, because they are alike possessed of reason and capable of virtue, says Cicero. Where Aristotle had found the justification of slavery, Seneca found the place of unconquerable freedom; the body may belong to a master, the mind cannot be given into slavery. It is only the same principle which Lactantius expressed when he said that God, who brings forth men, wished them all to be equal. He made them all for virtue, and promised them all immortality; in God's sight no one is a slave or a master. The Christian writers did not create this philosophical principle; they were only transposing it into the terms which belong to the Christian theology. This new conception was not a discovery of Christianity, but it was taken up into it, and became the first and fundamental principle of its conception of human nature.

There are, it is true, some, not perhaps very intelligent historians, impatient of what they think the exaggerated importance attached to ideas, who may think that these conceptions were little more than rhetorical abstractions, which had little, if any, relation to actual life. In this case it happens that such an unintelligent scepticism is particularly unfortunate, for we can find in the Roman law not only the expression of these principles, but also the parallel changes in the legal position of the slave. In a well-known passage of the 'Institutes', Gaius gives an account of the legal position of the slaves in the second century, and says that the slave had been in the absolute power of his master, but that this was no longer the case, for the law did not now permit the master to behave with arbitrary violence or cruelty to his slave, and we can trace in the ' Digest ' some of the stages through which the Roman law came to recognise what we may call the legal personality of the slave.

We have here the beginnings of that principle which has gradually become the foundation of the legal aspect of modern Western civilisation, the principle that all men are equal before the law, that all men are responsible for their own actions, because it is assumed that they are all possessed of reason. It would be difficult to find a more remarkable example of the influence of an idea or principle. For though the law may assume this equality and responsibility as a simple fact, we are also well aware that behind this apparent simplicity there bes an immense complexity of indeterminable elements.

We have so far dealt with the significance of the conception of equahty as related to the development of the idea of personality; we must consider a bttle further the conception of bberty, not now as personal liberty, but as related to politics.

It was not, we think, a mere accident that Cicero, who contradicted the Aristotehan conception of the inequality of human nature, also refused to recognise that an absolute monarchy or aristocracy, even of the most ideal kind—that is, the rule of men who far excel the rest of the community in

wisdom and in virtue, and whose energies are directed wholly to setting forward justice and the good of the whole community—could be recognised as a good government. Good, he refuses to call such governments; at the best they are tolerable, and the reason he gives for this judgment is highly significant, for there is, he says, under such constitutions something of the nature of slavery. It could not be said that under such governments the multitude really possessed liberty.

This identification of political liberty with a share in political power is another illustration of the essentially modern character of his political thought. We are not here discussing the final value of this conception in political thought; we shall have more to say about this matter when, in the next chapter, we discuss the later phases of the development of medieval political theory. But it is fairly clear that behind these words of Cicero there lies the assumption that it is the equality of human nature which makes even the best absolute monarchies or aristocracies unacceptable. It is because all men have reason, and are capable of directing their lives to the end of virtue, that we cannot call a man free who is under the absolute control, however well meant, of another man. This judgment is, after all, the same as the judgment of all the more highly developed political societies of the present day. To an Englishman, or American, or Frenchman, the idea of aquiescing in a paternal despotism, even of the most well-intended or capable ruler or rulers, seems a merely laughable absurdity, the expression not of intelligence but of immaturity. We propose, we intend, to govern ourselves, and even the most seductive promises of efficiency—promises for which there has been little justification in history—will not induce us to submit to a master. There is, as Cicero says, something of the nature of slavery in all such governments ; and it may, not unreasonably, be said that we are beginning to understand that it is just here that we find one most important cause of the industrial difficulties of the modern world.

It is, however, not only in the Ciceronian conception of government that we find an important expression of this idea of political freedom. His statement, paradoxically enough, coincided in time with the disappearance of constitutional government in the west, but it is only the more interesting to observe that, in spite of this, the one and only theory of the source of political authority, which the Roman Jurists handed on to the Middle Ages and the modern world, was the theory that all political authority is derived from the community itself, is founded upon the consent of the community. The Eoman emperor was absolute, but this absolutism was a legal absolutism—that is, it was derived from law, for if he was absolute, it was because the Eoman people had conferred upon him their own authority. This is the theory, and the only theory of the Roman Jurists, from Gaius in the second century to Justinian himself in the sixth century.

Political authority rests not on the superiority of the ruler to the ruled, not on the principle of inequality, but solely upon the will of the community; it belongs to the community, it is delegated by the community. It rests not at all upon some supposed delegation of the divine authority to the ruler; that was nothing but an alien Orientalism, which some of the Christian Fathers, notably Gregory the Great, imported from a Semitic tradition of the Old Testament.

Aristotle might speak of the ideal monarchy or aristocracy as absolute, for to him the government of a civilised society was the expression of the superiority of some men over others; even his ideal commonwealth is the rule of a small body of equal citizens over a great mass of unenfranchised persons. To the Roman Jurists political authority resides in the community, and it is only from it that it can be received.

There is another aspect of the political theory of the ancient world, not only of the Christian writers, but just as much of Plato and Aristotle, which the mediaeval and modem world inherited, and that is the principle of the moral purpose and function of the State.

The description of the nature of the State by Cicero in the ‘De Republica’ is well known. “Res publica, res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus”. St Augustine says that Cicero meant

that the State cannot exist without justice; that where there is no justice there can be no "jus", and therefore no real "people"; that when the Government, whether a tyranny, oligarchy, or democracy, was unjust, there was no "respublica" at all. This conception of the State is continually referred to by the writers of the Middle Ages, and it is combined with the sharp distinction which St Isidore of Seville made between the king and the tyrant.

In all this the post-Aristotelian political theory was carrying on the Aristotelian principle that it is the association of beings who have the sense of the just and unjust which makes both the family and the State, and the related principle that the only true forms of government are those which aim at the common good of the whole community, while those which pursue the private interest of the ruler are perverted forms.

The Christian writers express this principle when they say that government is a divine institution, as, for instance, St Paul, in the words, "Let every soul be subject to the higher powers, for there is no power but of God, and the powers that be are ordained of God". This is the accepted principle of the nature of the State and its authority in all mediaeval writers. The notion that Hildebrand or any other intended to dispute it is merely a misconception, as we have shown in detail, due to the failure to understand the significance of that contrast between the natural and the conventional with which we have dealt.

It is true that this principle was sometimes misunderstood, and that it was perverted into the absurd doctrine that the king was in such a sense the representative of God that he could not be resisted even if his rule were evil and unjust. This perversion, for which Gregory the Great was mainly responsible, was, however, little regarded in the Middle Ages. Its importance belongs to that period in the centuries from the sixteenth to the eighteenth when the constitutional principles of the Middle Ages were for the time neglected, and we do not therefore need to concern ourselves greatly with it. It was an idea derived from some Semitic traditions of the Old Testament.

The real meaning of St Paul is clear to any one who will be at pains to look at the way in which he develops the principle which he has set out. For he not only says that the powers that be are ordained by God, but explains the meaning of this saying. "Rulers are not a terror to the good work, but to the evil", and "He is a minister of God to thee for good". St Paul is putting into the terms of religion the principle that the State with its authority is a divine institution, because its purpose or function is the maintenance of righteousness or justice. And this is the sense in which he was normally understood both by the Christian Fathers and by the political thinkers of the Middle Ages. St Irenaeus, in a passage which has been too often overlooked, especially by those who overstate the influence of St Augustine, explains the origin and the purpose of government as being indeed a consequence of the sinful nature of man, but as, also, a remedy which God has established for man's sin. He has set men over each other that by this means they might be compelled to some measure of righteous and just dealing. St Thomas Aquinas, in the middle of the thirteenth century, maintains that sedition is indeed a mortal sin, but the resistance to an unjust and tyrannical government is not sedition.

The Christian doctrine of the divine origin and nature of government was therefore, properly speaking, a statement under the terms of religion that the end of government was a moral one—that is, the maintenance of justice.

So far, then, the political ideas which came down from the ancient world to the medieval, while they were accepted by the Christian writers, and expressed by them in terms appropriate to Christian theology, were not specifically Christian or greatly modified by Christianity.

There is, however, one important principle of the nature of human society of which this cannot be said, one great principle and problem of the medieval and modern world, which took its form from Christian principles. This is the principle which lies behind the great problem of the relations of Church and State, or as the medieval people would have expressed it, the relation of the Temporal

and Spiritual Powers. This great question, of which the modern world has no more found a final or complete solution than the mediaeval, was the source of that great conflict of the Middle Ages in which both the political papacy and the empire were destroyed. We have explained several times that in our very clear judgment this great question, although it is inextricably bound up with the political events of the Middle Ages, did not, in itself and directly, contribute anything to the development of the other political ideas or institutions of the Middle Ages, and we think this will presently again become clear. But in a more general sense, in its relation to the general principles of human life and its organisation, no development in history is more significant than this of the independence of the spiritual life and its organisation.

When we consider the question carefully, it is evident that what we are dealing with is intrinsically the result of that developed sense of the individual human personality, of which we have spoken before. There was no question of Church and State in the earlier times of the ancient world, because religion was not something which belonged primarily to the individual, but to the group, the family, or tribe, or nation. Even among the Hebrews it was not, as most modem scholars seem to agree, until after the exile that it is possible to speak of an individual or personal religion. It is only in the later prophets, like Jeremiah and Ezekiel, and in the later Psalms, that we can find the expression of a personal or individual relation to God. And among the Western peoples this is even more obvious. We have learned not to undervalue the religion of the Greeks, and even of the Eomans, but this religion was not normally a personal thing; the God was the God of the family or tribe rather than of the individual man. All this was greatly changed with the new conception of personality, not that the conception of the social aspect of religion was lost, but that the individual conception became immensely important.

The new conception cannot be better expressed than in the words of Ezekiel, to which we have already referred. “The soul that sinneth, it shall die : the son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son; the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him”. The individual man is responsible to God, and will be judged, not by the character of the group to which he belongs, but by his own.

With this great change, it became impossible for the moral and religious life to accept the authority of the political society in the matter of religion. We are not here discussing the question of the possible meaning of national religion, though it is obvious enough that the conception has become difficult; what we are concerned with is the sense of the independence of the spiritual and moral life from the control of the political authority. The new attitude is admirably represented in the words which the writer of the Acts of the Apostles attributes to Peter and John when they were brought before the Jewish authorities, and were forbidden to teach in the name of Jesus, “Whether it be right in the sight of God to hearken unto you rather than unto God, judge ye” (Acts IV. 19).

The relation of the Christians to the Eoman Empire during the first three centuries was a practical exemplification of the significance of the new principle. They recognised, indeed, with St Clement of Eome, that it was from God that the rulers of the world had received their authority, and that it was in the name of God that they should submit to them, but they could not, and would not, obey them in matters of religion and conscience. It was this claim which Constantine recognised in the Edict of Milan, when he proclaimed that not only the Christians but all other men should have the right to follow whatever religion they preferred. It is no doubt true that this recognition did not last, the Theodosian Code shows that in less than a hundred years the Christian religion had not only become the official religion of the empire, but that, with the exception of Judaism, it was the only religion that was tolerated. We cannot, however, discuss the reasons for this failure. From the point of view of the practical politicians it may have appeared that the divergences of religion menaced the unity of the empire; from the point of view of the historian of civilisation it may seem that the group

system was still too strong, and that the world had to wait many hundred years before the sense of the individual and personal responsibility was sufficiently developed to compel its recognition.

Whatever the reason may have been, and however great was the spiritual and moral failure of the representatives of the Christian Church, who if they did not directly cause, at least acquiesced in and justified, the action of the Roman Empire, it must not be supposed that the assertion of the independence of the spiritual life had entirely disappeared. It had assumed a new form, for the spiritual life was embodied in the Christian Church, and the Church recognised no spiritual authority in the State.

It is possible to find some traces of uncertainty, some examples of a wavering and undecided attitude in the writings of the Western Fathers, but in the main their attitude was clear and uncompromising, and is best represented by St Ambrose. He was clear that there were rights of the Church which were sacred and inviolable, that the Church had its own jurisdiction, to which all Christian men, whatever their rank, were subject, and that the jurisdiction of the State did not extend over any strictly ecclesiastical matters. To the Western Church it was in the main clear that there were two great authorities in the world, not one, that the Spiritual Power was in its own sphere independent of the Temporal, while it did not doubt that the Temporal Power was also independent and supreme in its sphere.

This is the principle which is formally stated in the letters and treatises of Pope Gelasius I in the latter part of the fifth century. Before the coming of Christ he admits that there were some who were both kings and priests, and the true and perfect king and priest was Christ Himself; but Christ, seeing the weakness of human nature, separated the two offices, and gave to each its own peculiar function and duties. Thus the Christian emperor needs the priest for the attainment of eternal life, and the priest depends upon the government of the emperor in temporal matters. There are, then, two authorities by which chiefly the world is ruled, the sacred authority of the pontiffs and the royal power. The burden laid upon the priest is the heavier, for he will have to give account in the judgment even for kings, but the authority of the emperor is derived from the divine order, and the rulers of religion obey his laws, while he must obey the spiritual rulers.

This conception of the two autonomous authorities existing in human society, each supreme, each obedient, is the principle of society which the Fathers handed down to the Middle Ages, not any conception of a unity founded upon the supremacy of one or other of the powers. And, as we have endeavoured to show, this conception was never really lost. For the mediaeval system did actually always tend to this dualism, and not to the idea of unity as has been sometimes suggested. It is no doubt true that the working out of this dualist principle proved to be surrounded with difficulties, and raised problems which are probably still in theory insoluble; and in the conflicts of "Church and State", of papacy and empire, from the eleventh to the thirteenth centuries, some claimed that the Church was supreme. But the claim was not admitted or made good, and with the death of Boniface VIII it fell to the ground.

In the modern world it may sometimes seem as though the Temporal Power had established its supremacy, but this is only an illusion; and, indeed, with the recovery of the sense of the rights of the individual personality during the last four hundred years, the claim to supremacy has become impossible, for the truth is that the principle of the independence of the Church is only one form of the demand for freedom of the individual personality. It may no doubt be said, and with much truth, that the Church became in the Middle Ages the most dangerous and resolute enemy of this freedom, that it often tended to limit and hinder the development especially of intellectual freedom, and yet it remains true that in its claim that the spiritual and moral life are and must be independent of the political organisation of society, it did in its own way preserve the very principle which it seemed to attack.

Such, then, are the most important political ideas which the Middle Ages inherited from the ancient world, but it will be observed that, with the exception of the principle that the end or purpose of the State is the moral end of the establishment of justice, these principles are derived, not from the great political theory of Plato and Aristotle, but from the post-Aristotelian philosophy and literature. The political theory of the Middle Ages is not Aristotelian. It was not till the middle of the thirteenth century that St Thomas Aquinas recovered the political theory of Aristotle, and it is probably true to say that even his great influence and authority was not powerful enough to produce any great and permanent change. It was not till the latter part of the eighteenth century that the Aristotelian mode of political theory was really recovered, and became, as it then did, the dominant influence in modern political thought.

CHAPTER II.
THE CHIEF PRINCIPLES OF THE POLITICAL THEORY OF THE MIDDLE AGES.

The principal foundation upon which mediaeval political theory was built was the principle of the supremacy of law—law, which is the expression of that which the community acknowledges as just, law which is the expression of the life of the community. There is nothing more characteristic of the Middle Ages than the absence of any theory of sovereignty, as this conception has been sometimes current during the last three centuries. The king or ruler of the Middle Ages was conceived of, not as the mast er, but as the servant of law; the notion of an absolute king was not mediaeval, but grew up during the period of the decline of the political civilisation of the Middle Ages. How it grew up in the Continental countries we hope to consider in another volume. As we have indicated in this volume, up to the end of the thirteenth century the conception of a king or ruler who is above the law was represented only by one or two insignificant or academic writers and jurists, and had no relation to the actual conditions of political society.

It must, however, also be observed that if there was no absolute king there was also no absolute community. For the law, which was the supreme authority in the mediaeval State, was not conceived of primarily as expressing the deliberate or conscious will of the community. It was, properly speaking, nothing but the custom of the community, a habit of action which was the expression or form of the life of the community. And even when we can see in the ninth century, or in the course of the twelfth and thirteenth centuries, under the influence especially of the revived study of the Roman jurisprudence, the beginnings of the conception of law as expressing the will of the community, this will was still conceived of as strictly restrained and limited by a law which was greater than that of any community—that is, by the natural law, the law which was the expression or embodiment of the principle of reason and justice.

All this, we think, is clear from the ninth century, when we can see the beginnings of formal political theory, to the great legal and philosophical writers of the latter part of the thirteenth. The political writers of the ninth century like Hincmar of Rheims, Jonas of Orleans, and Sedulius Scotus are never weary of saying that the function of the king is to maintain justice, that a king who does not do that is no king but a tyrant, the unjust king is no better than a wild beast. The only true authority is a just authority, or, as we might say, justice is the end or purpose of the State. And again, the king is not above the law; rather it is the nature of his office to maintain it, and he is bound by it as are all the people, for laws, so far as they are made, are made not by the king alone, but, as Hincmar says, "Generali consensu fidelium suum". This is the real significance of the words of the 'Edictum Pistense' of 864, " Quoniam lex consensu populi et constitutione regis fit."

We have here, then, a very important resemblance and difference between the principles of the Middle Ages and those of the Roman world. An important resemblance, for the purpose and end of political authority is a moral end, the maintenance of justice; but also an equally important difference, for the law, which is the form or method of justice, is conceived of not as something which is made by the ruler, but as resting upon the agreement of the whole community. The constitutional theory of the Roman Empire, no doubt, as we have seen, looked upon the authority of the emperor as given to him by the community, a delegation of the authority of the community; but, in fact, the Roman emperor became the legislator. Justinian, indeed, speaks of him as the sole legislator. The historical importance of this difference can hardly be overstated. In a very real sense we might say that it was this, together with the principle of equality, which more than any other has really distinguished the political civilisation of the modern world from that of the ancient empire, and that all the other characteristic principles of modern civilisation are ultimately derived from it. The

tendency of the Continental countries of Europe in the seventeenth and eighteenth centuries to conceive of the king as being over the law and the sole source of law, whatever may have been its historical origin and explanation, was nothing but a relapse into a less developed conception of the political order.

We must consider the meaning and form of this resemblance and difference a little more closely. The conception that the end and purpose of the political order is the maintenance of a moral order is treated by mediaeval jurists in the main under the terms of the relation of the State to the ultimate principle of justice, sometimes under the terms of its relation to natural law.

Of the first we find an excellent example in the works of the great jurists of Bologna. They are agreed that jus—that is, the whole system of law—is derived from *justitia*; it flows from it, as a stream from its source. Justitia is the constant will or habit of mind which desires to render to every man what is his due, or as that which gives expression to the principle of aequitas. Aequitas they describe in terms which come to then ultimately from Cicero as "rerum convenientia quae in paribus casibus paria jura desiderat", and they conceive of the principle of aequitas as residing in God Himself, for "God is aequitas". Law to the Bologna Civilian is the expression of justice—that is, of something which belongs to the divine nature itself ; it does not represent the mere convenience or will of any person or persons.

The Bologna Jurists also deal with the relation of law to the moral order under the terms of its relation to the natural law, but that is more strictly the characteristic of the Canonists. Natural law, says Gratian, is divine law, and all laws which are contrary to this are null and void, and this is the judgment of all the Jurists, both Civilian and Canonist. We have seen in an earlier chapter of this volume that St Thomas Aquinas, in his careful analysis of the nature of law, defines natural law as that part of the eternal law of God which is apprehended by man's reason, and he affirms that human law must be conformed to this.

We have distinguished the terms of justice and natural law under which the mediaeval writers conceive of the limitation of the authority of the law of the State, but for our present purpose their significance is the same. Political authority in their judgment was not, never could be, absolute, because it is always limited by principles which are even more sacred than itself, the principles of the divine reason and moral order. Human law is the expression of these, or deals with matters which are indifferent.

This may seem to some a matter of little practical importance, but we venture to think that this would be a very hasty and unconsidered opinion. To mediaeval political writers certainly it did not seem to be so, for to them it was the first test of a legitimate or illegitimate government; and it was the foundation of their principle of the supremacy of law. The law is supreme because it is just and so far as it is just, and all other authority is subject to the law. This is the foundation of the principle which we may here call the "Rule of Law". We have dealt with the matter very fully,4 and cannot here repeat what we have said in detail, but we may recall to ourselves some of the most noteworthy sayings of John of Salisbury and of Bracton, as representing in the most significant terms the common judgment of mediaeval thinkers and jurists.

The difference, says John of Salisbury, between the prince and the tyrant, lies above all in this, that the prince obeys the law, and governs his people according to the law, while the tyrant rules by violence and destroys the law; and the law which the prince obeys does not represent the arbitrary will either of himself or of the community, for it is subordinate to the law of God, whose justice is eternal, and whose law is "aequitas". The authority of the king, says Bracton, is the authority of law (or right) not of wrong; the king is the vicar of God the eternal king when he does justice, but he is the servant of the devil when he does wrong, and, therefore, the king is under the law as well as under God; there is no king where there is no law.

It will be observed that the principle of the practical jurist coincides exactly with the principle of the philosopher, for it was not merely an abstract principle; it was the foundation of that legal and constitutional system of the Middle Ages which provided that for every violation of the law, even by the overlord or king, there was a legal remedy. The whole system of feudalism as a form of political authority was based upon the principle that the lord, even if he were king, was subject to the legal authority of the feudal court, whose function it was to declare and enforce the laws which regulated the mutual obligations of lord and vassal. This is the doctrine which is expressed in almost all the feudal law books. It is no doubt true that in the later thirteenth century it began to be felt that the question of the procedure against the king involved difficulties which had not been fully recognised; but even then Bracton, while he is clear that the ordinary process of law cannot be used against the king or other person who has no superior except God, admits that some at least would say that the case would be dealt with by the "Universitas Regni" and the baronage in the Court.

The principle that the end or purpose of the State is justice,and that law is the embodiment of justice, is carried on in the Middle Ages from the ancient world, but the development of this into the mediaeval principle that the king himself was subject to law and to the court which administered the law goes beyond at least the explicit forms of Roman law. When we turn to the question of the origin or source of law, we certainly find a great and significant difference.

It is no doubt true that the ultimate source of law was even under the empire held to be the custom or will of the Roman people, but its immediate source was normally the will and command of the emperor. This was, as we have said, entirely foreign to the normal conception of the Middle Ages. It is really time that historical scholars should recognise that to think of the mediaeval king as in his own individual person a legislator is really to misunderstand the whole structure of mediaeval life and society, and to read back into it conceptions which belong to a later world.

For the whole structure of the mediaeval world was founded upon custom, and it was only very slowly and imperfectly that the conception that law represents the deliberate will and purpose even of the whole community developed. It may no doubt be thought that this was, in a measure at least, due to the fact that the mediaeval world was only slowly emerging from barbarism, and that the Roman and the modern conception of law represents a higher stage of civilisation; and this is true, though it must also be remembered that there is a considerable measure of illusion in the modern conception of law as a command of the deliberate will. But this is, after all, immaterial to our present subject, for the fact was that to the Middle Ages law was and remained to the end of the thirteenth century primarily custom; and, therefore, to think of the mediaeval king as a legislator is to think of him in terms which have no proper relation to the actual circumstances of the times.

We have dealt with this matter in detail, and cannot here recapitulate what we have said, but we recall a few of the more important statements of the principle. Bracton claims it as a peculiar excellence of England that, while in other countries men used written laws, in England unwritten law and custom prevailed; it would seem probable that Bracton thought of other countries as being governed by the Roman law. Certainly Bracton's suggestion about other countries was curiously inaccurate, for Beaumanoir lays down the same principle of the authority of custom—all pleas, he says, are determined according to custom. It is plain also that Alfonso of Castile and Leon in the 'Siete Partidas' recognises that custom has "naturally" the force of law, and that it could still make the written law void.

In this matter the general principle of mediaeval society was reinforced by the Canonists; indeed, it was Gratian who stated the principle that all human law was, properly speaking, nothing but custom, in the broadest terms. The human race, he says, is ruled by two things—by natural law and by custom. And he also maintains that no written law had any authority unless it was confirmed by the custom of those who were concerned.

The Roman Jurists also had held that the custom of the Roman people at least once had made and unmade law, and Gratian's statement is derived from that fifth book of St Isidore's 'Etymologies' which has been thought to represent some manual of Roman law, and we shall presently have occasion to deal with the conception of the authority of custom as treated by the Bologna Civilians. For the moment we are only concerned to make it clear that the foundation of the mediaeval conception of authority, as embodied in law, was the custom of the people.

This, however, is only a part of what we have to observe. For it is true that we can also see the appearance, first, in the ninth century, and then again in the twelfth and thirteenth, of the conception of law as expressing some deliberate purpose or intention, and as taking the definite form of a command. It is here, as we have seen, that we can trace the first beginnings, for the modem world, of the conception of "sovereignty"—that is, of an authority behind the law, an authority which can deliberately make and unmake law. But here again we must make no mistake; the authority is not the king, not, at least, the king alone, but the community. The Roman law, indeed, recognised frankly and explicitly that the ultimate source of the authority of law was the Roman people. "Lex est quod populus jubet atque constituit", but the Roman people had committed this legislative authority to the emperor, and Justinian could speak of himself as the sole legislator.

There is really no ambiguity or uncertainty about the mediaeval position; if, and so far as, the law is made, it is made by the authority of the whole community in all its parts—the king, the great or wise men, and the whole people. The famous phrase of the 'Edictum Pistense' in the ninth century, " uoniam lex consensu populi et constitutione regis fit", or that of Edward I in the thirteenth century, "Quod omnes tangit ob omnibus approbetur", were not merely rhetorical phrases, but did really represent the principles of the political society of the Middle Ages. Again we cannot recapitulate our detailed discussion of this question. We can only refer any one who is still in doubt to the earlier volumes.

Whether we consider the actual methods of legislation or the principles laid down by the feudal jurists, our conclusion is the same. In the Empire, in England, in Prance, in Spain, law was made, so far as it was made at all, by the king, but with the advice and approval of the community. It is, of course, true that until the development of the representative system in the twelfth century in Spain, and in the thirteenth century in England, there was no normal and direct method of consulting the community; but it is exactly this which gives its importance to the principle to which we have already referred, that however laws were made, they required to be confirmed by the custom of those who were concerned. The custom of the community, which had once been the only source of law, continued to be necessary for its validity.

If we turn from the constitutional forms and practice to the feudal jurists, we find the same principles. Bracton's words represent this in the clearest way; the law is that which is made with the counsel and consent of the "magnates", the common approval of the commonwealth, and the authority of the king, and Alfonso of Castile and Leon lays down almost the same doctrine when he says that "Fuero" is made with the counsel of good and prudent men, with the will of the lord, and the approval of those who are subject to them."

It is true that in the twelfth and thirteenth centuries we can trace the appearance of a new influence upon the conception of legislation—that is, the influence of the revived study of the Eoman law in the great school of Bologna. Here the medieval Civilians found a conception of legislation which was in some respects fundamentally different from that which was represented in the constitutional systems of the Middle Ages. The great jurists of the 'Digest' were indeed clear that the ultimate legislative authority was the Roman people, but the Roman people had transferred to the emperor their legislative authority and function. "Quod principi placuit legis habet vigorem", Ulpian said, and his doctrine is that of all the Roman Jurists, and the mediasval Civilians recognised this. They did not, indeed, forget, as may sometimes have been done later, that Ulpian added, "Utpote

cum lege regia quas de imperio enim lata est, populus ei et in eum omne suum imperium et potestatem conferat". The medieval Civilians understood as clearly as the Roman Jurists that the "people" was the only ultimate source of authority; but they were also in contact with a conception of the legislative process which was, as we have just said, greatly different from that of the mediaeval constitutions. It is not very easy to determine what exactly they thought about the relation of these principles to the existing circumstances. The medieval empire was to them continuous with the ancient empire, and in their theory should have possessed and exercised the same power, and yet obviously enough it did not do so. It was perhaps the divergence between the theory and the fact that led some of the Civilians to find in one of the sections of the fourteenth title of the Code of Justinian the normal form under which the emperor should exercise his authority. In the eighth section Theodosius and Valentinian had laid down the form under which new laws were to be issued, including the consultation and consent of the Senate. The author of the 'Summa Trecensis' (Irnerius himself, in the judgment of Fitting), Roger, and Azo agree in maintaining that this was the proper form of imperial legislation, and it is possible that they found in this an approximation to the actual practice of the Middle Ages.

It is also possible that it was this divergence between the principles of the ancient Eoman law and the actual constitutional conditions of their own time which led some of the Bologna Civilians, and especially Azo, Hugolinus, and Odo-ridus to assert that, when it was said that the Roman people transferred their authority to the emperor, this did not mean that they had parted with it in such a sense that they could not resume it. Hugolinus was specially emphatic about this; the Roman people had given its power to the emperor, but it still retained it. It had created the emperor its "procurator ad hoc"—that is, for the purpose of legislation.

Other Civilians like Bulgarus and John Bassian, while they do not seem to have spoken as explicitly as Azo or Hugolinus, at least maintained that the general custom of the people had still the power to abrogate law, and that even the custom of a particular city would do this, so far as that city was concerned. There was, indeed, obviously a sharp difference of opinion upon this question among the Bologna Civilians, for Irnerius, Roger, and Placentinus maintained that the Roman people having tranferred their authority to the emperor, their custom had ceased to have legislative power.

The influence of this new conception of the delegation of legislative authority from the community to the ruler cannot indeed be traced in the constitutional forms and methods of the thirteenth century, but it had some influence upon certain of the writers on politics. In the twelfth century, the writer whom we know as "Glanvill" was aware of the woids of Ulpian, but he defines law as that which is promulgated with the consent of the "Proceres", and the authority of the prince.

John of Salisbury was also aware of the saying that what the prince pleased had the power of law, but he is mainly concerned to guard against a misapprehension of this. What is the use, he says, of talking about the will of the prince in public matters, when he can will nothing but what law and aequitas and the common good requires.

In the thirteenth century St Thomas Aquinas was evidently familiar with the conception that the legislative function might be discharged either by the community as a whole or by one person, who in his own words, "curam populi habet et eius personam gerit". Curiously he does not anywhere, so far as we have seen, directly refer to the Roman law as the source of the conception of the one person who acts for the community, but it can hardly be doubted that it was from the Roman law that he derived it. He recognised two possible cases, the one where the people was free, and could make laws for itself, the other where the laws are made by a superior. He himself prefers the mixed constitution, in which laws were made by the "majores natu simul cum plebibus."

At the end of the century, Ptolemy of Lucca and Egidius Colonna recognise two possible forms of government, the "regimen politicum" and the "dominium regale" (or "regimen regale"). The first is that when the country is governed by laws which it makes itself, the second when it is ruled by

laws which are in the prince's own heart, and which he makes himself. Ptolemy enumerates the respective advantages of each, but gives no dogmatic preference of his own. Egidius recognises both as legitimate, but he definitely gives his preference to the latter—that is, to the form of government where the prince rules "secundum arbitrium et secundum leges quae ipse instituit". It is again noticeable that neither Ptolemy nor Egidius relates his conception of the legislative authority of the prince to the Koman law, but again it can hardly be doubted that this was its source.

We venture, therefore, to say that while the conception of a law-making power became important in the thirteenth century, and was, indeed, the first form in the modern world of the conception of the sovereign power behind the law, this sovereignty in the practice and in the normal constitutional theory of the thirteenth century belonged to the whole community. The first appearance of the conception that the prince was the legislator, was due to the revived study of the Roman law, but it remained till the end of the thirteenth century merely academic, and had no effect upon the constitutional practice of mediaeval societies, and very little on political theory.

The true character of the medieval conception of government only becomes clearer when we turn from the consideration of the supreme authority of the law, and inquire what then was the source and nature of the authority of the prince or ruler. It is the law, said Bracton, that makes the king, and these words are very characteristic of the mode of thought of the Middle Ages. The doctrine of an indefeasible divine right of any individual person to the throne may have been alleged in the seventeenth century, but it was not accepted in the Middle Ages. The medieval conception was much more complicated; the action of the divine Providence, the custom of hereditary succession, the election by the great men and the people, all these were elements in it. But the one element which is normally present was that of the election or recognition by the community. The distinction between the elective and the hereditary method of succession finds recognition in many writers, and sometimes at least it was suggested that those who held by hereditary succession might claim to possess a greater authority. In the empire the elective principle finally triumphed, while in the other European societies the custom of hereditary succession within one family came to be recognised as normal; but this did not mean that a claimant would be recognised, even if he stood nearest in hereditary order, if he were not suitable in character and capacity. It is significant in this connection to observe that Egidius Colonna, the only person who in the thirteenth century expressed a preference for the absolute monarchy, agreed with his contemporary John of Paris, who praised the constitutional and mixed government, in asserting that the authority of the ruler was derived from the consent of the people.

The medieval principle with regard to the relation of the authority of the prince to that of the community is, however, more clearly indicated when we observe that there is little, if any, hesitation among the writers of the Middle Ages as to the power of the community to depose the ruler who misused his authority. Even Egidius Colonna, in his work on the resignation of the papal throne by Celestine, recognised that as the authority of the ruler was derived from the consent of the people, it might be taken from him by the same consent, and St Thomas Aquinas is very clear and emphatic in his contention that the people are in no way bound to obey a ruler whose authority is usurped or abused.

It may, however, be urged that after all this is only what in modern times we might call the right of revolution, and that it would be a somewhat barbarous and uncivilised constitutional system which could find no other remedy for mis-govemment than the somewhat violent method of revolt and deposition, and that if that were all that mediaBval political development attained to, it would not represent anything very valuable.

This was not, however, the real character of the political order of the Middle Ages either in practice or in principle. As we have already said, the really fundamental principle of the Middle Ages was the supremacy of the law and the subordination of the ruler to the law. It is here perhaps that we

shall find the most significant element of feudalism as a system of government, for there was nothing more important in the feudal system than the fact that the lord, even if he was the king, was answerable to the jurisdiction of the feudal court. For the feudal court was the guardian and administrator of the law. It seems to be true that the well-known words which say that the King of England was subject not only to God and the law, but also to the court, were not written by Bracton, but this is really immaterial. For, even though Bracton did not use the words, he admits that it may be maintained that if the king will not do justice he might in the end be constrained to do so by the "Universitas Regni" in the court.

What is more important is that the principle that in cases of dispute between a vassal and his lord the judgment belongs not to the lord but to the court is the principle of all the feudal law-books from the 'Consuetudines Feudorum' and the Assizes of Jerusalem to Beaumanoir; and except for Bracton's assertion that the ordinary process of law could not be used against the king, there is no suggestion that the king was not bound to accept the judgment of the court. This is the real significance of the famous clause of Magna Carta which provided that no man could be imprisoned or outlawed or attacked even by the king except by the judgment of his peers or the law of the land. To read this clause, or, indeed, any part of Magna Carta by itself, and without relation to the whole system of feudal law, only leads to a complete misunderstanding of its real significance.

It is the same principle, only under another form, which is represented by the statement of the 'Sachsenspiegel' that even the emperor has a judge to whom the decision of questions between himself and his vassals must be referred; and this statement of the 'Sachsenspiegel' is illustrated for us in the reports of the proceedings between Rudolf of Hapsburg and the King of Bohemia. It would seem probable that the same principle and form was represented by the great official whom we know as the "Justitia" in Aragon ; and we have seen that under less determined forms the same principles appear in the record of the mode of settlement of questions between the king and his vassals in various parts of Spain.

The political order of the Middle Ages, therefore, was not only built upon the principle of the supremacy of the law, but had developed a method by which this supremacy could be enforced even upon the prince. This is the real political meaning of the struggle over the question of taxation. The feudal prince was legally entitled not only to the various services of his vassals, but for certain purposes had the right to demand financial contributions. But his right was in this matter determined by custom and law; he had no arbitrary or unlimited rights over his vassals' property, any more than over their persons. Many even of the Bologna Civilians repudiated the opinion which was attributed to one of their number, Martinus, that the emperor had an absolute right over the property of his subjects, and as far as we have seen no other writer or jurist even suggests such a theory.

The authority of the prince was then, in the political system, as well as in the theory of the Middle Ages, founded upon law and limited by law. It is here that we find the foundation of that contractual principle which was sometimes expressed and always implied in mediaeval political theory. The obligations of the prince and the people were mutual obligations, and these obligations were expressed in the law.

The mediaeval thinkers were little, if at all, affected by the unhistorical and artificial theory of the seventeenth century, of an original contract by which the commonwealth was formed, we are not here concerned with the question what significance, not of an historical kind, that theory may possess, but the conception of a mutual agreement between the ruler and the subjects was familiar to them. As we have pointed out, it was the foundation of all feudal relations, and was emphatically stated by the feudal jurists.

The conception was, however, as it seems to us, older and more deeply rooted than the developed feudalism. It appears to us that it can be traced to the forms of the coronation order as far back as the ninth century, and it survives in the English coronation order of today. For while the

subjects swear to obey the prince, the prince swears to administer the law. The sharp and drastic terms in which this principle was statod by Manegold of Lautenbach may be abnormal, but the principle was normal; the prince held his authority on the understanding that he fulfilled his obligations. The prince who persistently violated them forfeited all claim to his position, and might properly be deposed. This is the constitutional principle not only of Manegold, but of St Thomas Aquinas, and the history of the Middle Ages illustrates sufficiently clearly that it was not a merely abstract principle.

It may, however, be said again that these principles and practices represent a somewhat undeveloped and even barbarous condition of society, and that would no doubt be true if they stood alone, if the Middle Ages had not advanced any further. This was, however, not the case; on the contrary, it is clear that we can see both in fact and in theory the development of a system of a limited and constitutional method of government. St Thomas Aquinas will furnish us with the best example of this theory. In the same passage which we have just cited, he sets out the general principle that it would be well that the authority of the king should be so tempered that he could not easily abuse it, and in the 'Summa Theologica' he expresses his own preference for a form of government in which authority should be shared by the king with others, who should represent the community. His opinion is restated by John of Paris. How far either St Thomas or John of Paris were aware of the actual tendencies of the constitutional development of the twelfth and thirteenth centuries does not appear; but their theories correspond with the actual facts.

We have in this volume endeavoured to give a summary account of some of the experiments by which in the course specially of the thirteenth century it was attempted to provide for some constant and effective control upon what we should call the administrative action of the Crown, but these, except in so far as they anticipated the later development of the principle of the responsibility of ministers, were in themselves abnormal and of comparatively little importance. It was not until the development of some method by which the community as a whole should be more or less effectively represented that this continuous control over the action of the crown could be properly created.

It was, therefore, in the creation of a system which could be conceived of as representing the whole community that the political development of the Middle Ages culminated, and that its political principles found their most complete expression. It is no doubt true that it was under the pressure of particular conditions and movements in various countries that the elective and representative bodies were created, but the principle which they embodied was the principle which lay behind the character of the whole political civilisation of the Middle Ages, and it is only a grave misunderstanding which would separate between the development of the representative system and the general political principles of mediaeval society.

We venture therefore to say, and we do it without hesitation, that the proper character of the political civilisation of the Middle Ages is to be found in the principle that all political authority, whether that of the law or of the ruler, is derived from the whole community, that there is no other source of political authority, and that the ruler, whether emperor or king, not only held an authority which was derived from the community, but held this subject to his obedience to that law which was the embodiment of the life and will of the community, and that the development of the representation of the community in Cortes or Parliaments or States-General was the natural and intelligible form which that principle assumed. How it came about that in the course of the succeeding centuries these rational and intelligible principles of political society should have in some measure given place to the somewhat barbarous conception of the absolute monarchy, we hope to consider in the next volume ; but we trust that we have succeeded in making it clear that, whatever may have been the circumstances which explain this, to the Middle Ages the conception of an absolute or arbitrary monarchy was practically unknown.

The life of the Middle Ages was turbulent, disorderly, often almost anarchical, but they found the remedy for this not in submission to an irrational despotism, but in the recognition of the supreme authority of law, a law not external or mechanical, but the expression and embodiment of the life of the community.

BOOK. VI.
POLITICAL THEORY FROM 1300 TO 1600

PREFACE

It was with the help of my brother that this work on the history of Medieval Political Theory was begun in 1892; indeed his article on "The Political Theory of St Thomas Aquinas" in the Scottish Review, 1896, was its first published form. He was one of the pupils of Arnold Toynbee at Balliol, and though what he learned from him was mainly in Economics, it was from him, I think, that he learned not only the significance of Economic History and Theory, but also the importance of the history of Political Thought. During the many years of his long service in the Government of India, 1880 to 1916, and in spite of the pressure of his public work, he contributed by his continual sympathy and his careful judgment and criticism to help and correct this work; and happily, in the year after his retirement in 1916 he was able to write a large part of Volume V. I had hoped to finish, as I had begun, with his help, but this was not to be, for he died in 1934, and I can only express something of what he was and did by dedicating this volume to his memory—the memory of an honourable, just, and kindly man, and an indefatigable scholar.

Till the last year of his life he was occupied with the materials for this volume, and happily something of his work I have been able to include in it, but only a little of that which he was preparing. This has unavoidably compelled the omission of one very important subject which we had hoped to treat in this volume, as in former ones—that is, the relations of the Temporal and Spiritual Powers—and I fear that it is too late to hope to be able to deal with this. I greatly regret this, but at the same time I feel that in the fourteenth century, and still more in the fifteenth and sixteenth centuries, these relations must be studied under terms in many ways very different from those under which we have dealt with them in these volumes.

With the downfall of Boniface VIII the long conflict between the Papacy and the Empire had, as it seems to me, really come to an end. No doubt it was renewed in the struggle between the Popes and Henry VII and Louis of Bavaria, and it may even be said that this ended in the success of the Popes; but the Declaration of the Electors at Rhense in 1338 seems to indicate that there was little real significance in this.

Again, while there were in the fourteenth century several treatises like those of Augustinus Triumphus which asserted the theory of the temporal supremacy of the Popes in the strongest terms, these do not seem to add anything of importance to the contentions of Innocent IV, or Hostienis, or Egidius Romanus, or James of Viterbo.

The truth is, as it seems to me, that from the fourteenth century the history of the relations of the Temporal and Spiritual authorities, while we must not overlook the great importance of Papal authority, must be studied primarily under the terms of the relations of Church and State within the separate nations. This is true of the fourteenth and fifteenth centuries, and even more of the sixteenth, and that not only in the Reformed but also in the Catholic countries. These questions are so important that their proper treatment would require a detailed examination of the circumstances and the literature of the subject in each of the more important Western countries, and this is a task of a formidable complexity and magnitude.

At almost the same time as our last volume appeared, there was published the most important and valuable work of Professor J. W. Allen, *A History of Political Thought in the Sixteenth Century*, and I would express both my high admiration for this admirable and illuminating work and also my obligation to it for much information. I trust that our readers will recognise that what we have attempted in this volume on the sixteenth century is not like Professor Allen's work, a detailed study of every important aspect of the rich and varied "Political Thought" of that century, but a treatment of it, primarily, in its relation to that of the Middle Ages.

Among other important works recently published, I should wish to draw the attention of historical students to the very valuable work of Professor Ercole of Palermo, 'Da Bartolo all' Adthusio', and to the excellent work on the Political Theory of Hooker by Professor A. P. d'Entrkves of Pavia.

I must also express my great obligation to the late Professor G. Fournier of Paris in directing my attention to the sources of information on the French Civilians of the sixteenth century, and I should wish to express something of the regret that every serious student of mediaeval civilisation must feel at the loss which we have suffered in the death of so great, so learned, so judicial a student of Canon Law. We are indeed glad that he was able to complete his work on the Collections of Canon Law from Pseudo Isidore to Gratian; and we look forward to the forthcoming treatment of Gratian himself by Fournier's learned successor in Paris, Professor Le Bras.

By the kindness of Professor Giorgio del Vecchio of Rome, one chapter of this work (Chap. II. Part II.) was translated into Italian and published in the 'Rivista Internationale di filosofia del diritto'.

I cannot end without once again expressing my profound indebtedness to Dr R. Lane Poole, the most learned of English mediaeval scholars. Looking back after fifty years I remember not only his continual kindness to an immature student, but also that it was from his 'Illustrations of Mediaeval Thought' that I first learned something of the real character of the political principles of the Middle Ages.

A. J. CARLYLE.

March 1936

PART I.
FOURTEENTH CENTURY.

INTRODUCTION

We have seen in earlier volumes that the political principles of the Middle Ages were clear and intelligible, and that, though the forms of the organisations in which they expressed themselves were in many respects different from those of the present day, the principles themselves were really not very far removed from our own. The confusion about this which is still to be found in the minds of some people is simply a confused ignorance. The medieval world was a rational world; indeed, as has sometimes been suggested, its defect was that it was somewhat too rational. The great schoolmen, especially, appear to us sometimes to have too great a confidence in the power of the human reason to analyse the complexity of human life. However this may be, the political thinkers of the twelfth and thirteenth centuries are to us intelligible and rational.

It is very different when we come to some of the political ideas of the seventeenth century; it is difficult to say which seems to us most irrational : the absurdity of the theory of the divine right of the monarch, or the absurdity of the theory of the absolute sovereignty of the State as represented by Hobbes. It is no doubt true that we can recognise behind both these absurdities some historical conditions which serve to explain their appearance, but they do not justify them. To us these conceptions seem, and indeed they are, irrational and mischievous. The conception of the divine right of the monarch has happily, even if only in our days, disappeared, and the theory of the absolute sovereignty of the State only lingers on among politically uneducated people or societies.

Our task, then, in this volume, is clear; we have to consider, first, the continuity of political civilisation, and, secondly, the conditions or circumstances under which this continuity was in part interrupted by the reappearance of that confused orientalism of Gregory the Great, the theory of the divine right of the monarch, and by the appearance of the conception of the absolute power of the prince, in the State.

CHAPTER I.
THE SOURCE AND AUTHORITY OF LAW : CONSTITUTIONAL PRACTICE AND GENERAL THEORY.

We have seen that the most important political conception of the Middle Ages was the conception of the supremacy of law, the law which was the expression, not merely of the will of the ruler, but of the life of the community; and this life, which expressed itself in the customs, and therefore the law of the community, was conceived of as itself the expression of moral principles. The law was supreme, because it was the expression of justice; the unjust law was not law at all. This conception can, as we have shown, be traced through all medieval literature from the ninth century to the thirteenth. It is sometimes expressed in the technical terms of the derivation of Jus from Justitia, or of the subordination of all positive law to the natural law, sometimes in the more popular terms of the distinction between the king and the tyrant.

It is then these profound conceptions of the real nature of political authority which the Middle Ages handed down to the modem world, and our first task is to consider how far these conceptions may have been modified in the period with which we are now dealing. We begin, therefore, with the consideration of the conception of the immediate source of the authority of the positive law of a political community.

As we have, in former volumes, endeavoured to show, there was from the twelfth century at least a divergence between what we have called the normal conceptions and practice of medieval society, and the theory of some at least of the students and teachers of the Roman law, and we shall have to consider this divergence carefully in the period with which we are now dealing, and shall have to ask how far the absolutist theory of some of the great civilians may have modified the traditional political principles of mediaeval society.

We begin with some observations on the actual methods of legislation in the fourteenth century.

There is a noteworthy phrase in the coronation oath of Edward II and Edward III of England, which will serve to express the constitutional procedure and theory of the time. They swear to hold and maintain, not only the laws and customs granted by former kings, but also the laws and lawful customs which the community shall have chosen. The words express both the place of custom in the system of medieval law, and also the recognition of the principle that laws derive their authority, not only from the consent of the king but from the determination of the community. The words in which the ordinances of 1310 were annulled in 1322 only add to this the statement of the method in which the determination of the king, the barons, and the whole community was to be expressed—all those matters which are to be established for the kingdom and people are to be discussed, agreed upon, and established in Parliament by the king, with the assent of the prelates, counts, barons, and the community of the kingdom, as had heretofore been the custom.

It is interesting to observe the parallel between these conceptions and those of the Cortes of Castile at Burgos in 1379, and at Bribiesca in 1387. At Burgos the Cortes complained that certain persons produced “Cartas” (briefs) annulling ordinances made by the king in the Cortes, and petitioned the king that nothing done in the Cortes should be undone except by the Cortes. The king, Juan I, seems in his reply to be a little evasive and to reserve to himself some freedom of action (of suspending or dispensing).

At Bribiesca, however, Juan I laid down in the most explicit terms that royal briefs (Cartas), which were contrary to custom or law, were not to be regarded, that the royal officials were not to seal any briefs which contained “non obstante” clauses, and that laws, customs and ordinances were not to be annulled except by ordinances made in the Cortes.

These are statements of constitutional practice, and when we consider the actual methods or forms of legislation we find that there was no other method of legislation in Castile than that of the king acting with the advice, in earlier times, of his prelates, nobles and magnates, and as the representative system developed, of the prelates, nobles and delegates of the cities. There is really no trace of any other system in Castile or England, and it is a curious misconception which has led some serious historical writers to speak as though the legislative authority in Castile belonged to the king alone. This has arisen partly from a hasty interpretation of the phrases which describe the law as the king's law, and such phrases as those used by Alfonso XI of Castile in issuing a new lawbook at the Cortes of Alcala de Henares in 1348 : "Et por que al Eey pertenesce el poder de fazer fueros e leyes e delas entrepretar e declarar e emendar". We have pointed out in the last volume that the similar phrase used by Alfonso X in the 'Especulo' cannot be taken to mean that he claimed an absolute or sole right to make or unmake law, but only that no law could be made without him, and that it was his part to promulgate or declare the law. And it must be observed that in issuing the new law book at Alcala, Alfonso XI was acting with the counsel of the prelates and nobles and the good men of the cities, and that it was in this same Cortes that the great law book of Alfonso X, the 'Siete Partidas', was first formally recognised as having legal authority, for it had not hitherto been promulgated by the king or received as law.

With regard to France it is more difficult to speak precisely; while, as we shall see in a later chapter, there is frequent mention of the States general, and of the Provincial Estates, the former at least did not meet so regularly as Parliament in England, or the Cortes in Castile, and it is more difficult, therefore, to make precise statements about the methods of legislation; but it seems, from examining the collection of Royal Ordinances, that, so far as these can be described as having the nature of law, they were promulgated under the same terms as those of the thirteenth century, by the great council, sometimes with reference to the barons and others, sometimes with the advice of the estates.

The formulas of legislation in the Empire are more explicit, and seem to imply normally the presence of the members of the Diet.

We can now turn to the general theory of the legislative authority in the fourteenth century. It seems hardly necessary to cite the opinions of the English writers, for it is obvious that they adhere to, and indeed frequently simply repeat, the opinions of Bracton.

Britton represents the king as issuing a law book, and as commanding that it was to be obeyed in England and Ireland, but reserves the right to repeal or annul these laws with the consent of the barons and counts and the other members of his council. Fleta restates almost literally the judgments of Bracton. The king has indeed no equal, but it is the law which has made him king, and it is therefore right that he should recognise the authority of the law. The king can do nothing except that which he can do lawfully, and the saying that the prince's pleasure has the force of law must be understood under the terms of the statement that it was from the "lex regia" that he derived his authority, and that, therefore, it is to be understood that that only is law which has been made after due deliberation by the advice of the "magnates" and the authority of the king. The king must restrain his authority by the law which is the bridle of power, and must live according to law, for it is the principle of human law that laws bind the legislator. This was evidently the normal opinion of English lawyers, and there is therefore nothing surprising in the terms used by that curious work, the ' Mirror of Justices. The worst of all abuses is that the king should be against the law, for he ought to be subject to it, as is expressed in his coronation oath. It is a grave abuse that ordinances should be made by the king and his clerks and others who would not venture to oppose the king, while laws ought to be made by the common consent of the king and his counts.

It is, then, from this standpoint that we can understand the real significance of the treatment of the source of authority of law by Marsilius of Padua in the 'Defensor Pacis'. He is not, as appears to

be thought by some writers who are not very well acquainted with medieval political literature, setting out some new and revolutionary democratic doctrine, but is rather expressing, even if in rather drastic and unqualified terms, the normal judgment and practice of the Middle Ages : he represents not the beginning of some modern and revolutionary doctrine, but the assertion of traditional principles. It is, however, true and not unimportant that the author derives his doctrines from various sources, that he combines the principles of the actual practice of the Middle Ages with conceptions derived, on the one side, from Aristotle, and on the other, to some extent from the Civilians.

He lays down, for instance, the principle that there is no "politia" when the law is not supreme, and he cites in support of this some words of Aristotle; but this doctrine had been implied in the Assizes of Jerusalem, and asserted by Bracton. Again, he sets out with great emphasis the principle that the source of law is the "populus" or "universitas civium" or its " alencior pars", and not either one man or a few men, for either the one or the few might make bad laws directed to their own advantage rather than to the common good. Marsilius refers to Aristotle as having laid down this doctrine that the universitas is the source of law, but the principle had been suggested by some of the earliest Civilians. We have drawn attention in the second volume to the words of works attributed to Irnerius and Bulgarus, that it is the "populus" or "universitas" which is the ultimate source of law, and it is evident that they had learned this from the Roman law books. It seems reasonable to say that Marsilius is restating the doctrine of the ancient Roman law and of the medieval Civilians.

But further, as we have seen, there is scarcely any trace whatever, either in the constitutional systems or in the writers on political theory of the Middle Ages, except in the medieval Civilians, of the conception that law could be made by any one person, even by the prince, except with the advice and consent of the community as a whole, or those who stood for it, whether they were the great and wise men, or the elected representatives of the community. Egidius Colonna stands practically alone in suggesting that the king should rule according to his own will and the laws which he had made, and not according to the laws which the citizens had made. So far, then, Marsilius was simply expressing in clear terms the normal conception of the Middle Ages, but there are some aspects of his statement which deserve further notice, and especially the emphatic phrase which he uses about the "valencior pars" of the populus. It will be observed that be explains these words when he adds, "Valenciorem inquam partem, considerata quantitate personarum et qualitate in communitate illa super quam lex fertur", for there seems to be no doubt that this is the correct reading. It seems clear that he does not mean simply the greater number. The history, however, of the development of the theory of the majority in the political and ecclesiastical organisations of the Middle Ages is one of great complexity, and we do not feel that we are competent to discuss this subject.

It should also be observed that Marsilius sets out a very important defence of the authority of the whole people in making law. Men, he says, are more ready to maintain a law which they have imposed upon themselves, and it is therefore well that whatever may concern the common convenience should be known and heard by all; and, while he admits that the legislative power should not be entrusted to a base and incompetent authority, he meets the contention that the "universitas civium" is a body of this kind with a flat denial. For, he declares, the great mass of the citizens (civium pluralitas) are not normally or generally base or incompetent, rather they are all, or for the most part, of sound mind and reason, and have a right intention towards the Commonwealth and what is necessary for its maintenance. And, therefore, although every individual, or the greater multitude, is not capable of devising new laws, yet everyone can judge and determine as to that which is devised and proposed to him by others.

It seems to us, then, to be clear that the constitutional procedure and the general political theory of the fourteenth century represent the same principles as to the source and supremacy of the law which, as we have seen in former volumes, were characteristic of the Middle Ages. The law of

the State is the expression of the custom and will of the whole community, and it is supreme over all members of the community, even over the king and prince. We shall, however, have more to say about this in later chapters, when we deal directly with the conception of the nature and limitation of the authority of the prince in the fourteenth century.

CHAPTER II.
THE LAW, ITS SOURCE AND AUTHORITY. CIVILIANS.

It remains, then, to consider the treatment of this subject by the Civilians and Canonists, for here if anywhere we may find some development of another kind. We have pointed out in earlier volumes that in the twelfth and thirteenth centuries there are clear traces of two and divergent movements of opinion : that some of the Civilians seem to think that the Roman people had so completely transferred their original legislative authority to the emperor that they no longer possessed it at all, while others thought that though they had given the emperor this authority it still, also, remained with them, and could still be reclaimed and exercised. We have now to consider how far the Civilians and Canonists of the fourteenth century can be said to adhere to the one or the other of these opinions.

It is well to observe at the outset that there is no question in the minds of these Civilians that it was the people from whom the prince derived his authority. This is very clearly set out in a passage in the ‘ Commentary on the Digest’ by Cynus. (Cino of Pistoia; one of the most important of the Civilians of the early fourteenth century.) Cynus maintains very dogmatically that the “imperium” is from God, but he holds that this is not inconsistent with the principle that the prince was created by the lex regia, the emperor derives his authority from the people, the “imperiuin” is from God.

Having made ourselves clear on this point we can consider an important discussion of the whole question of the legislative authority of the people, by Cynus in his Commentary on the Code, which indicates very clearly that he was well aware of the contention between the older Civilians about this question. He cites the opinion of “Joannes” and of “Hostiensis”, that the Roman people could not now make a law, but also the judgment of Hugolinus to the contrary, and says that some of the “moderni” (his contemporaries) held with Hugolinus. Cynus himself seems to be indifferent as to the question, but the reason he gives seems to imply that he is thinking not of the general authority of the people of the Roman empire, but of the authority of the people of the city of Rome, which would have no reality outside of the city.

We must, however, observe also the opinion of Cynus on two different but related questions. He discusses with some care the meaning of the famous passage in the Code, “Digna vox maiestate regnantis legibus alligatum se confiteri” (Code I. 14, 4), and maintains that, while the emperor is not bound to observe the law “de necessitate”, he feels himself bound “de honestate”. And he goes on to discuss a question whose importance we shall have to consider in relation to other writers, and even with regard to Bodin in the sixteenth century. The question is, whether the emperor and his successors are bound to observe an agreement (or contract, pactum) which he has made with any “civitas”, or baron. The question, as he says, had been propounded by Guido de Suza, and it is not quite clear whether the discussion of the question is that of Cynus, or whether he is stating it in the terms of Guido, but the conclusion, at least of Guido, seems clearly to be that the emperor is bound by such a “pactum”, and that the subjects may be entitled to resist any unjust and manifest violence.

It is also important to observe that Cynus is clear that the authority of the prince does not include the right to take away a man’s property without adequate cause. He can indeed take it “de facto”, and his action must be assumed to be founded upon some just reason, but he cannot do this “de jure” without reason : the laws give him no such power, and if he does it, he commits a sin.

We have given these somewhat detailed quotations from Cynus, because it appears to us that his position represents very fairly that of the fourteenth-century Civilians in general; they were, like Cynus, aware of the divergent judgments of the older Civilians. In one important passage Bartolus comments on the well-known words of the Code VIII. (52, 2) in which Constantine said that while

the authority of custom is not insignificant (vilis) it could not override reason or law, and he points out that Azo, John Bassianus, and the Gloss (*i.e.*, the "Glossa Ordinaria" of Accursius) maintained that a local custom overrides the "lex communis" in that place, and a general custom overrides it everywhere, while Placentinus had contended that this had been true in ancient (pre-imperial) times, but not in later. He also cites one of the earlier fourteenth-century Civilians, William of Cuneo, as maintaining that the custom of the Roman people retained its legislative authority, for this had never been transferred to the prince; and a jurist of the thirteenth century, Martin Silimani, as maintaining that the Roman people still retained the power of making a general and written law (lex).

When we compare these passages with others in his writings we may incline to the judgment that he accepts the distinction of William of Cuneo between the continuing legal authority of the custom of the people, and their power to make law (lex) in the more strictly technical sense. In one place, indeed, he states clearly and dogmatically that the Roman people have not the power of making law (lex); the reason he gives for this is, however, rather curious. So long, he says, as the Roman people retained the right of electing and deposing the emperor, they kept the power of legislation, but this right had now passed to the princes of Germany, and the right of deposition had passed to the Pope.

On the other hand, at the end of his discussion of the rescript of Constantine on custom, he says, dogmatically and in his own person, that, if custom is contrary to law, and the law is subsequent to the custom, the law annuls it; if, on the other hand, the custom is "praeter legem", it is superior to the law. A general custom is superior to law everywhere, and a local custom, to law locally; and it is perhaps worthy of note that here Bartolus refers to the highly important statement of Gregory IX in the Decretals.

If we turn to his great contemporary Baldus, we find that his position is much the same as that of Bartolus on this question. In commenting on the Code (I. 14, 12) he says dogmatically that the Roman people cannot make law (lex), for its general authority has been transferred to the prince; on the other hand, commenting on Dig. I. 3, 32, he also seems to repudiate the contention of Placentinus, that custom does not now override the written law, and that, therefore, no custom has authority unless it has been formed with the knowledge of the prince; this, he says, is not required, at least with regard to local customs, and he refers to a Decretal of Boniface VIII, and also to Gratian's well-known doctrine that laws are abrogated by custom.

Bartolus and Baldus again agree with Cynus about the binding nature of contracts or agreements between the prince and the people.

Bartolus maintains that while the prince is "legibus solutus", it is "equum et dignum" that he should live according to law, though he does this of his free will, not of necessity; but if he has made a "pactum" with any city, he is bound to keep this, for "pacta" belong to the "ius gentium."

Baldus, commenting on the same passage of the Code, sets out the same opinion, that the prince should obey the law, though he is not bound to do so "ex necessitate"; and he adds a judgment of considerable significance, that there is a supreme authority in the prince, as well as an ordinary authority, and that this supreme authority is not under the law. He also, however, like Bartolus, quotes Cynus as maintaining that a pactum, made by the prince with his subjects, if it has natural justice and equity, and is made for the public good, is binding, not only on the prince but on his successors, and in his comment on 'Digest' I. 3, 3 (Princeps legibus solutus), he sets out the principle again and seems to accept it for himself.

Here we have come upon an important point of contact between the Civilians and the system of Feudal law. We have, happily, an important work of Baldus upon the Feudal law, and when we turn to this we shall be led to think that the conception of the contract which is binding upon the prince is related to Feudal conceptions, and that this affects also the conception of customary law.

The emperor, Baldus says, has, no doubt, the fulness of power (plenitudo potestatis), for God subjected the (leges) laws to him, but God has not subjected to him the agreements (contracta) by which he is bound, and he gives as an example of his meaning the grant by Frederick I of the Countship and other territories to the community of Pavia on their taking the oath of fidelity to him : this grant neither Frederick nor his successors could revoke, except on the ground of some guilty action of Pavia.

Good and natural consuetudines, Baldus says in the same work, bind the prince, for the "jus naturale" is stronger than the "principatus" : the prince is bound to maintain his "consuetudines", for customary law (jus consuetudinarium) has authority over the prince (concludit principi). In his commentary on the Peace of Constance he sets out the same principle: if the prince had granted to any city the right to make any statutes for itself, he could not revoke the grant. And in another place Baldus sets out as a general principle that custom is a tacit agreement of the citizens.

We have dealt with the position of Cynus, Bartolus, and Baldus at length, for we think that they are in these matters representative of the Civilians of the fourteenth century, hut we may notice a few points in others.

Joannes Faber, one of an important group of French Civilians of the early fourteenth century, asserts very dogmatically, not only that the prince derives his authority from God, but through the people, but also that the people can for proper causes depose him. He holds that the people can no longer make a general law (lex), for it has transferred the power to the prince, but it can, under proper conditions, make a municipal law. Custom, however, he seems clearly to mean, still makes and unmakes law.

He also raises the question whether the prince was hound to consult the "Proceres" when making a law, as laid down in Cod. I. 14, 8 : he seems to think not.

Jacobus Butrigarius, an important Bologna Jurist under whom Bartolus studied, in an interesting passage discusses the question of the authority of custom, and suggests that both those who upheld the view that custom still makes and unmakes law, and Placentinus who denied this, were right, for the Roman people had transferred their authority to the prince and could not, therefore, make general laws, but they could revoke this grant to the prince and could then make any law. We shall have to return to this passage in the later chapters, when we discuss the theory of the prince or ruler, but in the meantime it is worth noticing for Butrigarius does not stand alone in the suggestion. It is suggested by Vacarius, and by Azo.

The Canonists of the time do not, as far as we have been able to see, deal with these questions to any great extent, but it is worth while to notice that the great Canonist, who is generally known as the "Archdeacon", in his Commentary on Gratian's Decretum, while he does not express his own judgment, mentions that some said that the people could not now make a law; but others maintained that they could take away from the emperor the authority they had given him, and he contrasts this with the position of the Pope. The Archdeacon also reasserts the principle of Gratian, that all laws required to be approved and confirmed by the custom of those concerned, but he adds that if the subjects refuse to accept a reasonable constitution, the legislator can compel them to do this.

Again, William Durandus the younger, in his important work on the mode of holding a general Council, written in the first decade, probably, of the fourteenth century, makes some important observations on the obligation of both Temporal and Spiritual rulers to obey the law, and also maintains that the Pope should not make laws without the consent of the cardinals, nor kings and princes without the consent of the "Probi", for that which concerns all should be approved by all.

Joannes Andreae, another important Canonist of the first half of the fourteenth century, discusses the authority of custom, and denies that it can change the "lex communis", canonical or civil, but admits that it may "derogate" from it in some particular province or place, and create a "municipal" law, if this is permitted by the Pope or the prince.

It will be, we think, evident that the Civilians and Canonists can hardly be said to express any very clear judgments upon the general question of legislative power. They are, in the main, rather endeavouring to expound the tenets of the Civil Law than stating the actual and working principles of the political society of the time. At times at least they are even thinking rather of the powers of the actual citizens of the city of Rome than of the people of the empire. This is in strong contrast with their judgments when they turn from the general principles of constitutional law to the conception of the municipal laws of the Italian cities. We have already, but only incidentally, observed some of the references to these : we must now very briefly consider them.

We may begin by observing a general statement of Bartolus in his Comment on Gaius' famous phrase, as cited in Dig. I. 1, 9 : " Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partem communi omnium hominum iure utuntur". Some argue that only the emperor could make law, but this is an error: any people can make its own law, "jus civile proprium", while only the prince can make "jus civile commune".

This, however, raises the question, what is the relation of these municipal laws or statutes to the general law. There is an important statement on this by Bartolus, in an opinion (consilium) which he gave on the question of the validity of a will by which a certain citizen of Arezzo had left his property to his illegitimate son, born of a concubine, while his wife was alive. We are not concerned with the merits of the case, but with the reason why Bartolus advised that the will was void. He cites, and seems to agree with, the opinion that only the prince could legitimatise, and that the "jus commune" prohibited the legitimisation of "spurn", in this case the child was born in adultery, and concludes with the judgment that the people only made laws by the permission of the prince, and cannot therefore make them contrary to his prohibition.

Albericns of Rosate discusses the question in general terms and asks whether, if the statute of the Civitas contradicted the "jus commune", it is valid; he points out that there was much difference of opinion about the question, but he concludes that the general opinion vas that the statute was valid for those who made it (inter statuentes) as long as it was not "specialiter derogatoria de statuto". He adds, however, that a city could not make a statute to the prejudice of the empire, or of those who were not subject to it.

It is important, also, to consider the form under which the Civitates made their statutes. Bartolus discusses the question in the later part of the passage of which we have before cited the first words. If, he says, the statutes are made by the "judices maiores" or the lords of the cities, it is well that this should be done with the consent of the wise men; they can, however, do it "proprio motu". If the statutes are made by the people, this should be done by an assembly of the whole people, or of those who form the council of the people, and represent it, and the assembly should be called together by the Podestà, or some other magistrate. Another method is that some definite proposal should be put before the people, and the decision of the majority should become law.

Albericus a Rosate also states three methods of making statutes. The first is by the authority of the whole people or "universitas" in a public "parliamentum", to whom the "Rector" or magistrate is to put the question whether they desire to make statutes, and what statutes, and by whom they are to be made; and these questions are to be decided by the voice of the majority. This method, Albericus says, was now rarely used. The second method was that they should be made by the "decuriones", whose place was now taken by the Councillors of the city. The third method was that the "universitas", the "decuriones", or Councillors of the city should elect certain expert persons and give them power to make statutes, and these should be valid, as though they had been made by the "universitas". This method also, Albericus says, was now not much in use, and he seems thus to mean that normally in his time the statutes were made by the Council of the city.

We regret that we cannot in this work discuss the constitutional forms developed in the Italian cities and their relations to the empire, nor the municipal constitutions of Northern Europe. The

subject is of too great importance and complexity to be treated summarily, and it has a very large modern as well as medieval literature.

We have given what may seem to some of our readers a disproportionate space in this chapter to the political ideas expressed or implicit in the work of the Civilians and Canonists of the fourteenth century, for, as will now be apparent, we do not think that those writers added much to the conceptions of the Civilians of the twelfth and thirteenth centuries. It is necessary, however, to consider to what extent and in what way the revived study of the Roman Law may have ultimately contributed to the development of the monarchical as contrasted with the constitutional conceptions of Western Europe, and we shall deal further with this when we come to the fifteenth and sixteenth centuries. We have therefore been compelled to examine the nature of the development of the political conception of the Civilians, even when they have little immediate relation to the actual conditions of Europe outside of Italy.

CHAPTER III.
THE SOURCE AND NATURE OF THE AUTHORITY OF THE RULER.

We have in the last chapters discussed the theories of the source and authority of the law of the State. It is with these in our minds that we can now turn to the conceptions of the political theorists of this time with regard to the prince or ruler.

We turn first to a group of English works of the later thirteenth and early fourteenth centuries—that is, to Fleta, Britton, the 'Mirror of Justice', and the 'Modus tenendi Parliamentum'.

The work of Fleta would he of the very first importance, if it were not that in most essentials it does little more than re-state the principles of Bracton, with which we have dealt in a previous volume, but even so, it is important to observe that these principles were understood and reasserted; and there are a few points in which Fleta goes beyond the genuine text of Bracton. It is only necessary in these circumstances to summarise very briefly his statements. The king has no equal or superior in the kingdom, except God and the law; but it is the law which has made him king, and he should therefore recognise the "dominium and potestas" of the law, and his rule is evil when it represents a will different from that of the law. The king has in his hand all jurisdiction, but he is the Vicar of God and must give to every man what is his; he cannot do anything but that which he can do by law. It is said that what is the prince's pleasure has the authority of law, but this does not mean that everything which the king wills has the force of law, but only that which has been laid down by the king's authority with the counsel of the magnates, and after due deliberation. So far Fleta is only re-stating Bracton's position, of which the essence is that the law is not the arbitrary creation of the king, and that it is supreme over him. But now we come to an important deviation from the original text of Bracton. Fleta says that no one is to presume to dispute about the action of the king, and to go against it; but he adds that the king has two superiors in ruling his people : the law, by which he has been made king, and his Curia—that is, his counts and barons. The counts are so-called "a comitiva", and if they see that the king is without a bridle, they are bound to impose a bridle on him. And, he adds, kings should moderate their power by the law, which is the bridle of power; they should live according to law, for the human law declares that laws bind the legislator; and elsewhere it is said (*i.e.*, Cod. I. 14, 4) that it becomes the majesty of the ruler that the prince should profess that he is bound by the law.

As we have pointed out in dealing with Bracton, it seems most probable that this passage was not in the original text of Bracton, but was interpolated by a later hand. It does not seem very probable that it has also been interpolated in Fleta, though it must be observed that the text of Fleta has not been revised by any very modern editor. If, then, we assume that this passage does not belong to the original text of Bracton, it is very important to observe that whether Fleta found it in his text of Bracton, or it was his own doctrine, it is obviously a principle of high importance, for it means that not only was the prince bound by the law, but that there was a legal process by which this could be enforced.

The statement of the principle is sharp and clear, but it must not be considered as anomalous or eccentric. For, as we have pointed out, it was the judgment of all feudal law that a lord could not be judge in a question between himself and his vassal, and Bracton, in another passage whose genuineness has not so far been contested, says that some at least maintained that in the last resort, if the king refused to do justice, this should be done by the "universitas regni et baronagium suum in curia".

There is another passage in Fleta which, as far as we have seen, does not correspond precisely with anything in Bracton, and which is important. It is a passage in which he repeats Bracton's legal doctrine, that there is no remedy against the king by way of the Assize (of Novel Disseisin), but he

goes on to say that the aggrieved person may have recourse to one of two remedies: he may proceed by way of a supplication addressed to the king, as Bracton had said, but he may also proceed directly against the "spoliator", but without bringing in the king's name. If the "spoliator" says that he cannot reply without the king, in whose name he acted, the process under the Assize is not to be postponed. If the "spoliator" has manifest grounds for his action, judgment is to be postponed till the king has been consulted; if not, the plaintiff is to receive *seizin* with double damages, both against the *escheator*, the sheriff, and the other royal officers, as well as against any private persons.

The work of Britton contains some important statements on the nature and source of law, which we have already mentioned, and on the nature of the royal authority. The introductory statement which is put into the mouth of King Edward declares in the first place that there can be no peace among his people without law, and he has therefore caused the laws which have been in use in the kingdom to be written down. In the second place, he declares that the king has power to repeal or to annul these laws when he thinks this to be desirable, but only with the consent of his counts and barons and the other members of his council.

In another passage Britton sets out the principle that the royal jurisdiction is over all other jurisdictions, but later he adds a very important passage, in which Edward is represented as laying down the general doctrine that no man can be judge in his own cause, and adds that in cases where he (the king) is a party—that is in cases concerning felony or treason against the king—the court is to be the judge, and not the king.

The curious tract called the 'Mirror of Justices' has been carefully edited and criticised by Mr Westlake and Professor Maitland, and the circumstances of its origin discussed. The work undoubtedly represents a very individual and eccentric point of view. But it is not without value, when it agrees with other judgments of the time, even though it may express these in sharper terms than more careful writers would have done.

In one Book the author discusses a series of what he calls "Abusions", and the first and chief of these is, as we have seen, that the king should be over the law, for he ought to be under it, in accordance with his oath. The king, he says in another place, has to swear at his coronation that he will maintain the Christian Faith and that he will guide his people according to law, without regard of persons, and be liable to judgment in law, like any of his people. And again, the king's court is open to all suitors against the king or the queen, as much as against other persons, except with regard to "vengeance" of life or limb. In the Book on the "Abusions", he says that it is an "abusion" that a man should not have remedy for a wrong inflicted by the king or queen, except by the will of the king.

In another place, again, he asserts that, while the king should have no equal in his land, neither the king nor the king's commissioners can be judges in the case of a wrong (tort) done by the king to one of his subjects, and it is therefore law that the king should have companions who should hear and determine in the Parliament the complaints about such injuries done by the king or queen or their children, or "leur especiaus"; these companions are, he says, called counts, from the Latin word "comites". This is the general principle, and it is therefore of less significance that he asserts it also with regard to the relation of the king to his immediate vassals, the tenants-in-chief.

He also denounces as an " abusion " the notion that" Parlementz " are only to be held rarely and at the king's will, while they ought to be held twice in the year. And when they meet, their function is not merely to provide aids for the king, but to make ordinances by the common consent of the king and the counts. These ought not to be made, as was being done, without summoning the counts, and without consideration of the rules of law, by the king and his "clerks" and others who would not dare to go against the king, but only desire to please him. Such counsel was not directed to the wellbeing of the community of the people, and some of the ordinances which were being made were founded rather on will (volontie) than upon law.

The principles of the writer are asserted very definitely and even contentiously, but that does not mean that they are abnormal or inconsistent with the general conceptions of the time. The principle, that the king is under the law, is, as we have so frequently said, the normal political principle of the Middle Ages, and no one had expressed it more definitely or emphatically than Bracton. The principle that the king, in cases between himself and his subject, was "justiciable"—that is, that he was under the jurisdiction of a court, was clearly a matter of some complexity; but it must be remembered that it was strictly in accordance with the general principles of feudal law, and probably, even, as has been recently urged by M. Ganshof, of pre-feudal law. The 'Mirror of Justices' is only expressing the same judgment as the interpolator of Bracton, as Fleta, and as Britton. The principle that laws were to be made, not by the king alone, but with the advice and consent of his great council, corresponds with the constitutional usage of the Middle Ages. The principle that Parliaments should be held frequently and regularly belongs to the question of constitutional usage, while the assertion that when they met they were not concerned solely with granting "aids", clearly corresponds with the facts.

There is yet another English treatise of this time, the 'Modus Tenendi Parliamentum', which has considerable importance as representing opinions upon the nature of the constitution of the time, which must not be taken as universally accepted, but are not therefore unimportant.

In the first place, it is laid down in emphatic terms that when the king requires "aids", he must ask for these in full Parliament, they cannot be imposed without the consent of Parliament.

What is perhaps more significant in the treatise is the assumption that all difficult and serious questions in the government of the country should be brought before Parliament, and a description of what the writer conceived to be the proper order of business in Parliament. He puts first, questions of war and the affairs of the king and his family; second, the common affairs of the kingdom, the amendment of laws, &c.; and third, the affairs of private persons and petitions.

Another passage of some importance is that in which the author declares that Parliament must not disperse until all petitions have been considered, and that if the king permits this, he is perjured.

We may put beside these English works a treatise written evidently in France in the latter part of the fourteenth century, for it is addressed to Charles V, the 'Somnium Viridarii.'

In Book I., Chapter 134, the discussion turns upon the nature of the tyrant, but this part of the work corresponds so closely with Bartolus' tract, 'De Tyranno', with which we deal in a later chapter, that it is unnecessary to consider it here.

In Chapter 140, however, the discussion takes a new direction, and raises important questions about the nature of the royal power and the rights of the community in regard to this. "Clericus" asks by what right the King of France imposes upon his subjects the "Gabella" and other intolerable burdens. Is not this tyranny? "Miles" replies that the King of France has certainly the right to impose such taxation, but he is guilty of sin if he does this without cause. He can do it for the defence of the Commonwealth against the enemy, but if he uses the money thus raised for other purposes, the blood and sweat of his subjects will be demanded of him at the Day of Judgment. This leads him to the important distinction between the ordinary revenues of the crown and the extraordinary; the prince should not normally demand of his subjects more than the former. Even with regard to these, however, it must be assumed that they were originally granted for such great purposes as the defence of the country and the administration of justice, and they must be used for the purposes for which they were granted; if they were diverted to other purposes, they may justly be refused, the prince may justly be deposed, and the people may elect another prince.

He repeats that the prince may impose *talliages* for the defence of the country, but he may not spend the money on his personal pleasures and vices; if he does so, he must repay it. Except for public purposes, no king or prince may impose such taxes; and if he does so, the subjects are not

bound to obey, for he is exceeding the limits of his power. It is clear that the author has definite and dogmatic views about the limitations of the authority of the king in matters of taxation.

The principle of the right of the subjects to resist and even to depose the king who neglects his duty, or abuses his authority, is stated again very dogmatically in a later chapter, and is there brought into relation to the principle that it was from the people that the king had received his authority. If the emperor or king be guilty of destruction of the kingdom, or of damnable negligence, or of tyranny, or any other crime for which he deserves to be deposed, the people, from whom he received his authority, tacitly or expressly, are to depose him, and not the Pope, unless those who are responsible will not or cannot do this. He brushes aside the tradition that it was Pope Zacharias who had deposed Chilperic; the French at that time consulted him because, perhaps, they were not sure of their power, for at that time there was not yet the University of Paris, and there was not then in France the multitude of wise men that there is now.

The greater part of the work is occupied with the discussion of the relations of the temporal and spiritual powers, and with this we are not here concerned.

We turn to a treatise written by Lupold of Babenburg about the year 1338. Every people, he says, who are without a king can by the "jus gentium" elect a king for themselves; and it is thus that the electors of the empire elect a king or emperor, as being the representatives of the princes and people of Germany, of Italy, and the other provinces of the kingdom and empire. They do this "vice omnium"; they are acting, not as individuals, but as a "collegium", and as representing the "universitas" of the princes and people of the empire. Again, he says that some maintained that the translation of the empire received its authority, not from the Roman Church, but from the Roman people. Again, in another place, he cites the opinion of some great Jurists, who held that the Roman people could still make laws, especially during a vacancy of the empire, for the people was greater than the prince, and could, for just reason, depose the emperor. He is careful to explain that he means by the Roman people the whole people of the empire, and that this people included the whole community, the princes and nobles as well as the others.

We can now consider the exact nature and importance of the contribution to this subject, made by Marsilius of Padua, in his treatise, 'Defensor Pacis'.

Marsilius is anxious to show that his treatment of political theory is related to the Aristotelian "Politics". He therefore begins with a discussion of the origin of civil society, which is taken directly from Aristotle, and he states the purpose and end of this also in the terms of Aristotle; the end of the state is the good life.

He cites from Aristotle the description of the various forms of government: the good forms, monarchy, aristocracy and the Commonwealth; and the corrupt forms. It is, however, when he comes to the discussion of the place of law in the State, and its source, that his discussion begins to have a substantial importance; we have already, however, discussed this part of his work in the first chapter, and we are here concerned with his very important statements with regard to the ruler or "Principans". (If we may conjecture, we should say that he generally uses the term "Principans" instead of the more usual term "Princeps", because he does not conceive of the ruler as being necessarily one man, and this may possibly be due to the circumstance that he is thinking of an Italian city, at least as much as of a northern monarchy).

Marsilius sets out very emphatically the principle that the "Principans" derives his authority, not at all from his personal qualities, but solely from the election of the legislator—that is, the "civium universitas", and that the correction and, if necessary, the deposition of the ruler belongs to the same authority. Marsilius appeals to Aristotle as confirming his judgment, but it really seems much more probable that his principle that it is the universitas which is the source of the authority of the ruler, is founded upon Roman Law and upon the general mediaeval conception of the source of the authority of the ruler, which we have considered in former volumes.

Marsilius goes on to discuss the nature of the functions of the "Pars Principans" as compared with those of the "universitas". It is the legislator, that is the "civium universitas", which is the primary source of the order of the State; the "Pars Principans" is the secondary : it is instrumental and executive under the terms of the authority entrusted to it by the legislator, and in accordance with the law which controls its actions and dispositions. It is the legislator who determines who are to administer the various offices in the State, but the exercise of these is to be directed and controlled by the "Principans", for this can be more conveniently done by one person or a few, than by the whole community.

Marsilius is obviously making the distinction, familiar to us, but perhaps implied rather than explicit in mediaeval constitutions, between the executive and the legislative functions, and he is clear that the executive functions are delegated by and subordinate to the legislative. The explicit distinction is important, but it must be remembered that it is implicit in the whole nature of medieval political theory and constitutions.

He adds, in a later chapter, that in any one state or kingdom there must be one only "principatus", that is, one "Principans"; but whether this is to be one person or one body of persons, seems to him indifferent.

In the same chapter Marsilius refers to the question whether there should he one supreme authority for the whole world, but says the question is not relevant to his present inquiry.

Finally, Marsilius turns to the discussion of the question what is to be done if the "principans" should transgress against the law or wellbeing of the state. He lays down very explicitly the principle that it is for the legislator (*i.e*., the "universitas") to deal with this, either itself or by such persons as it may appoint for the purpose. While the case is being considered, the authority of the "Principans" should be suspended and put into the hands of those who are to act as judges. He is careful to observe that the transgression of the "Principans", which is thus to be judged, may be against some provision of the law, but it may also be of a kind not provided for by the law; and the judgment should therefore be in accordance with the law, if possible, but if this is not possible, then it is to be determined by the "sententia" of the legislator.

The position of Marsilius is plain and dogmatic, but again we must not make the mistake of thinking that it was new and revolutionary. We cannot recapitulate our treatment of these questions in earlier volumes, where we have, as we think, made it sufficiently clear that the normal medieval tradition was, not only that the prince was hound by the law, and that he could not take any action against either the persons or the property of the subjects, except by process of law, but that in the last resort the community was entitled to take legal action against him and, if necessary, depose him. This was not the judgment only of writers like Manegold or John of Salisbury, who may be thought to represent an extreme or merely theoretical position, but also of so careful and measured a political thinker as St Thomas Aquinas.

We turn to the political theory of William of Occam. He conceived of the authority of the emperor as being derived from God, but through men (per homines). What does he then consider to be the nature of this authority? In one important passage he draws out the same distinction, which we have already seen in some writers of the thirteenth century; the distinction that is between the king who rules according to his own will and not according to the laws of the community, and the king who rules according to the law. Like these writers, Occam draws a very sharp contrast between these.

The first governs according to his own will, and is not bound by human law or custom, but only by natural law. Such a king does not swear to keep the human laws and customs : he need only swear to observe the natural law and to pursue the common good. The second is bound to obey the laws and customs made by men, and must swear that he will do this. It is not very clear from this

passage whether Occam intends to give a preference to the one form of kingship or the other; but it is important to observe that he doubts whether in his time there was any monarchy of the first kind.

Occam is here discussing the nature of monarchy in general. Another part of the 'Dialogus' is entitled "De Iuribus Romani Imperii" : he is here discussing the question of the political authority of the emperor, and the treatment is somewhat complex. The emperor, he says, and every king in his kingdom, is "solutus legibus", and is not bound to judge according to the law. The emperor is above all positive law, but not above "natural equity". So far, Occam might seem to mean that the emperor is one of those who govern according to his own will, and not according to the laws or customs of the community. We must, however, observe that this does not give us a complete account of Occam's conception of the power of the emperor. A little further on, the question is raised whether men must obey the emperor in all lawful things (in omnibus licitis). The "Discipulus" asks whether men must obey the emperor in everything; the "Magister" replies that we must not obey him in unlawful or unjust things, and that men are only bound to obey the emperor in matters which belong to the temporal rule. The disciple asks whether this means that a man must obey the emperor rather than his immediate lord, and the master answers that he must do so, for the emperor is the immediate lord of all men in temporal things. The disciple urges that this would have "duo inconvenientes"; first, that if all men are bound to obedience, they would all be slaves; and, secondly, that those who follow their immediate lord in war against the emperor would be guilty of "laesae majestatis". The answer to both points is very significant. It does not follow, the "Magister" in the first place answers, from what has been said, that the subjects are bound to obey the emperor in all things, but only in those things which belong to the rule of the people; and, therefore, if the emperor should command anything which is contrary to the utility of the people, they are not bound to obey. Subjects are not under the same obligation as slaves: slaves would have to surrender all their goods at the command of the lord, but freemen are not under that obligation; the emperor cannot command this, except for the common utility or good, and this utility must be necessary and manifest. In the second place, he says, it is true that the man who follows his lord in an unjust war against the emperor is guilty of "laesa majestas".

The treatment of these questions by Occam is as interesting as it is complex; the necessity of obedience is at first stated very sharply, but it appears that Occam leaves a large amount of discretion to the subject to judge of what the emperor may legitimately require, and especially this passage suggests a reference to the questions of property and taxation, and to the very complex conditions of the Feudal Law with regard to the relations of vassal and lord.

The question of the relation to private property is further developed in a survey of different opinions. There are some, Occam says, who maintain that the emperor is not "dominus omnium rerum temporalium", others that he is; but there is also a third opinion that he is not lord of all property in such a sense that he can do what he likes with it, but he is lord in a certain sense, for he may use it for the public utility when he sees that this is to be preferred to the private. He may not do this arbitrarily, but only on account of the guilt of the owner, or for some common purpose, and he has, therefore, no absolute rights over property in general.

This section of the 'Dialogus' ends with the question whether the emperor has "plenitudo potestatis" in temporal things. He gives reasons for the view that he has, but other reasons against it. The emperor can only make law for the public good, not for his private convenience, for the Imperial Power is only established for the public good, and does not extend to things that do not concern this. The emperor is not bound by his own laws, but he is bound by the "jus gentium".

We must, however, turn to another work of Occam before we endeavour to sum up his position : this is the work entitled 'Octo Questiones super potestate et dignitate Papali'. It is chiefly concerned with the position and authority of the Pope, but frequently refers to that of the emperor, and in some

important passages it seems to be dealing rather with the general principles of royal authority than with the empire in particular.

We begin by observing an important general statement. The king is superior in the kingdom, but in some cases ("in casu") he is inferior in the kingdom, for in cases of necessity he may be deposed and held prisoner, and this by "jus naturale", for by this law violence may be resisted by violence. The words are strong, but they receive an additional significance when we observe that Occam goes on to say that if the emperor commits some great crime, such as the destruction of the empire, or is guilty of extreme negligence, the Romans, or those to whom the Romans have entrusted their power, ought to depose him.

In another "Question" he deals with the nature of the authority of the ruler in more general terms; terms the more significant because Occam begins by setting out his opinion that the best form of government is the monarchy. This does not mean that this authority should be absolute. The "principans" should not have that "plenitudo potestatis" which in an earlier "question" he had discussed—that is, that he could take from his subjects what he might will, for this would mean that his subjects were his slaves.

In another "Question" he returns to the subject of the origin and nature of the power of the emperor, and discusses the question of the transference of the empire from the Greeks to Charlemagne. He argues that this was not done by the Pope, but by the Roman people: it was to them that from the beginning the "Imperium" belonged, and it was from them that the emperor received it, for they transferred their authority to him for the common good; but they did not give him authority to rule despotically, nor did they abdicate their power of disposing of the empire in certain cases (casualiter). Had they done this, they would have ceased to be free, and would have made themselves slaves, and the emperor would have possessed a despotic and not a royal authority.

It is interesting to compare the position of Occam with that of Marsilius, for there are obvious differences between them. Marsilius sets out in broad terms, which are related both to the general theory and to the constitutional practice of the Middle Ages, that the community itself is the ultimate source of all law and all authority, and remains the legislator, and that the ruler (principans) as he receives his authority from the community, so also remains subject to its authority and judgment.

Occam appears to us to represent something more of the tradition of the Civilians. Like them, he recognises frankly that it is the community from which all authority ultimately comes, but he conceives of the community as having transferred its authority to the ruler, including the legislative power, and he does not seem to think that the community had retained the power of legislation. On the other hand, he does dogmatically assert that the power of the ruler is not unlimited or absolute; he can only exercise his authority for the public good, and the subject is not bound to obey when the ruler transgresses against this; and he is very emphatic in his assertion that the people may in the last resort depose the ruler. The Roman people had always retained the right "disponendi de imperio". We seem here to find again a parallel to that rather curious position of Vacarius that the Roman people cannot legislate unless they first depose the emperor, and thus resume the right of making laws. The formal terms of the conception of the nature of political authority in Marsilius and in Occam seem, at first sight, far apart, but the final results are not very different. The authority of the ruler is a limited authority, not an absolute one; the community is the source of authority and retains the power of restraining it.

There is another writer of the fourteenth century whose political theory we must examine—that is Wycliffe. We are not here concerned with his theological opinions or influence, but only with such political theories as are set out in the treatises 'De Civili Dominio', 'De Dominio Divino', and 'De Officio Regis'. We have endeavoured to put these together, but it must be remembered that Wycliffe is one of the most complicated of thinkers and writers, and it is difficult to feel entire confidence that we have done full justice to his conceptions.

For the sake of simplicity we begin, not, as he does himself, with the analysis and discussion of the nature of "Dominium", but with the discussion of the origin and purpose of government. We begin with a phrase, incidental indeed, but significant. "Civile dominium" (by which Wycliffe here means civil government) was created by the "Ritus Gentium", and coercive authority was accepted by the custom and consent of the people as being approved by reason, for, as St Paul says in Romans XIII. 4, the ruler bears the sword not without a cause. And again, civil law was introduced by men on account of sin, with respect to the goods of the body and of fortune. These are, of course, traditional medieval conceptions, and lest we should misunderstand them, it is well to observe that Wycliffe also says in the next chapter that we must not think that because the civil law was instituted by men on account of sin, it does not derive its authority from God.

Having thus recognised that Wycliffe repeats the normal patristic and medieval conceptions about the origin of government as being a Divine remedy for sin, we can inquire what were Wycliffe's views about the best form of government and its conditions. He deals with this subject at length in the 'De Civili Dominio'.

He first raises the question whether it is better to be governed according to the law of God by judges, or according to a civil law by kings. The first he calls an aristocracy, the second is monarchical or royal; his conclusion is that it is probably better, in view of man's sinful nature, to be governed by kings. In the next chapter he asks whether the Christian man should obey the tyrant, and seems to say that the Christian man should do so; and he cites the example of Christ as having obeyed Herod and Pilate and the chief priests.

He then discusses the relative advantages and disadvantages of hereditary and elective governments, but arrives at no certain conclusion. The only observation Wycliffe makes, which might be thought to have some importance, is that the continuity of the hereditary succession might encourage tyranny, while the possibility of deposition would act as a check upon tyranny. Those words, if pressed, might seem to mean that Wycliffe recognised the possibility of the deposition of an elective, but not of an hereditary ruler. In the thirtieth chapter, Wycliffe raises a difficulty which applies both to hereditary and elective kingship, and that is that there can be no true dominium without "caritas"; and he argues that this is illustrated by the fact that the Christian Church would not suffer any unbaptised person to rule in the church, for he is in mortal sin. We shall come back to this question presently.

We have so far been dealing with the political conceptions of Wycliffe as expressed in the treatise 'De Civili Dominio', but we must also take account of these as they appear in his work, 'De Officio Regis'. In this work he says clearly that political authority was made necessary by sin, and that, in his opinion, monarchy was the best form of government. He also sets out in clear terms that the authority of the ruler is founded on the election of the community, and that this was the case both in England and in other kingdoms.

So far the position of Wycliffe is normal, but it is different with his conception of the extent of the royal authority and the relation of the subjects to this. In one set of passages he asserts the necessity of obedience to the king, as the Vicar of God, whether he is just or unjust. He begins the treatise by citing the First Epistle of Peter (II. 13-17) as requiring obedience to kings for the Lord's sake, and St Paul's words, "Let every soul be subject to the higher powers, for there is no power but of God" (Rom., XIII. 1). For the king is the Vicar of God. And he even applies to the relation of subjects and kings, St Peter's words : "Servants, be in subjection to your masters with all fear, not only to the good and gentle but also to the froward" (1 Peter, II. 18).

He draws out his conclusion in very precise terms. The authority, even of perverse rulers, is from God. We must indeed distinguish between the case where the injury which is inflicted affects us only personally, and that where the ruler's action is against God. In the first place, we must

patiently submit, in the second we must resist even to death, but in patience and submission. The man who goes beyond this and resists by force or fraud, is guilty of a great sin.

He admits, indeed, that it might be argued that such evil rulers are not really kings, for they have not "dominium" (we shall discuss the meaning which Wycliffe attaches to this word presently), but he brushes this argument aside and says that we must honour even perverse kings, for their power has been given them by God. He even extends this to truants; they are indeed kings only in name, but they have a "potestas informis" to rule, although their "potestas" is not "dominium".

It is true that in one place he approaches the conception of the nature of the royal authority in a different manner. That is, when he discusses the functions or duty of the king. Wycliffe's words are indeed very general, but he says that the first duty of the king is to provide just laws for the kingdom, for Aristotle had said that law was more necessary for a community than a king; and he maintains that the king transgresses against God and his people if he violates the law; he has indeed the right to dispense with it in some cases, but only when this is reasonably required. Aristotle had said that wise philosophers maintained that the king should obey the law.

In a later chapter, however, Wycliffe contrasts the conception that the king is subject to his own law, with that which he attributes to Aristotle, that the king as the maker of law is above law. Subjection to law may be understood in two ways : as due to the authority of law itself, or as due to a higher law. The first is called compulsory subjection, the second a voluntary. The king is subject to his law, in virtue of the authority of the Divine law, but not in virtue of the authority of his own law. The king, therefore, as head of the kingdom, serves his own law voluntarily, while the subjects must be compelled to obey it.

It would seem, then, that there is no contradiction between Wycliffe's judgment about the relation of the king to the law, and his judgment that the king is the Vicar of God, and that his subjects must submit to him whether his actions are just or unjust. The king should indeed govern justly and according to law, but Wycliffe does not allow any legal right in the community as against the king.

We must now, however, examine the meaning of the term "dominium" in these treatises. As we have seen, in the 'De Civili Dominio', I. 30, Wycliffe says that if a man lacks "caritas", and is in mortal sin, he cannot have "dominium"; and in the 'De Officio Regis', that wicked men are not really kings, for they have not "dominium". What does Wycliffe mean by "dominium"? It must first be observed that he sometimes uses it with reference to political authority, sometimes to property.

Wycliffe begins the 'De Civili Dominio' by laying down the general principles that all human "ius" presupposes as its cause (presupponit causaliter) the divine "ius", and, therefore, all "dominium" which is "justum ad homines" presupposes a "dominium" which is "justum quoad deum"; but the man who is in mortal sin has not a "dominium" which is "justum quoad deum", and therefore "simpliciter" he has not "justum dominium". He confirms this by an appeal to the words of St Augustine: "Fideli homini totus mundus divitiarum est, infideli autem nec obolus". And he affirms again, in the next chapter, that God does not grant his gifts to anyone who is in mortal sin.

This sounds as if it were a drastic criticism of property as it exists in the world, but we must observe that Wycliffe is careful to distinguish various senses of the conception of property. It is necessary, he says, to make some distinctions about "habicio" (property) and "justicia". There are three senses in which the word "habicio" may be used : "natural", "civil", and "evangelical". In the first sense sinners may possess natural goods, although they do this unjustly; in the second sense, "habent potentatus seculi bona fortunae, aut fortuita"; but in the third and most exalted sense, only those who are in "charity" or "grace" possess anything.

Wycliffe develops these distinctions and their consequences at length, and especially brings out clearly the principle that the unjust (or unrighteous) man cannot properly be said to possess anything, for he abuses, he does not use, what he has, and he cites with approval some words of St

Jerome, that the avaricious man does not really possess that which he has, any more than that which he has not; and again, that, as "grace" is lacking to the unrighteous man, he has not "dominium"; and again, "grace" is needed for the true use of things, and, therefore, it is required for all true "dominium". His whole conclusion is expressed in the last words of a later chapter. The unrighteous man has not "dominium", although he has "bona naturalia modo improprio".

The meaning of Wycliffe's conception of "dominium" is further elucidated when he goes on to maintain that the righteous man is lord of the whole "sensible" world, and that he should not be disturbed because he has not civil "dominium" in these things, for this might rather injure than benefit him. His meaning is perhaps best illustrated by his comment on the saying of Christ: "There is no man that has left house or brothers, &c., for my sake and for the gospel's sake, but he shall receive a thousandfold now in this time". This, Wycliffe says, must be interpreted spiritually.

It is from this standpoint that we must understand Wycliffe's treatment of the community of goods. His meaning is only understood when we observe his mode of stating it. Every man, he says, ought to be in grace, and if he is in grace, he is lord of the world and all that it contains; therefore every man ought to be lord of all (universitatis); but this would be impossible with a multitude of men, unless they had all in common, therefore all things ought to be common. Christ, in confirmation of this, rejected (individual) property, and had all temporal things in common with his disciples; and after his ascension, all things were common to his disciples.

That he does not mean by this that individual property was to be rejected in the world as it actually is, is evident from his account in another chapter of the origin of 'Dominium Civile'. In his judgment 'Dominium Civile' was instituted by man on account of sin; and a little later he says that, assuming the fall of the human race, it was necessary to establish human laws and ordinances, lest a man should take of the goods of fortune whatever he might wish.

It is therefore, we think, clear that when Wycliffe says of the man who is in mortal sin, or is not in "grace" or "charity", that he has not "dominium", he means that he has neither political authority nor property in the full and proper spiritual sense, but he does not mean that he cannot have these in the ordinary or legal sense. Political authority and private property are institutions which men have been compelled to create by the fall, by the corruption and vice of human nature, as it actually is. They are therefore to be regarded as conditions of man's sinfulness.

It is interesting to observe that at first sight Wycliffe's doctrine of "dominium", as belonging only to men in a state of grace, seems closely parallel to the principles set out early in the fourteenth century by two extreme papalists, Egidius Colonna and James of Viterbo. Egidius maintained that no one could hold political authority, or private property, who was an infidel or outside of the communion of the Church. James of Viterbo mitigated Egidius' political doctrine, but held that no one could hold private property, "secundum ius divinum", who was not subject to the Spiritual Power. The contention of Egidius was extreme and revolutionary in character; it was intended to support the most extreme doctrine of the supremacy of the Spiritual over the Temporal Power, even in Temporal things; while the doctrine of Wycliffe had no such revolutionary character.

It is evident that Wycliffe's treatment of "dominium" is in principle closely related to that of Richard Fitz Ralph, the Archbishop of Armagh, in his treatise 'De Pauperie Salvatoris'. This treatise was probably written between 1350 and 1356, and arose out of the work of a commission appointed by Pope Clement VI to inquire into the disputes as to the nature of the poverty of our Lord. The Archbishop, finding the discussion protracted and inconclusive, prepared a treatise on the whole subject, which includes a detailed discussion of the meaning of "dominium". He lays down the general principle that no one can be said to have "istud dominium" unless he is purged from sin and has received grace; but this does not mean that the sinner has lost his natural "titulus" to the use of things; and in later passages Richard says that the right to the use of things needed to be safeguarded

by "positive" law, and defines the "dominium positivum" as the right of a man to possess and to use rationally those things which are subjected to him by "positive" law.

This seems to be substantially the same position as that of Wycliffe. It appears to us that their conceptions of "dominium" added little or nothing to the mediaeval theory of political authority and of private property, that is that neither of these belonged to the state of innocence, but that they were the results of the fall, and remedies for it.

We have felt ourselves compelled to give a considerable space to the discussion of Wycliffe's political conceptions, because there has been much controversy about his real meaning.

As we have just said, it seems to us that his conception of "dominium" had little real significance, at least in political theory, and there is nothing new in his conception of the source of political authority. He evidently accepted the normal principle of the Middle Ages, that political authority was derived ultimately from God, but immediately from the community. When, however, we turn to his conception of the nature of this authority we find that Wycliffe reasserted that conception of the duty of absolute obedience to the prince, and of the wickedness of resistance, which, as we have often pointed out, was dogmatically stated by Gregory the Great, but had practically disappeared in the Middle Ages, being asserted only by a few writers like Gregory of Catino in the eleventh century. Wycliffe in the 'De Officio Regis' states this dogmatically and without qualification. He held, no doubt, that the prince ought to obey the law, but, like many of the Civilians, when they interpreted the "Digna Vox" of 'Cod.' I. 14, 4, he thought that the obedience of the prince should be voluntary and was not compulsory.

We shall have much to say in later chapters of this volume about the development of the conception of the "Divine Right"; in the meantime it is obviously important to observe it in Wycliffe.

It is evident that the writers with whom we have dealt in this chapter approach the question of the nature of the authority of the ruler or prince from different points of view, and that they differ to a considerable extent in their judgment upon particular questions. If, however, we omit Wycliffe, whose work indeed cannot well be brought into line with that of the others, they seem clearly to agree with each other, and with the normal character of medieval political thought, in holding that the authority of the prince was derived from the community, that it was limited by the law, and that, in the last resort, the community could resume the authority which it had given, and depose the prince who was incompetent or who willfully and persistently disregarded the law.

CHAPTER IV.
THE NATURE OF THE AUTHORITY OF THE RULER : CONSTITUTIONAL PRACTICE.

We must turn to the question of the actual nature of the constitutional practice of Western Europe in the fourteenth century, and we shall do well to begin by reminding ourselves of the great importance of the feudal background of the development of the political constitutions in Western Europe, and especially of the great importance of the principle that the authority of the feudal lord was not only limited by law, but that, in cases of dispute between lord and vassal, the declaration of the law belonged not to the lord but to the court of the vassals.

We may take one or two important examples of the continuance of this principle in the history of France in the fourteenth century. The first is the case of Count Robert of Flanders in the year 1315. Proceedings were taken against him before the king's court in Paris, "afforcé" by the great nobles and bishops, and the judgment is represented as being that of the peers, "et de la cour garnie". The other is the case of the Duke of Brittany in 1378. Proceedings were taken before the king and his "Parlement" in Paris, to which the peers of France were summoned, and as it is said, the peers protested that the judgment belonged not to the king but to themselves.

We shall, however, recognise more fully the importance of the limitations of the prince's authority by the law, when we consider the frequent references to the principle that no proceedings can be taken against the person or property of the subject except by process of law. There is a significant statement of this in France in an ordinance of Louis X of the year 1315. The king's "Baillis", "Prevoz", and other "Justiciers" are forbidden to seize or imprison any person or his goods until he has been condemned, and if he demands "droit" he is to receive this by the men of the "Chastellenie" in which he lives, according to the usages and customs of the country. There is an example of this same principle in the "confirmatio privilegiorum" of Dauphiné issued by Charles V in 1367 ; no "inquisitio" is to be made against any of the inhabitants of Dauphiné except in the case of notorious and grave crimes, unless there is a legal accuser, but even these grave crimes must be understood and declared in accordance with the laws.

We find the same principle continually maintained by the Cortes, and recognised by the king in Castile. In the Cortes of Valladolid of 1325 the Cortes demanded that no "carta blanca" should be issued, and the king replied that he would not issue them, but adds that, if it should be necessary to do so, in order to seize some evildoers, the persons thus seized shall not be killed or injured, nor shall their property be taken until they have been heard and judged according to "fuero" and law. In the Cortes of Valladolid of 1351 the Cortes demanded that no man should be killed or taken prisoner without an inquiry, according to "fuero" and law; and the king, Pedro I, assented and promised to instruct his officers that they were not to kill or injure anyone without "razón" and law. This promise was emphatically renewed by Henry II at the Cortes of Toro in 1371. The "merynos majores" and others are not to kill or imprison except by the judgment of the *alcaldes*, as was ordered by King Alfonso in the Cortes of Madrid, and in another clause a similar provision was demanded by the Cortes and granted by the king, with regard to a man's property. A similar condition was imposed by the Cortes of Madrid in 1391 upon the Regency appointed for the minority of Henry III.

It is hardly necessary to argue that the same principle was continually maintained in England. Bishop Stubbs has dealt with the matter carefully in his *Constitutional History of England*, and we only cite one or two of the passages in the Rolls of Parliament to which he refers, in order to illustrate the mode in which the subject was treated.

The truth is that there was nothing new in this. We have pointed out in previous volumes that the principle that the authority of the king was limited by the law with respect to the property and person of his subjects was part of the normal conception of the Middle Ages, and the constitutional practice of the fourteenth century corresponds with this. That does not, of course, mean that the legal principles were not frequently violated by the rulers; on the contrary, it was often their violation or neglect which was the occasion of their affirmation.

The question of the limitation of the royal authority with regard to private property leads us to another and equally important aspect of the constitutional practice of the fourteenth century, and that is to the question of taxation. This subject is, however, so closely related to the development of representative institutions that we have thought it better to postpone our discussion of it to a later chapter (VI), where we deal with it in detail. Here we need only say that it seems to us clear that the limitation of the authority of the king with regard to taxation was an essential part of the constitutional tradition and practice both of France and of Castile in the fourteenth century.

We find some examples of the continuance of what we have called the contractual conception of the relation of the ruler and his subjects in the fourteenth century. We have dealt with this in earlier volumes, and have pointed out that this was really implied in the whole feudal structure of society. The first of these is to be found in the detailed statement of the conditions under which the inhabitants of Dauphiné were to accept the Dauphin on his accession. Charles V of France in 1367 issued a charter confirming the privileges and liberties of the people of Dauphiné, in terms which are significant and important. When the new Dauphin or his successor comes to assume the rule of Dauphiné, before he can compel any individual or "communitas" to do him homage or "recognition" he must swear that he will maintain inviolably all the franchises, liberties, and privileges which are mentioned in this document. The barons, nobles, and "communitates" of Dauphiné are not bound to obey either him or any of his officials until he has taken the oath in a public form and manner. As though this were not sufficiently drastic, the next clause adds that all the "baillis", the judges, the procurators and "castellani" of Dauphiné must in like manner swear that they will maintain and observe all these liberties, &c., and if any of them refuse to do this no man need obey them. If any of them should violate these oaths, he is to be punished as a perjurer, and in addition must repay any expenses which the nobles, or communities, or individual persons have incurred in the measures they have taken against him.

An almost precisely similar conception of the mutual obligations of ruler and subject is to be found in the Charter in which Charles VI in 1381 confirmed the privileges which had been granted to the people of Briançon by the Dauphin Humbert II, and among other things it is provided that the Dauphin on his first visit to Briançon after his succession was to swear to observe all these privileges, and that the men of the "communities" were not under any obligation to do homage to him until he had done this. The officials of the Dauphin were to take the same oath, and until they had done this the people were not bound to obey them.

The terms of these documents illustrate very clearly the contractual conception of the relations of prince and subjects, and it should be observed that this applies not merely to the relations between the prince and his nobles, but also to those between him and the communities or "Universitates".

We find a similar principle expressed in the proceedings of the Castilian Cortes, not indeed with reference to the king himself, but with regard to the regents or council of regency who were appointed to administer the kingdom during the minority of the king. At the Cortes of Burgos in 1315 the "Tutores" (guardians or regents) confirm the "fueros" and liberties granted by former kings, and declare that if they violate these they will cease to be "Tutores" and will forfeit all claim to obedience, and that the Cortes may appoint other "Tutores". At the Cortes of Valladolid in 1322 we find the guardian of that time declaring that if any Alcalde or Alcaldes "que andodieren en la casa del Rey o en la mia casa" (that is, presumably, of the household of the king or the guardian) should incur

any penalty, they were not to escape, even though they pleaded that they had acted under the orders of the guardian, and even though the guardian himself confirmed this. He also adds a clause similar to that of the Cortes of Burgos, that he confirms all their liberties, &c., that all "Cartas" contrary to these are to be neglected, and that if he does not carry out this promise they are not to obey him and can elect another guardian.

These examples of a contractual conception of the nature of political authority are in themselves no doubt of small importance, but when we put them alongside of the more general principle of the limitation of the authority of the ruler, they are not wholly insignificant.

We must, however, now go on to observe a more drastic conception still with regard to the limitation of royal authority as represented in the theory and actual practice of the fourteenth century, and that is the conception that as the authority of the king was derived from the community, so also in the last resort the community could deprive him of that authority and depose him.

In Volume V of this work we have pointed out that medieval society not only assumed the limitation of the rights of the king, but also developed various methods of enforcing these limitations. The right to resist illegal action on his part, the determination of questions between the vassal and the king as feudal lord by the Court of the Vassals, the right to withdraw allegiance from a king who refuses to accept the judgment of the court, such were some of the practical forms which were recognised in the Middle Ages for this purpose. But the resources of the medieval community were not conceived of as limited to these methods; even such careful and moderate political thinkers as S. Thomas Aquinas were clear that in the last resort the ruler who persisted in unjust and illegal actions could rightfully be deposed, and the principle found a practical illustration in the last years of the thirteenth century in the deposition of the Emperor Adolf—a deposition which, as it was contended, was effected by due process of law.

It is, then, with the recollection both of the theory and the historical circumstances of the thirteenth century, and of the principles represented in the political and legal literature of the fourteenth century, that we must approach the consideration of the deposition of Richard II of England. It is no doubt true that his deposition was the work in the main of a baronial faction, and that their motives had probably little, if anything, to do with the merits of the constitutional principles alleged. But this does not destroy the importance of the terms and forms of his deposition as expressing what was alleged to be the constitutional tradition of the English community as represented in Parliament.

It was represented to Parliament that Richard had resigned the Crown, and the first proceeding of Parliament was to accept the resignation; but not satisfied with this, it was agreed that a statement of the principal charges against Richard should be read to the people. This begins with a statement of the terms of the oath which, as they said, Richard had taken at his coronation. By this he promised to maintain justice and the just laws and customs which the "vulgus" should have chosen. (The word "vulgus" should be compared with the terms of the coronation oath of Edward II and III, which we have already cited, "les leys et les custumes droituriers lesquels la communaute de votre Reiaume aura esleu ").

We need not enumerate all the charges; it is, for our purpose, specially important to notice some of them, and these may be divided into two groups. The first group is concerned with the relation of the king to the law, and the administration of justice. It was alleged that the king, desiring not to maintain the just laws and customs of the kingdom, but to act according to his own will, frequently, when the laws of the kingdom had been set forth and declared to him by the Justices and others of his Council, said in express terms, and with a severe countenance, that the laws were in his mouth and in his heart, and that he could, by himself and alone, alter and make the laws of his kingdom. It was further alleged that the king, led astray by this opinion, had refused to allow justice

to be done to many of his subjects, and by threats and terror had forced them to withdraw from the pursuit of justice.

He was charged with having frequently declared, in the presence of various lords and others, that the life and property of his subjects were his and at his disposal "absque aliqua forisfactura"; this was wholly contrary to the laws and customs of the kingdom. It was alleged that, in spite of the provisions of Magna Carta, 39, which declared that the king could not seize or imprison any free man except "per legale iudicium parium suorum vel per legem terrae", many men had been seized and brought before the marshal or constable in a military court, on the ground that they had said something "ad vituperiun scandalum seu dedecus" of the king's person; and that they could only defend themselves by trial of battle. It was alleged that he caused a number of the judges to come to him at Shrewsbury, and had compelled them by various threats to answer certain questions concerning the law of the country against their will, and otherwise than they would have done if they had been free and uncoerced.

The second group of charges was concerned with the Parliament and the king's relations to it. The first of these was the allegation that at the last Parliament the king, with the intention of oppressing his people, had by subtle means procured an arrangement that, with the consent of estates, the power of Parliament should be given to certain persons to deal with some petitions which had not been dealt with; and that, under colour of this, these persons had, by the will of the king, dealt with other general matters concerning that Parliament. This was, it was alleged, a grave prejudice to the position of Parliament and the good of the kingdom, and a dangerous precedent. The king had also, in order to give colour and authority to these doings, caused various changes and omissions to be made in the Rolls of Parliament. It was also alleged that while certain statutes had been made in Parliament which were binding unless they were revoked by the authority of another Parliament, the king had procured the presentation and acceptance of a petition to Parliament from the "Communitates Regni", that the king should be as free as any of his ancestors. Finally, it was alleged that kings had interfered with the freedom of election and had directed the sheriffs to secure the return of persons nominated by himself. It was on the ground of these and other charges against Richard, which were accepted by Parliament as notoriously true and as being sufficient to justify his deposition, that they decided to proceed to this, and appointed a Commission to carry it out. The Commission, sitting as a Tribunal, after reciting his offences and his recognition of his incompetence for the rule and government of the kingdom, formally deposed him.

It will, we hope, be clearly understood that we are not here discussing the truth of these charges: we are here only concerned with the constitutional conceptions and the principles of political authority which are implied in these, and in the formal act of deposition. When we consider them from this standpoint, it is obvious that they have a very great significance. In the first place, the charges against Richard bring out very clearly the repudiation of the conception that the king was, by himself, the source of the law, and that he was above it. The law is conceived of clearly as something which draws its authority from the community, and not from the king alone; he is not above it, but under it. The rights of his subjects are protected by the law, and the king could not be permitted to violate them. In the second place, they illustrate very clearly the development in England of the importance of the organised representation of the country in Parliament and of the relation of this to the royal authority.

The circumstances of the deposition of Richard II are indeed for us important, primarily as illustrating in a highly dramatic fashion the principle of the fourteenth century, as well as of the Middle Ages, that the authority of the ruler was a limited and conditional authority, limited by the law, and conditional upon conformity to the law.

CHAPTER V.
THE THEORY OF THE CIVILIANS WITH REGARD TO THE NATURE OF THE AUTHORITY OF THE RULER.

We have, in a previous chapter, considered the opinion of the civilians on the subject of the source of law, how far they conceived of the legislative authority as having been transferred to the prince in such a sense that the people now possessed no legislative authority, how far they conceived of this as still belonging at least to their custom. As we have said, they seem to us a little uncertain about the whole matter, but this uncertainty seems to us to be intelligible enough when we remember that they were endeavouring to apply the text of the Roman law itself to the very different conditions of the fourteenth century. If they have doubts as to the legislative authority of the people of the empire they have no doubts as to the legislative authority of the community in the cities of Italy, and with respect to constitutional conditions they are much more concerned with those of the Italian city than with those of the empire or the Northern National States. We must now consider their theory of the nature of the authority of the ruler or prince as distinct from the question of his legislative power.

We may conveniently begin by observing some aspects of the theory of government in the treatise of Bartolus entitled 'De Regimine Civitatis'. He begins by enumerating the various forms of good and bad government as given by Aristotle, and then asks which is the best of the good governments. This, he says, had been treated by Aristotle, but more clearly by Egidius Romanus in his treatise 'De Regimine Principum', and he gives his opinion that the best form of government was the monarchy—that is, the government by one man. He points out, however, the distinction between the king who governs according to the laws and the king who makes the law as he will; the first does not hold the "regalia" which belong to the State which he rules, or to some superior ; the "regimen regis" is properly that of the second, to whom all things belong.

He asks, then, whether it is good to be governed by a king, and cites, first, the description by Samuel (1 Sam. VIII) of the oppressive nature of the king's government, and next, the different terms in which it is described in Deuteronomy, and contends that Samuel described, not what the monarchy ought to be, but what might happen if the king became a tyrant. The proper character of the kingship is that which is described in Deuteronomy XVI, in which the subjects are not the slaves but the brothers of the king. It would appear, however, that Bartolus felt that this did not give a sufficiently clear notion of what was the extent of the king's rights, and he therefore adds a brief but significant sentence. The king has the right to demand whatever is necessary for the royal expenses, "omnia tributa, vectigalia et census publicos". He can for sufficient reason impose "collectas", for kings have all power.

He returns then to the question whether it is good for a "civitas" or "people" to be governed by a king, and, as we understand him, he thinks that this is the best form of government, and he also thinks that this was the opinion of Aristotle as well as of Egidius Romanus. He observes, however, that we must consider not only what is good, but also what is likely to happen, for the king or his descendants may become tyrants.

This leads him to a discussion of the best form of government in relation to the different magnitude of different States. The small State or city is, he thinks, best governed by the multitude or whole people. The second grade of State in magnitude—and he gives as examples Florence and Venice —is best governed by a small number of men, that is, by the wealthy and honourable men. The third or great State should be governed by a king, and he cites, as illustrating his view, the statement of Pomponius in the 'Digest' (I. 2, 2), that when the Roman Empire grew and conquered

many provinces, the government was put into the hands of one ruler. He adds, however, that in such a great multitude there will be many good men, and the ruler should take counsel with them. This monarchy, Bartolus says, may be either hereditary or elective, but the elective method is alone proper for the universal monarchy—that is, the Empire. It is interesting to notice that while he has a great reverence for the empire, he admits that since it ceased to be held by Italians it had fallen in their esteem. Bartolus is clear that monarchy is not adapted to the small or even to the moderately large State. He evidently thinks that it is not suited to Italy; the question of the relation of the city State to the Empire does not here seem to be in his mind.

We must, however, be careful to observe that, like Egidius, he very sharply distinguishes the true king from the tyrant. The monarchy which he thinks to be good is absolute, but it is directed to the common good of the community, while the tyrant pursues his own advantage. And here we can see that his judgment is quickened by his sense of the Italian conditions.

For to Bartolus tyranny is not only a corrupt form of government, but it is the worst of all corrupt governments. The government of a few, or of the multitude, is corrupt when they pursue their own advantage, but it is not so far removed from a government for the common good as that of the one man. We may put it in concrete terms, the Italian oligarchy or democracy was not so really corrupt and evil a thing as the Italian tyranny. Bartolus adds that the corrupt oligarchy or democracy tends to develop into a tyranny, as they had seen in their own day, for "Italy is full of tyrants". This treatment of tyranny by Bartolus is of importance, and we must consider it not only in the 'De Regimine Civitatis', but also in another treatise, entitled 'De Tyranno'. We have just seen that Bartolus derives from Egidius Colonna and Aristotle the conception of the tyrant as one who governs for his own profit and not for the good of the community. In the treatise, 'De Tyranno', he derives from S. Isidore, directly or indirectly, the description of the tyrant as that wicked king who exercises a cruel rule over his subjects; from S. Gregory the Great he takes his description of the tyrant as one who governs the commonwealth but not lawfully (non jure), and he applies this to the case of the King or Emperor of the Romans; if any man seeks to obtain that place unjustly he is properly called a tyrant.

In another place Bartolus says : "The tyrant may he either 'manifest' or 'veiled', but, what is more important, he may be a tyrant, 'ex defectu tituli' or 'ex parte exercitus'." The distinction is important, though it was not new; Aquinas had pointed it out in his commentary on the "Sentences". When he comes to the question of tyranny "ex parte exercitus", he first says in general terms that the tyrant is he who does tyrannical things—that is, things directed to his own advantage and not that of the community, and then cites from a work, which he attributes to Plutarch, 'De Regimine Principum', an enumeration of such actions.

What is the remedy against the tyrant. If he has a superior, it is for the superior to depose him; but Bartolus interpolates the observation that there may be occasions when the emperor or Pope may maintain such tyrants in their position for some grave and sufficient reason. In another work he seems clearly to indicate that the tyrant may rightfully be deposed, and he cites a passage from Aquinas, to which we have often referred, that it is not sedition to resist the tyrant.

It is not easy from all this to form any very clear view as to the judgment of Bartolus with regard to the nature of the authority of the ruler. He is clear that monarchy is not proper to the Italian city, but he seems to incline to the view, which he may have derived from Egidius Romanus, that it is suited to the great monarchies, that is to Northern and Western Europe; his hatred of the tyrant may be interpreted as related to these as well as to Italy.

We turn from Bartolus to his great contemporary Baldus. He says in one place, but merely incidentally, that a good king is better than a good law. In another place he says that the emperor is called a king because he rules others, and is ruled by no one, though he rules himself by the advice of

the wise men. All kings have supreme jurisdiction in their kingdom, and there is no appeal from their judgment, for their judgments are accepted as law; their "bene placitum" is subject to no law.

We may compare a passage in his Commentary on the Code in which he discusses the question whether the prince is bound by the law. Baldus says that the passage in the Code on which he is commenting means that he should live according to the law "de debito honestatis", but this must not be taken too precisely. The supreme and absolute power of the prince is not under the law; the words of the Code must therefore be taken as referring to the ordinary power of the prince, not to his absolute power. While the emperor's authority is derived from the "lex regia", it must be borne in mind that this "lex regia" was promulgated by the divine will (nutu divino), and therefore the empire is said to be immediately from God. It should be observed, however, that after all this Baldus adds that he is a good ruler who desires that God and the laws should rule, and this is why the emperor says that he subjects his "principals" to the laws.

In a work of Jason de Mayno, an important civilian of the fifteenth century, we have found an important reference to Baldus as having said that the Pope and the Prince can do anything "supra ius, et contra ius, et extra ius". Unfortunately Jason gives no indication of the place from which he cites this.

What are we to understand by all this? Baldus thinks that a good prince is better than a good law; he admits, and indeed is clear, that a good prince should normally respect the law, but he is also clear that he is not, strictly speaking, under the law, and he suggests an important distinction between the ordinary and the absolute power of the prince.

We might then incline to the conclusion that the theory of monarchy of these great civilians of the fourteenth century was very different from that of the normal theoretical and constitutional tradition of the Middle Ages and of the fourteenth century, but before we draw such a conclusion we must remember some other aspects of their theory which we have already considered. We have already dealt with their discussion of the question whether indeed the prince was the sole source of law, and have seen that with respect to the custom of the people they are at least hesitating and uncertain, and we must remember that other question of the legal or quasi-legal relation of the prince to his subjects—that is, the conception that the prince may enter into relations with his subjects which are of a contractual nature, and that these are binding both on himself and on his successors. We have already discussed this question, and here therefore we only cite again the words in which Baldus gives his interpretation of the passage in which Cynus had dealt with it. Cynus had said (but it is not really clear whether it is the opinion of Cynus or of Guido de Suza) that if the emperor had made peace or a "capitulum" with his subjects for the public good, this was binding even on his successor. As we have pointed out, this is clearly related (by Baldus) to feudal principles.

There is yet another very important limitation upon the authority of the prince which is discussed by these civilians. Cynus says, very dogmatically, that the prince cannot lawfully (de jure) take away a man's private property without cause. He can undoubtedly do so "de facto", and his order should be obeyed, for it must always be supposed that he is acting for some just reason ; but it cannot be doubted that he commits a sin if he does it without cause. Jac. Butrigarius sets out a somewhat curious view that the emperor can take away any man's property for proper reasons (ex causa), but not without reason; but this is not due to a defect of authority, but because he had said that he would not do it.

Bartolns, referring to some statement of Jo. Butrigarius that the prince could take away a man's property without cause, says flatly that this is not true. The prince cannot take away a man's property unjustly, for the prince holds his jurisdiction from God. God gave him jurisdiction, but not the power of taking away what belonged to another man without reason.

Baldus cites the "Gloss" as saying that the prince cannot by his rescript take away a man's property without proper cause. He seems to imply in this passage that private property belongs to the

"jus gentium", but in commenting on the 'Digest' he says that it really belongs to the "jus naturale", meaning by this that law which properly belongs to human nature. When he deals with property under feudal law he is even more explicit. He asks whether the emperor can deprive a vassal of his fief without a definitely proved offence, and he cites the "Gloss" as saying that this is not "reason", for good and natural laws bind the prince and natural law is stronger than the "Principatus". And in another place he even deals with this in relation to taxation, and, while he seems to think that the prince has the right to impose a "collecta" on his subjects and that they are bound by "natural obligation" to pay this if it is useful for the service and necessity of the commonwealth, they are not bound by "natural obligation" to do this if the tax is levied merely by the arbitrary will of the prince.

Joannes Faber, an important French civilian, in one passage says that the prince can take away a man's property for some definite cause, but the person to whom he may give it has not a just title before God unless there was a just cause—*i.e.*, for the action of the prince. Finally, Angelo de Perusia, a civilian of the later part of the fourteenth century, says plainly that the prince cannot take away a man's property without cause, and he refers for a full discussion to the passage of Cynus just quoted.

It may possibly appear that this is not a sufficiently important point to deal with so fully, but that is a mistake. For it will be evident, on a little reflection, that the principle of the civilians is clearly related to, if not identical with, the more precisely stated principle that the king cannot proceed against a man's property except by process of law.

We return to one very important question : What did the civilians of the fourteenth century think about the right of the community to depose the ruler? Bartolus in his commentary on the 'Digest' raises the question whether the Roman people can revoke the authority which they had given to the emperor, and he says that two of his predecessors among the civilians, William of Cuneo and Cynus of Pistoia, maintained that they could do this, and in his treatise 'De Guelfis et Gebellinis', which we have already cited, he asserts that it is lawful for a proper cause to depose a tyrant.

Baldus discusses the subject, but his own conclusion is, at least technically, adverse. He asks whether the subjects may expel their king on account of his intolerable injustice and tyranny, for an evil king is a tyrant. His answer is first in the affirmative, but then he says that the truth is the opposite, for subjects cannot derogate from the right of the superior. They may, in fact, expel him, but the superior does not lose his "dignitas". Joannes Faber is confident in his assertion that the people could depose the emperor. The emperor receives his jurisdiction from the people, and it is reasonable to hold that the people have the power to revoke it; besides, he says, it is known that this had been done in former times. He adds, however, that this is a dangerous thing to do.

CHAPTER VI.
THE DEVELOPMENT AND FUNCTIONS OF REPRESENTATIVE INSTITUTIONS.

We have in the last volume given a short account of the beginnings of the system of representative assemblies in Western Europe in the twelfth and thirteenth centuries, and have pointed out that this was the natural and logical outcome of the character and principles of medieval society, and above all of that principle which lies behind all the complex forms of medieval civilisation, the principle that political authority is the expression of the character and life of the community. It is unfortunate that even well-informed persons should still sometimes seem unable to understand that mediaeval society was not irrational, or should seek to find its real quality in what seem to them its unintelligible superstitions. At any rate, the representation of the community was evidently a highly rational expedient for obtaining some kind of method for the expression of the common judgment of the community—a judgment which was indeed liable to error and to confusion like that of any ruler, but which did impose some limitations upon the frequent stupidity or incapacity or caprice of the foolish ruler, and which also added greatly to the effectiveness and power of the capable ruler.

We have in this chapter to examine very briefly the development of this system in the fourteenth century, and to consider the purposes for which it was used : very briefly indeed, for we are not writing the constitutional history of the European countries, but, as we hope, with sufficient detail to render it reasonably clear what were its most significant features in this century.

We begin with Spain, which, as we have pointed out, was the country in which the representative system was first developed. And we do this also in order once again to make it clear that the political civilisation of Western Europe in the Middle Ages was homogeneous, that, whatever may have been the cause of the later divergence of the political organisation of England from that of the Continental countries, the medieval political systems were in their origin similar—we would almost say identical—and the ideas or principles they embodied were the same.

We have pointed out that by the end of the thirteenth century the Cortes of Castile and Leon were meeting very frequently, and that they were regularly attended not only by the prelates and magnates, but by the representatives of cities. It is well therefore to begin by pointing out that this continued throughout the fourteenth century. It is clear that they had become a normal part of the machinery of government, and not only a normal but a very important part.

During the minorities of the kings, and they were frequent, the Cortes assumed almost the form of a permanent Council of Government. We have pointed out that at the Cortes of Palencia in 1313 the guardians of the king undertook to call together the Cortes every second year, and agreed that if they should fail to do this, the Cortes was to be summoned by the prelates and sixteen knights and "good men" whom the Cortes had appointed to act as counsellors of the guardians. In 1315, at the Cortes of Burgos the guardians confirmed all the "liberties", &c., of the cities, and it is clearly laid down that if they did not carry out their obligations the Cortes were to elect others. The Cortes of Valladolid in 1322 appointed Don Felipe as guardian of the king, and provided that there should always be with the king a council of twenty-four "cavalleros e ommes buenos", representing the people of Castile, Leon, Estremadura, and Andalusia, to hear and determine all matters brought before the king, and that all officials of the household of the king or his guardian should be punished for any offence which they might commit, even if they pleaded that they had acted under the order of the guardian.

Alfonso XI attained his majority in 1325, and held the Cortes at Valladolid. This was composed of the prelates, magnates, and procurators of the cities, &c. The Cortes demanded, and the

king promised, that he would not take any action against the person or property of any one till he had been heard and examined according to "fuero e derecho."

The Cortes of Madrid in 1329 complained that various officials had violated their privileges, and desired that the king should appoint others, and they asked, and the king promised, that no illegal taxation, either particular or general, should be raised without consultation with the Cortes; they complained also that the Chancery was issuing illegal briefs (cartas desafforadas), which caused many imprisonments and deaths, and other violations of their "fueros" and privileges, and they requested that instruction should be given to the officials of the cities that they should disregard such briefs. The answer of the king to this was somewhat evasive, but, as we have seen, the matter was dealt with more decisively at the Cortes of Bribiesca in 1387.

We do not, however, attempt here to give an account of all the important proceedings of the Cortes: what we are concerned to make clear is that the Cortes played an important part in all public affairs. There has been sometimes a tendency to think that these representative bodies had few functions except to provide the finance required by the ruler. This impression is curiously inconsistent with the varied character of the functions of the Cortes of Castile and Leon.

Not, of course, that their financial power was unimportant. From the beginning of the fourteenth century to the end it is clear that the Cortes constantly asserted that they, and they only, could grant the money required by the Crown beyond the normal and customary revenues. It was plainly asserted in the Cortes of Valladolid in 1307 that if any tax—*i.e.*, any special tax—was needed, the king (or regent) must ask for it, and that he could in no other way impose it, and the king assented.

At the Cortes of Madrid in 1391 it was declared that the Council of Regency just appointed for the minority of Henry III should have no power to raise any tax unless it had been authorised by the Cortes, or in a case of special urgency, by the procurators of the cities who had been placed in the Council of Regency. In 1393 the Cortes of Madrid, after granting the king, who had just attained his majority, a tax of a "twentieth" for a year, demanded that he should take a solemn oath "in the hand" of one of the archbishops, that he would not impose any tax or loan upon the cities, or upon individuals, until he had called together the estates in Cortes, in accordance with the good and ancient custom; and that, if any royal briefs or commands with regard to taxation were granted (without the consent of Cortes), they were to be disobeyed without incurring any penalty.

This constitutional authority of the Cortes over taxation is clear, but it is a complete mistake to suppose that this was the only important aspect of their position. We must again insist upon the point with which we have already dealt in Chapter I, that while in Castile, as elsewhere in Western Europe, the king was the proper person to make law, he could not do this alone but only with the consent of the prelates, magnates, and the representatives of the cities assembled in Cortes. The king could neither legislate alone, nor could the legislature of the king in Cortes be abrogated except in Cortes. Even when, however, we have recognised the powers of the Cortes in legislation and taxation, we have not yet adequately appreciated its functions. The Cortes of Madrid, for instance, was summoned in 1329 by Alfonso VI for the purpose of dealing with the various abuses which had been prevalent in the kingdom since the death of his father. The Cortes constantly made representations to the king about ecclesiastical abuses, such as the interference of ecclesiastical courts in cases which did not belong to them; they protested against the presence of ecclesiastics in the Chancery on the ground that clerical officials could not be proceeded against like others, and also against the abuse of excommunication. They made representations to the king about combinations of men in various employments. It was in Cortes that the king made ordinances about the coinage and about debts contracted in the depreciated currency.

We have already pointed out the important position occupied by the Cortes during the minority of the king, and we have another very important example of this in the proceedings of the Cortes of

Madrid in 1391, on the accession of Henry III, who was still under age. While in the cases we have mentioned before, they had appointed one of the princes of the royal house as guardian, they now determined that the government of the kingdom during Henry's minority should be entrusted to a Council to be appointed by a Commission of eleven nobles and thirteen procurators of the cities. To this Council they entrusted all the powers of government except certain points, such as the making war and peace; and the Cortes was careful to add that they could not impose any tax without the authority of the Cortes, or take proceedings against anyone without due process of law.

This is important, but perhaps more significant still is the fact that in the second half of the century we find the Cortes demanding that there should be a certain number of citizens on the King's Council. In 1367 the Cortes of Burgos demanded that twelve good men of the cities should be chosen to serve with the King's Council for the special purpose of seeing that the customs and "fueros" of the cities of the kingdom should be better kept and maintained. The king, Henry II, assented. At the Cortes of Toro in 1371 Henry II announced that he would appoint certain good men of the cities to go through the provinces of the kingdom to report on the administration of law; and the king assented to the request of the same Cortes that he should appoint some prudent men of the cities to serve on his council. The same demand was put forward to Juan I by the Cortes of Burgos in 1379.

The Cortes of Castile and Leon was in the fourteenth century not merely a body which the king might from time to time consult, to whom he might turn for advice in legislation, or for financial assistance in emergencies, but it represented the claim that the community as a whole should exercise some control over every aspect of the national affairs.

We must now examine the development of the States General and of the Provincial Estates in France, and, while this is not the same as that of the Castilian Cortes, it does also illustrate very clearly the growth and development of the representative element in government.

In the first place, the States General or analogous bodies met frequently. The proceedings of these meetings have not been preserved for us in the same form as those of Castile, and it is not possible always to say whether all these meetings can be described as technically meetings of the States General. This, however, is a question which belongs to the detailed constitutional history of France; for our purpose it is enough to observe that they have a representative character. We have in addition frequent references to the meetings of the representatives of particular provinces (Provincial Estates), and sometimes even of particular towns. It must be remembered that the kingdom of France was not unified in the same sense as that of Castile and Leon, or that of England.

When we now attempt to consider the powers and functions of the States General, we shall find that they were not unlike those of the Cortes in Spain—that is, that they were manifold, in some respects clear and determined, in others vague and undetermined; but the history of the fourteenth century shows very clearly that they were summoned not only to deal with taxation, but rather that any question of general national importance might and did come before them.

In the last volume we have dealt with the first meeting of the States General, which was called together by Philip the Fair in 1302 to deal with the situation produced by the conflict with Boniface VIII, and it is noticeable that their second meeting was also called to deal with a great ecclesiastical matter—that is, the question of the Templars.

It is important to observe the terms in which the summons to the "communitates" is expressed. Philip the Fair calls them to take part in what he calls the "sacred task", and bids each of them to send two men who, in the name of the "communities", are to assist him in carrying out what was required. At the end of the century again it was in the name and with the advice and consent of an assembly which was taken to represent the whole people, as well as of the Church of France, that Charles VI renounced the allegiance of France to Pope Benedict XIII.

We are not here concerned with the motives or the merits of these actions with regard either to the Templars or to Benedict XIII, but it is obviously highly significant that the Crown should have

felt it to be proper and desirable that the whole community should, through its representatives, share the responsibility of the Crown. It is scarcely less significant that on some occasions at least during the great war with England the Crown summoned assemblies which had at least the character of States General to deliberate upon questions of war and peace. In 1359 the terms of peace demanded by England were laid before the Estates; they are reported as being indignant, as demanding the continuance of the war, and as offering a subsidy for the purpose. In 1363 John I issued an ordinance after a meeting of many prelates and clergy, the princes of the blood, many other nobles, and many of the good cities of the kingdom, assembled at Amiens, at which he had taken counsel with them on the business of the war. And in 1385 it was with the advice of the council, at which were present many princes of the blood, prelates, nobles, and citizens, that it was decided to send an army to Scotland.

Again it is not unimportant to observe that it was with the counsel and advice of the cities that Charles IV issued an ordinance in 1322 for the reform of the currency, and Philip of Valois did the same in 1329 and 1332, with the advice of the prelates, barons, and cities.

It is time, however, that we should turn to the question of taxation, for it is no doubt true that we find here one of the best illustrations of the principle of the limitation of the royal authority and of the development of the representative system. It is clear that normally the Crown procured the money which it required, over and above that which formed its normal revenue, by grants, either from particular provinces or towns or from assemblies which represented the whole country. This is well illustrated in a letter of Philip V in 1318, in which he recognised that a grant of a fifteenth made to him by the nobles of Berri was made by their free will and liberality, and that neither he nor his successors could claim that it had conferred upon him any rights which they did not possess before. In 1349 Philip VI says that he had asked the inhabitants of Paris for an aid and subsidy for the war with Edward III, and that they had liberally granted him for the period of one year an imposition on the merchandise sold in the city.

In 1350 John I asked for aid of the nobles, communes, and cities of Vermandois towards the expenses of the war with England, and says that they had of their good will granted him this. In the case of a similar grant from Normandy in the same year there are some additional and important details; the prelates, barons, and communities had met in Paris, and had agreed in principle on the grant of an aid to the king, but the representatives of the communities were not clear that they had sufficient authority to grant the aid in the name of the cities, and they were therefore sent back to deliberate and consult with them, and to receive authority to make this aid and subsidy. It is worth observing how carefully guarded were the rights of the communities to tax themselves.

We do not for the moment deal with the important constitutional movements of the years from 1355 to 1358 : these are so important that they need a separate treatment. It must not, however, be imagined that the victory of the Crown meant that it had established any constitutional right to impose taxation at its pleasure. In 1363 the estates of Beaucaire and Nîmes while continuing the gabelle on salt for the year, and promising that, if this should prove insufficient, they would with the king's authority impose other "impositions et gabelles", protest energetically that no royal justiciary, whatever his rank or dignity, should interfere in any way in raising these taxes, but only those who had been chosen by the representatives or those deputed by them ; that if the king himself or his representative, or any of the royal officials, were to do this, all the impositions should fall to the ground, and the inhabitants should be free from them.

In 1364 the king, Charles V, says that the burgesses of Paris were disposed to make him aids and subsidies for the conduct of the war. In 1367 the prelates, barons, ecclesiastics, and communities of Dauphiné, in return for the confirmation of their liberties and franchises, made a "gracious gift" of thirty thousand florins to the king and dauphin. In the same year the nobles and cities of Artois, the "Boulenois", and S. Pol granted an aid to the king, but with the express condition that this was not to

prejudice their liberties and freedom; and we find this particular grant constantly repeated to the end of the century. In 1369 we find Charles V promising the towns and other "lieux" of Ponthieu that for the future no aid or subsidy was to be imposed on them without their consent, and we find the same promise made to the towns of Crotroy and Rhodez. The 'Grand Chronique' refers to a meeting of estates in 1369, which voted a subsidy. In 1372, Charles V gave authority to the Bishop of Limoges to impose "tailles et subsides" in the diocese and viscounty of Limoges "se la plus saine partie d'icelle pais s'y accorde."

In 1381 we come to the very important ordinance by which the regent, in the name of the king, Charles VI, during his minority, abolished the aids, &c., imposed in the time of his father and his predecessors since the time of Philip the Fair. This ordinance was issued after an assembly, held at Paris, of the ecclesiastics, nobles, and citizens of the towns of Languedoyl. It has been disputed whether the meeting was formally a States General or not, but the question is not of much importance from our point of view. It cannot be doubted that it had a representative character; and it was these representatives who presented the complaints against the subsidies and subventions as having been contrary to their immunities, liberties, privileges, constitutions, and customs, and also against the ancient royal ordinances. The king therefore orders that all such aids, &c., of whatever kind they were, which had been imposed since the time of Philip the Fair, should be annulled and abolished; and he adds that the fact that they had been imposed should not be taken as having given either himself or his predecessors or his successors any new rights, or as having in any way prejudiced the immunities, liberties, customs, &c., of his people. He reserves only "noz rentes, yssües, travers, et prouffiz des vivres et denrées menées hors de notre royaume" and the "redevances" of the Genoese, Lombards, "Tresmontains", and other aliens. It seems to us clear that this represents the admission by the regent that such taxation had been and was illegal, and he not only annulled it, but also emphatically assented to the principle that such illegal action should not be taken as a precedent. It is true that there is no statement of how such taxation could legally be imposed; but it is implied that it could only be made legally by the consent of those who were to pay the taxes, and that this implied some system of representation, either local or general.

It may be urged that this concession was only made in view of the particular circumstances of the regency, and there is probably some truth in this, but it must be observed that from this time down to the end of the century the references which we can find to taxation seem in almost all cases to imply that the Crown was careful to pay at least a formal deference to the principle of taxation by consent. In 1384 the "Universitates" of Briançon made of their free will a grant of 12,000 florins to the Dauphin. In 1384 a letter of Charles VI speaks of "certaines aides à nous accordées par les gens d'Église, nobles, bourgeois et habitans" of the province of Rouen. In 1382, Juvenal des Ursins says that an assembly which had the nature of a "States General" had been called together at Compiegne, and had been asked to sanction an aid, but the representatives of the cities said that they had no power to act. In 1383 the instructions to the royal officers about the levy of a new aid speak of this as having been imposed with the advice of several of the princes of the blood, prelates, nobles, and others. Another ordinance of 1383 mentions that in the previous year the citizens of Paris had granted various aids. In 1385 Charles VI refers to a decision to make an expedition into Scotland, and says that this had been done by the advice and after long deliberation of his council, at which there were present several of the princes of the blood, prelates, nobles, citizens, and others, and that in view of this he had ordered the levy of a certain sum of money. In 1388 we find a reference which might be interpreted in a contrary sense : a tax is imposed "par manière de taille", with the advice of some of the princes of the blood and the great council—no other persons are mentioned. In 1393 Charles VI writes to the Governor of Dauphiné instructing him to summon the assembly of the prelates, clergy, nobles, and "communes" of Dauphiné, and to request them to grant an aid, as they had done before when he was in Languedoc. In 1395 we find an aid being levied for the marriage of

the king's daughter to the King of England; there is no reference to any assembly as granting this, but this would have been one of the normal feudal dues, except that it was apparently not being levied on the nobles. In the same year we find Charles appointing a Commission to call together the clergy, nobles, and other persons of Dauphiné, and instructing them to ask for an aid for the same purpose. In 1398 Charles announces that he had determined to levy an aid on all the clergy, and that he had done this by the order of the princes and the great Council and the consent of the prelates and clergy.

It would seem to be clear that throughout the fourteenth century it was assumed in France that the king had normally no arbitrary right of taxation, that if he needed money beyond the ordinary revenues of the Crown he had to ask for it, and that it could only properly be granted by the local or national community. It is also obvious, if only from the provisions of the Ordinance of 1381, that the kings had often exceeded their constitutional rights and had imposed and levied taxes by their own authority. It is possible that we can find an illustration of this in an ordinance issued by John I in 1360 on his return from captivity in England, when with the advice of his Council, and no other body or persons are mentioned, he imposed a tax upon all sales throughout the Languedoyl. We may perhaps conjecture that the Crown might have justified itself for its action under the terms of an ordinance of Louis X addressed to Normandy in 1315. Louis recognised without reserve that he was not entitled to impose tallages, exactions, subventions, or impositions on the people of Normandy beyond the "redditus communes et servitia nobis debita", but he added an important qualification—that is, "nisi evidens utilitas vel emergens necessitas id exposcat".

This does not, however, affect the fact that it was recognised in France throughout the fourteenth century as clearly as in England and Spain that taxes could not be imposed without the consent of the community.

We have not yet, however, exhausted the subject of the development of the representative system in France. We have still to observe that as in England and in Spain the representative bodies sometimes claimed a share in the control not only of taxation, but also of administration, as we should now call it.

We cannot here enter into any detailed discussion of what may be called the constitutional crisis in France of the years 1355-1358 : this has indeed been described by many historians. We must, however, for our purpose draw attention to some aspects of it, and the first point to which we must draw attention is the claim of the Estates not merely to make grants to the Crown, but to control the expenditure of these grants. The first example we have found of this is in the proceedings of an assembly of the prelates, barons, and communities of Anjou and Maine in July 1355. After protesting that aids were not to be levied without their consent, they proceeded to appoint a Commission of two bishops, two nobles, and two burgesses, who were to appoint persons to collect the aid, and to whom the collectors were to render account; and, not satisfied with this, the money thus raised was appropriated to the defence of the country, and was only to be spent (distribute et convertie) with the consent and advice of the six commissioners.

These principles—control of levy, appropriation, and control of expenditure—are the first and most fundamental aspects of the regulations laid down by the great meeting of the States General of the Languedoyl in December of the same year, 1355. They also granted taxation on a large scale for one year, and they laid down the same conditions. They appointed a Commission of nine, three from each estate, to superintend the levy, and they appropriated the money to the purposes of the war; in addition they provided that the estates should meet again on St Andrew's Day in the following year to consider how the money had been spent, and, if they thought proper, to grant a new aid. The king, in his reply to the estates, promised that he would appoint proper persons to deal with the money with the counsel of the Commission of nine elected by the estates, and that that Commission was to see the troops and only to pay the money for those who were actually present. Even this, however,

did not represent the whole of the concessions made to the estates. The king assured them that no one should have power to call out the "arrière ban" of the kingdom except the king himself or his eldest son, and that he would do this with the advice of the members of the three estates, if he could conveniently meet them.

The estates met again in March 1556, and, finding that the form of taxation authorised in 1555 had caused much discontent, imposed another. They met again in October 1556, after the king had been taken prisoner by the English. They then complained of exactions and misappropriation of subsidies, and demanded the removal of the evil councillors of the Crown, and that the regent should appoint, with the advice of the estates, certain wise and notable men of the clergy, nobles, and burgesses, who should be constantly with him and advise him.

The estates of Languedoc met in September 1355 and voted a subsidy. When they met again in February 1357 they determined that the money which was raised was to be held by four treasurers whom they elected, and that the treasurers themselves should pay the soldiers and should render account of the expenditure, not to the royal officer, but to the estates; and that the king and his "locum tenens" and his officers should have nothing to do with this. If they interfered, the treasurer of the estates was to notify the people, who would then be at liberty to refuse to pay the subsidy. They also determined that the subsidy was only to be renewed by the estates, which should meet to consider this.

It is noticeable that in the letter of the Dauphin of March 1358 announcing his assumption of the office of regent, he says that he had done this after mature deliberation with the members of the Council and other prelates, barons, and citizens of the great cities. He does not describe this as a "States General", but it seems reasonable to say that it had some kind of representative character.

In the States General which met at Compiegne in May 1358 it was laid down that the subsidies and aids were to be administered by persons elected by the estates, and that the regent was to act in important matters only with the advice of three members of the Council. The estates of Languedoc at their meeting in July 1358, in granting a subsidy for the ransom of King John, laid down regulations of the same kind as in 1357.

When the regent had gained the upper hand it is true that he annulled the condemnation and expulsion of the royal officials, which had been enacted by the earlier States General, but it should be observed that he was careful to state that this was done after careful deliberation, " en la grant chambre de parlement à Paris", at which there were present not only the princes, prelates, and nobles, but also men of the "great towns".

It seems to us that it is a serious error to look upon the failure of the movements of 1355 to 1358 as implying that the representative system and its limitation of the arbitrary royal authority had ceased to be important in France. We shall presently consider its place in the fifteenth century in detail; for the moment we have seen enough to recognise that its history in the fourteenth century is not indeed the same as that in England and Spain, but that it is at least closely parallel to it.

It is not necessary to deal at length with the development of the representative system in England, for this has been fully treated by the constitutional historians like Bishop Stubbs, and, though it may be that some modification of this treatment is necessary in detail, its substantial correctness cannot be seriously impugned. It is only necessary from our point of view to put together a few illustrations of its character.

We cannot, it seems to us, do better than begin by citing again the famous phrase of the revocation of the Ordinances of 1310-11 in the Parliament of 1322. Those things which are to be established for the kingdom and the people are to be discussed, agreed upon, and determined in Parliament by our lord the king with the assent of the prelates, counts, barons, and the commonalty of the kingdom, as had been the former custom. We do not feel that it is necessary to enter into any account of the complex antecedents of this statement, for it seems to us to be important primarily as

laying down shortly but distinctly the general principle which lay behind the whole constitutional development of the country. If these words may be taken as a general statement of the constitutional position of the representative assembly, we can also find some very significant illustrations of the tendency of Parliament to claim a certain control over the administration of government.

In May 1311 the Commons appointed a Commission to audit the accounts of the royal officers who had received money for the king, and they demanded that for the future any vacant office was to be filled by the king with the consent of the magnates, and that those appointed were to be sworn in Parliament to obey the laws; they even went so far as to demand that at the meeting of each Parliament these offices were to be taken "into the hand" of the king, and the Ministers were to be required to answer the complaints which might be made against them. If complaint was made against any Minister of any "misprision", "et de ce soit atteint en Parlement", he was to be deprived of his office and punished by the judgment of the peers. It is true that Edward III in October revoked his consent to these measures, and that Parliament in 1343 formally annulled them, but the demand remains of great significance.

The proceedings of the Parliament of 1376 were of equal importance, as illustrating the tendencies of the times; for it proceeded to a formal examination of the conduct of some of the king's Ministers and agents; Lord Latimer, the Chamberlain, was condemned to imprisonment and to be fined at the king's discretion, and Parliament prayed the king to remove him from his office and from the Council; and Richard Lyons, one of the king's agents, was condemned to imprisonment and forfeiture.

The Commons also demanded that the council of the king should be "afforced" with ten or twelve lords, prelates, and others, and that no important business should be done without the consent of all of these, or in the case of less important business, of at least four.

It is not necessary to multiply illustrations of the development of the representative system in England, but it should be observed how closely parallel this was to what we have already considered in relation to Castile and France.

CHAPTER VII.
THE CONCEPTION OF POLITICAL UNITY IN EUROPE.

The idea of a universal monarchy of the Western Christian world ceased to be effective in Europe generally after the break-up of the Carolingian empire ; and after the death of Frederick II the empire was no longer even the greatest Power in Western Europe. There were, however, two countries, Italy and Germany, where the empire was still actually or potentially a power to be reckoned with, and in these countries at least the idea of a world monarchy still survived.

In Italy, after the death of Frederick, there was no effective central control over the city states outside of the Neapolitan kingdom, and internecine conflicts in the towns gave occasion, even before the close of the thirteenth century, to the rise of the tyrants. The majority of the cities, however, had not yet lost their freedom, the nobles had generally been deprived of power, and city life was still vigorous but turbulent. In the 'Purgatorio' Dante thus apostrophises Italy :—

" Ahi serva Italia, di dolore ostello,
Nave senza nocchiere in gran tempesta,
Non donna di provincie, ma bordello!

Ed ora in to non stanno senza guerra
Li vivi tuoi, e l'un l'altro si rode
Di quei che un rauro od una fossa serra."

and he invites the German Emperor to come—
" Vieni, crudel, o vodi la pressura
Do' tuoi gentili, e cura lor magagne."
Chè le città d'Italia tutte piene
Son di tiranni, ed un Marcel diventa
Ogni villan che parteggiando viene."

Like Marsiglius of Padua a few years later, Dante attributes the blame for this largely to the Church :—

"Ahi gente, che dovresti esser devota,
E lasciar seder Cesare in la sella,
Se bene intendi ciò che Dio ti nota!
Guarda come esta fiera e fatta fella,
Per non esser corretta dagli sproni,
Poi che ponesti mano alla predella."

Dante was himself a victim, and though in the 'Convivio' or in the 'De Monarchia' he may discuss Church and Empire as a philosopher, in the 'Commedia' he shows his burning sense of wrongs inflicted because there was no peace nor justice in the country in the absence of a strong ruler standing above and aloof from local jealousies.

Dante was by birth a member of a Guelf family which had suffered in the cause after the battle of Montaperti; not one of the great houses, but not to be despised, even by such a haughty Ghibelline

as Farinata degli Uberti. At thirty-five years of age he was elected one of the Priors. The Pope, Boniface VIII, summoned Charles of Valois to support him, especially in Tuscany and the Romagna; and Charles, once admitted to Florence, despite his vows of impartial justice, allowed the extreme party of the Neri to oust the Bianchi. Dante was one of the excluded party, and with others of his former associates in the Government he was condemned to death, and went into exile. For a short time Dante joined with other exiles, Guelf and Ghibelline, in attempts to force his way back to Florence; but the attempts failed, and Dante, equally dissatisfied with both parties, ceased his efforts. Later on he refused to avail himself of opportunities for pardon, on account of the indignities involved in making his submission to the Florentine Government. He enthusiastically welcomed Henry VII on his arrival in Italy in 1311, and looked for the condign punishment of Florence, but Henry died in 1313 without taking the city. There is in the 'Commedia' a magnificent testimony to Henry VII, for whom a throne is set apart in heaven, where—

"Sederà Talma, che fia gia agosta,
Dell'alto Enrico, eh' a drizzare Italia
Verrà in prima che ella sia disposta."

There is not a line in the 'Commedia' to indicate that Dante had abandoned hope of the "veltro", the future emperor, who would come at a more opportune time to restore Dante's beloved Italy, the "giardino dell' impero".

Dante was not a mere theorist, the false prophet of a dead empire. He had everything in his experience to open his eyes to the need of a strong ruler in Italy, to control a turbulent people. It is easy for us now looking back to see that the time for a world monarchy was over; but in Dante's lifetime the Papacy, in outward appearance at the height of its power, had been mastered by the ruler of France, and now that the papacy had been so much weakened by Philip the Fair it was difficult to set limits to the power of a renovated Roman empire. There was nothing intrinsically absurd in the vision of a great emperor ruling the world in temporal matters hand in hand with a reformed and chastened papacy governing in spiritual matters.

The earliest statement of Dante's political theories is contained in the 'Convivio', and was probably written not later than 1308. The 'Convivio' is a fragment, and Dante wrote only four out of the fifteen books he had projected. In the last book of the 'Convivio' he discusses the question of what constitutes true nobility, and as he quotes and disagrees with the dictum on this subject of Frederick II, he digresses into the question of the nature of imperial authority. His two chapters on the subject contain in a condensed form some of his arguments in the 'De Monarchia'. Between the 'Convivio' and the 'De Monarchia' come his letters to the kings and other rulers of Italy, to the Florentines, and to Henry VII, written in connection with Henry's expedition to Italy. The last of his political letters was addressed, to the Italian cardinals, sometime (probably early) during the long interregnum between the death of Clement V and the election of John XXII.

References to the empire and the papacy occur throughout the 'Commedia'. In the first canto of the 'Inferno', Virgil, the poet of the empire, is sent to guide Dante through hell and purgatory, and it is not till they arrive at the terrestrial paradise that he leaves him in the charge of Beatrice. The thirtieth canto of the 'Paradiso' ends with the stern denunciation by Beatrice of Clement V :—

" E fia prefetto nel foro divino
Allora tal, che palese e coperto
Non anderà con lui per un cammino.
Ma poco poi sarà de Dio sofferto
Nel santo offizio ; ch'ei sara' detruso

La' dove Simon mago è per suo merto
E farà quel d'Anagna entrar più giuso."

While Dante makes no attempt in the 'Commedia' to moderate his language in order to conciliate his opponents, there is a studied moderation in the 'De Monarchia', which would fit in well with an attempt on his part, to write a defence of the empire and an assertion of its complete freedom, on the temporal side, from papal control, without exasperating the Curia.

According to Dante, man's end is twofold, in the first place happiness in this life, consisting in the unchecked development of his special "virtus". The other end of man is to secure the happiness of life eternal, to which man can only attain by the help of the divine light. Inasmuch, however, as man's happiness in this life is in some measure ordered for immortal felicity the emperor, who provides for man's temporal welfare, should show Peter that reverence which is due from a first-born son to his father, so that illuminated by the light of paternal favour he may the better rule this world, to whose government he has been appointed by God, to whom are subject all things alike, temporal and spiritual.

Dante points out that just as nature produces the thumb for one purpose and the whole hand for another and so on, in like manner we come finally to an end for which God has created the whole human race. Now the special capacity of man is apprehension by means of the potential ("possibilis"') intellect, and to make this capacity operative, many men are needed, for the work could not be done by one man or by some limited association of men. The function proper to the human race is to put into operation the whole of this capacity, not only for speculation but also for action. And just as each individual requires peace and quietness if he is to attain to perfection in knowledge (prudentia) and in wisdom, so too it is peace that enables the human race as a whole best to achieve its almost divine work. Universal peace is thus the best of those things which are ordered for our happiness.

We have it on the authority of the great philosopher in his Politics, and we can also prove that when several things are ordered for one end, one of them must direct the others. This is true of the home, of the village, and so on, up to the kingdom, and it applies also to the whole human race, since it also is ordered to one end. It is therefore clear that a monarchy or empire is necessary for the wellbeing of the world.

Dante gives other reasons for holding that the whole human race should be under one ruler; as, for instance, that it is the purpose of God that every created being should be in the divine likeness, so far as his nature will permit, and that therefore the human race is best disposed when it is most like to God; and as the essence of unity ("vera ratio unius") is in the Deity, it is likest Him when it is most one, and this can only be when it is subject to one ruler ("princeps"). Wherever disputes occur a judge is required, and as disputes are possible, where there are rulers not subject to one another, it is necessary to have a third person with an ampler jurisdiction who includes both in his government. A monarch is necessary for the whole world. The world is best ordered when justice is most powerful, and this can only be when it is under a monarch, who is more powerful than any other ruler and can thus most effectively do justice. He is also free from greed, the chief enemy of justice, as there is nothing left for him to desire. He is also in closer connection in every respect with his subjects than any other ruler, for their relations with their subjects are only partial. Moreover, other rulers derive their power from the monarch, while the monarch has his power over the subjects directly and prior to all others. The monarch, therefore, being closer to his subjects than any other ruler will beyond all others seek their good. That the monarch has more power than anyone else to do justice is clear, for he can have no enemies.

The human race is also at its best when it is most free, and this according to Dante is another argument in favour of monarchy, for it is under a monarch that it is most free. Freedom is the

greatest gift conferred by God on man, and as only that is free which exists for its own sake, it can only be attained under a monarchy; for it is only under a monarchy that perverted forms of government can be corrected, and the monarch, who beyond all others loves mankind, although the master as regards the means, is the servant of all as regards the end of his government. Dante is careful to explain that nations, kingdoms, and states have their own special conditions, which ought to be regulated by special laws. It is only as regards things which are common to all, that men should be governed by the one ruler.

In concluding his arguments to show that a monarch is required for the wellbeing of the world, Dante sees them confirmed by the state of the world when the Son of God became man. At no other time since the fall of our first parents was the whole world at peace, as was the case under the perfect monarchy of "divus Augustus".

Dante devotes the second book of the 'De Monarchia' to proving that the Roman people acquired lawfully the empire over all mankind. At one time, like many others, he believed that they had gained it unlawfully by violence. Later on the conviction was forced on him by most manifest signs that they owed the "imperium" to divine providence. He now deplored the grievous sight of kings and princes, agreeing only in this, to oppose their Lord and His anointed, the Roman Prince. Dante accordingly sought to prove by divine authority, and by the light of human reason, that the Roman empire existed "de jure". During its progress the Roman empire was supported by miracles which showed it was willed by God, and consequently that it was "de jure". The Romans showed in their history their devotion to the common good of the Republic, and therefore to what was just; they gave the world universal peace and liberty, and it has been well said that the Roman empire sprang from the fount of religion ("de fonte nascitur pietatis"). He gives a number of instances of the devotion to the common good of Roman citizens, such as Cincinnatus, the Decii, Fabricius, and others. Nature always acts with a view to its final goal, and this cannot be attained by one man working alone, but only by a multitude ordained for divers operations. There are not only individuals but also whole nations with an aptitude for government, while other nations are only fit to be subjects and to serve, and for such it is not only expedient but just that they should be ruled, even under compulsion. Now clearly the Romans were the people ordained by nature for command. That this was the judgment of God appears clear from the fact that it was the Roman people which prevailed when all were striving for the empire of the world. Dante appeals to history for evidence of this. Among other witnesses Luke, the scribe of Christ, writes that "there went out an edict from Augustus that the whole world should be enrolled", thus showing that the Romans at that time held universal sway. This empire was acquired as in single combat by the ordeal of battle, and whatever is so acquired is rightly acquired, for it is obtained by divine judgment.

The 'Commedia' breathes the same spirit in every reference to the empire, from the beginning of the 'Inferno' right through to the vision of the throne set apart for Henry VII in the empyrean. Dante's guide through hell and purgatory is Virgil, the great poet of the empire. In limbo we find Caesar, "Cesare armato con gli occhi grifagni", and many of his great predecessors in Roman story. Ulysses and Diomed groan in the flames for the horse, "che fe' la porta Ond' usci de' Romani il gentil seme". One of the lowest subdivisions of the 'Inferno' is named after the Trojan traitor Antenor, and in the very lowest depths of all Judas Iscariot has as his fellow sufferers Brutus and Cassius, the murderers of Julius Caesar.

In the 'Purgatorio' we have the magnificent lines, partly quoted above, in which Dante deplores the fate of Italy enslaved and full of woes, because it has no emperor to guide it, and ho attacks the "German Albert" and his father Rudolf for neglecting Italy, the garden of the empire.

In the sixteenth canto Dante places in the mouth of a Lombard (Marco Lombardo) a violent attack on the papacy for combining the temporal with the spiritual power. In another canto wo are told how the good Titus, with the help of the Deity, revenged the treachery of Judas. Finally, in the

earthly paradise, on the summit of the mountain of purgatory, we have the symbolical vision of Christ, under the form of a gryphon. We cannot enter into details of the vision and its symbolical meaning, but it shows how throughout this canto Dante has constantly in mind the empire and its importance to the world in connection with the divine scheme for its wellbeing. The last canto of the 'Paradis shows no change in Dante's conception of the importance of the empire in the government of this world. One of the first human beings on whom Dante sets eyes in heaven is Constance :—

" Che del secondo vento di Suave
genero il terzo, e l'ultima possanza,"

the wife of Henry VI and the mother of Frederick II. This is in the circle of the moon. In the next circle, that of Mercury, Justinian sets forth the praises of the Roman empire and of its great exploits, and tells how under Augustus it gave peace to the whole world, so that the gates of the temple of Janus were closed. He refers to the great crime done under Tiberius and to the vengeance on the Jews under Titus. He tells of Charlemagne and how he saved the Church from the Lombards. The Guelfs and Ghibellines sin alike, the one party by its opposition to the empire and the other by seeking to annex it to a faction; by their sins they are the cause of the ills of Italy. In the sphere of Jupiter the spirits, before Dante leaves, form themselves into the shape of an eagle's head and neck (the Roman symbol), and the eagle tells how Constantine now knows how grievously the world has suffered from his well-intentioned act (the donation).

There is one more reference to the empire when Dante, still accompanied by Beatrice, has reached the empyrean, the heaven which is pure light, where he sees the whole company of heaven, and where there is neither far nor near. Beatrice points out to our poet the great throne reserved for the exalted Henry, who will come to govern Italy before it is ready for his rule. The Pope, on the other hand, his secret and open opponent, will shortly thereafter be thrust down where Simon Magus has his place. Thus we find in the 'Commedia' from first to last the same exalted view of the empire as in the 'Convivio' and in ' De Monarchia', and throughout it is the one government that can secure justice and liberty, and therewith peace.

But the emperor was to be no mere *fainéant*. In his letter to the Florentines he warns them of the dreadful consequences if they do not submit to the Roman Prince, and reminds them of the destruction by Frederick I of Spoleto and Milan, and he prophesies that their city will be taken, the greater part of the inhabitants slain or made prisoners, and that they will endure the same sufferings for their perfidy as the glorious city of Saguntum bore voluntarily in its faithful struggle for liberty. The guardian of the Roman state, the "divus", and triumphant Henry has come thirsting not for his own but the public weal.

Similarly in his letter addressed to the princes and rulers of Italy, Dante gives them the glorious news of the coming of Henry, who will release Italy from bondage and show mercy to all who seek it, while avenging the crimes of backsliders. He calls on them not only to arise, but to stand in awe, before one whose waters they drink, on whoso seas they sail, and who possess whatever they hold, by virtue of his law. The Roman Prince is predestined by God.

Dante throughout his writings treats the empire of his time as one with the old Roman empire, divinely conferred on the Romans on account of their capacity for righteousness. Of Rome he says that he firmly holds that the very stones of its walls are worthy of reverence, and that the ground on which she is built is excellent beyond all that man can utter. As regards the German electors, he looked on them as merely the heralds of the divine providence.

Dante devotes the third book of the 'De Monarchia' to proving that the emperor receives his power directly from God, and that the Church is not qualified to exercise temporal power. There were three classes with whom he had to deal in proving that the emperor did not derive his power

from the Church. First came the Pope and certain of the clergy and others, whom he believed to be moved entirely by zeal and not by pride. Next came those influenced by greed, and last of all the Decretalists, who maintained that the traditions of the Church were the foundations of the faith. He contends that the temporal power does not derive its being, nor its authority, from the spiritual, though it operates more efficiently when aided by the light of grace imparted on earth by the blessing of the supreme Pontiff. It is unnecessary to follow Dante in his answers to the ordinary arguments on behalf of the Church, such as that the sun represents the Church, and the moon, with its borrowed light, the empire. As regards Constantine's donation, he does not dispute the historical fact, but maintains it was invalid, as no one has the right as holder of an office to do things inconsistent with that office ("contra illud oflficium"). Constantine had no power to make such a gift, and the Church had no authority to receive it, for it was inconsistent with the express commands in the Gospels that the Church should not possess gold and silver. This would not, however, prevent the emperor from granting a patrimony to the Church, so long as he retained "the superior dominion". The Pope might also receive gifts, not as a proprietor but as a steward on behalf of the poor.

Thus Dante derives the temporal power directly from God and not, as we have already said, from the Church, which has not even the right to exercise such power, but the very last words of the 'De Monarchia' are a warning to the temporal ruler to show such reverence to Peter as is due from the first-born to his father, so that enlightened by this paternal grace he may better rule the world, over which he has been set by God, who is the supreme Ruler of all things, spiritual and temporal.

Dante's conception of the need of a universal monarchy arose, no doubt, primarily from the lamentable political condition of Italy, the violent intestine quarrels in the cities, and the continual conflicts between these, but it also had reference to the need of some system of international peace for Europe. It has been contended by Professor Ercole in an important and learned work that, while Dante urges with such eloquence the need of the universal empire to give justice and peace to the world, he does not conceive of this authority as implying a continual interference with the internal laws and conditions of particular states; as indeed is indicated in a passage of the 'De Monarchia', which we have cited. Professor Ercole has also drawn attention to some very important passages in Engelbert of Admont's work, 'De Ortu et Fine Romani Imperii', which seem to express the same conception. He also points out that while Bartolus maintained the independence or autonomy of the great Italian cities as being "universitates superiorem non recognoscentes", when his position is more closely examined we find that ho thought of the imperial authority as still continuing, not as exercising a direct control over those and other states, but as a supra-national power whose function it was to maintain justice and peace in the world.

Dante was not then alone in the fourteenth century in the conception of some system of authority and order which should give peace to the world, and it is this which gives some real interest to the work of Pierre Dubois' 'De Recuperatione Terrae Sanctae'. There is indeed in this much which is fantastic and much which merely expresses the national ambition of some Frenchmen; but at the same time there is not a little which is significant.

Dubois had not indeed anything of the imaginative magnificence of the great poet: he was a man of pedestrian and even in some respects of confused mind, but, in some ways at least, his conceptions were perhaps nearer to the actual conditions of the time than those of Dante.

The nominal subject of the work is the recovery of the Holy Land from the infidel; but this is only a starting-point for the expression of the urgent need of peace among the Christian people, who were obedient to Rome. Obedient, that is, in spiritual things, not in temporal, for, as in the controversial pamphlets of the conflict between Boniface VIII and Philip the Fair, he denounces the attempt of Rome to assert a temporal authority over the French kingdom.

We shall return presently to the question of the creation of a universal authority which should maintain peace among Christian people. In the meantime we must observe what Dubois says about

the causes of the divisions and conflicts in Europe. The prelates of the Church and the Pope himself were, in Dubois' opinion, among the principal causes of these; and it is to the Pope that Dubois specially addresses himself. He begs him to consider how many and how great have been the wars in which he has been involved for the defence of the patrimony of St Peter. He therefore suggests that the Pope should divest himself of the charge of his temporal dominions, and, while retaining the right to the revenues derived from them, should hand them over to some king or prince to be held in a perpetual "amphiteosis". If he would do this he would not be the cause of war and of men's deaths, but would be able to give himself to prayer and contemplation and the care of spiritual things. He proposes that the bishops and abbots should do the same, that they should resign their feudal domains and receive in their place a fixed revenue.

This may seem very extravagant, but it should be remembered that a proposal of much the same kind had been made by Paschal II, in his negotiations about the Investiture question with the Emperor Henry V in 1111, with regard to the feudal domain of the bishops; and it is clear that while the proposal was then repudiated by the bishops, there had been devoted churchmen like Gerhoh of Keichersberg who felt that there was much to commend such proposals.

No doubt when Dubois speaks of the Pope surrendering his temporal dominions to some king, he was really thinking of the King of France, as indeed he makes plain in a later chapter. It would seem that there is some evidence that such a proposal had actually been made by Philip III to Pope Gregory X in 1273, and such a proposal is intelligible in view of the Angevin occupation of the Sicilian kingdoms, which were fiefs of the papacy.

We return to Dubois' proposals for the creation of some system for the establishment and maintenance of peace among the Catholic peoples of Europe. In order to do this he proposes that a Council should be called together, and that the king should invite the Pope to secure an agreement among the princes and prelates for the establishment of a Court to which the complaints of those who said that they had been injured might be referred. The Council should appoint a body of wise and competent men, who should in their turn appoint three clerical and three lay judges to inquire into and deal with these complaints. If either party were not satisfied with their decision the judges should transmit the case and their judgment to the supreme Pontiff, to be amended or confirmed by him. Dubois also proposes that obedience to these judgments should be enforced by coercive measures, to be applied if necessary by the other states.

These are far-reaching proposals, but they are not unintelligible under the conditions of those times. The conception of a General Council, which should represent all Christendom for spiritual purposes, was familiar to the Middle Ages, and was about to receive a great development in the fourteenth century; and it is therefore intelligible that men might conceive of such a Council as a body which could also be used for the settlement of political disputes. It is also true that both Innocent III and Boniface VIII had actually intervened in the disputes between England and France. But certainly both Philip Augustus and Philip the Fair had very emphatically and successfully refused to allow any such official action on the part of the Pope; and it is certainly remarkable that Dubois, who had, as we have seen, repudiated very emphatically the real or supposed claim of Boniface VIII to temporal superiority, should have been prepared to recognise the Papal See as the final arbitrator in international political disputes.

It is difficult to judge what importance exactly we can attach to this work, but it seems reasonable to us that when we put it beside that of Dante and of Bartolus and of Engelbert of Admont, it receives a new significance It seems clear to us that the general trend of mediaeval society was towards the disintegration of political unity in the West and the development of the independent political societies of modern Europe; but the conception of a larger political unity was not wholly lost, and we in the modem world are only taking up again the necessary task of civilisation.

CHAPTER VIII.
SUMMARY OF THE POLITICAL THEORY OF THE FOURTEENTH CENTURY.

We have endeavoured to set out the political principles of Western Europe in the fourteenth century as expressed by the writers whom we may call political thinkers or theorists, as implied or expressed in constitutional documents and practice, and as set out by the Civilians. It is, we think, clear that the conceptions of the political thinkers were, speaking broadly, closely related to constitutional practice, while those of the Civilians were not, and that thus the latter had little influence on the development of political conceptions in the fourteenth century in Northern and Western Europe.

There was indeed no difference between the theorists and the Civilians on the question of the source of political authority; they were all agreed that political authority was derived from the community, from God indeed ultimately, but from God through the community. There is no trace in the Civilians, any more than in the other political writers, with the exception of Wycliffe, of that fantastic orientalism of Gregory the Great, which had practically died out in the Middle Ages, but was revived in the sixteenth and seventeenth centuries, the theory of what is traditionally called the Divine Right of Kings. The community, the universitas, the populus was the immediate source of all political authority.

There were, however, also profound differences between the Civilians and the political theorists and constitutional practice of Western Europe.

We have pointed out in previous volumes that, as it seems to us, the fundamental political conception of the Middle Ages was that of the supremacy of law, and that law was primarily the custom which expressed the habit of life of the community—habit and custom rather than deliberate will. This conception continues to have an important place in the fourteenth century. When, however, as perhaps in the ninth century, and certainly in the thirteenth, the rapid development of mediaeval civilisation made something like direct legislation sometimes necessary, this was conceived of as expressing the consent and will of the whole community. This is the principle which was normally expressed in the fourteenth century in the constitutional methods of Western Europe and in the political theory.

It is here that we find the first important divergence between the Civilians and the normal mediaeval conceptions and practice. The Civilians of the fourteenth century, as we have said, always and frankly recognised that the original lawgiver was the community, and that, whatever was the authority of the prince, it was from the community that he derived it, but they also, and naturally, for they were interpreting the "Corpus Juris Civilis", conceive of the community as having transferred its authority to the prince. To them therefore the prince had become the legislator, the source of law ; and it is impossible to overrate the importance of the appearance of this conception, not indeed in relation to the fourteenth century, but to later periods.

We must not, however, imagine that the Civilians were thoroughgoing in their affirmation of this. As we have pointed out at length in earlier volumes, while some of the Civilians of the twelfth and thirteenth centuries held that the Roman people had transferred their authority to the emperor so completely that even their custom had ceased to have any legislative authority, others maintained that this was not so; the people had indeed given their authority to the prince, but they could resume it, and their custom still made and abrogated law.

In the fourteenth century, as far as we can judge, the most important Civilians, while refusing to allow that the people possessed the formal legislative authority, seem to allow that their custom still made and unmade law.

The second divergence is equally, perhaps even more, important. The prince, no doubt, in the political constitution and theory of the Middle Ages, was the head of the community, and had his share, a very important one, in making the law; but his authority was a limited one. He was limited by the law, by the custom and habit of life of the community ; the property and persons of the members of the community were not subject to his arbitrary authority, but were protected by the law. This principle evidently was generally maintained in the fourteenth century.

To the Civilians the prince was normally the source of the law, and, no doubt, mainly because he was the source of the law, he was thought of as being above it. They were indeed perplexed by an apparent inconsistency in the texts of the Roman law books. In some of these the prince was described as "legibus solutus". (We do not, of course, here or elsewhere, pretend to interpret the original meaning of these words). In other places, and especially in the famous words of 'Cod. I., 14, 4,' the prince appears as saying that it was seemly that he should acknowledge that he was bound by the law : "Digna vox maiestate regnantis legibus alligatum se principem profiteri". (Again we are not interpreting the original meaning). The Civilians were indeed perplexed, but, on the whole, they tended in the fourteenth century to the judgment, that while the prince was not formally bound by the law, he should habitually respect it. It is in this connection that the distinction, perhaps incidental rather than deliberate, made by Baldus between the ordinary and the absolute power of the prince is significant.

Here then we have a revolutionary conception intruded into the system of medieval life and thought. It must, however, be observed that we find in the Civilians of the fourteenth century two principles which in a considerable measure modified their tendency to think of the prince as possessing an authority unlimited by law. In the first place, they recognised that the prince might enter into contractual relations with his subjects, and that such contracts were binding upon him. As Baldus says, God had subjected the law to the prince but not contracts; by these he was bound. It appears to us from the context of many of these statements that their primary reference was to treaties which various emperors had made with cities in Italy, but the principle is stated in general terms, and sometimes is related to the contractual system of feudal law. The Civilians were also clear that the extra-legal powers of the prince do not entitle him to deal at his pleasure with private property; he cannot do this "de iure", whatever he might do "de facto".

There is, however, another aspect of the political theory of the fourteenth century where we find, rather unexpectedly, that some of the Civilians were in agreement with the theorists. This is the principle that in the last resort it was lawful for the community to resist and even to depose the unjust and tyrannical prince. This was affirmed by Marsilius of Padua, by William of Occam, by the author of the 'Somnium Viridarii', and is cited as the opinion of great jurists by Leopold of Babenberg; and the century ended with the deposition of Richard II. There was indeed nothing new in this; as we hope we have made clear in former volumes, it was the normal principle of the Middle Ages that resistance to unlawful authority, and even the deposition of tyrannical princes, was legitimate. It is, however, interesting to observe that some at least of the Civilians, notably Bartolus, Joannes Faber and Jacobus Butrigarius, seem clearly to maintain that in the last resort subjects might lawfully resist and even depose an unjust and tyrannical ruler.

We have dealt at some length with the political opinions of the Civilians, for we are in this volume concerned with the question how far we can trace in these centuries

It seems to us that in the fourteenth century political theory continued to be very much the same as that of the thirteenth, while the constitutional forms and methods represented the more or less normal development of those which the political genius of the Middle Ages had slowly created.

PART II.
FIFTEENTH CENTURY.

CHAPTER I.
THE SOURCE AND AUTHORITY OF LAW. CONSTITUTIONAL PRACTICE AND THEORY.

We again begin with the consideration of this subject, for it seems to us clear that in the fourteenth century as in the Middle Ages the principle that the authority of law was derived from the community, and that the law was supreme, not only over subjects but over rulers, was still the foundation of all the normal political thought of Western Europe. We have now to enquire how far this principle continued to prevail in the fifteenth century.

It appears to us that some of the best illustrations of the constitutional conceptions of the fifteenth century are to be found in the proceedings of the Cortes of Castile and Leon.

Juan II had, apparently, at the Cortes of Palencia in 1431, repudiated the constitutional provisions of the Cortes of Bribiesca (1387), by which laws were not to be annulled except by ordinances made in Cortes, and royal Briefs contrary to the laws were to be disregarded. At Valladolid, however, in 1440, the Cortes asked the King to give orders that any Briefs issued in his name, which were contrary to the laws, should be disregarded, and the King assented. A more detailed statement of this constitutional principle was made at Valladolid in 1442. The Cortes complained that the King (Juan II) was permitting Briefs to be issued which contained "non obstante" clauses, and in which he appeared as issuing commands "of his certain knowledge and absolute royal power", and they request that such extravagant phrases should not appear in the royal Briefs, and that if they did so appear, the Briefs should be held as null and void, and that the secretary who inserted them should be deprived of his office. The King replied that the law made at Bribiesca should be observed, and that it was his will to command that in all eases between "partes e privadas personas" justice should be done according to law, notwithstanding any Briefs which contained abrogations or dispensations, general or particular, professing that they were issued "proprio motu", and with certain knowledge, and by the King's absolute power; and he ordered that none of his secretaries were to issue Briefs containing such extravagant phrases, on pain of losing their offices, and that if they did so, such Briefs should have no force.

The same principle was affirmed in the Cortes at Valladolid in 1451; and soon after the accession of Henry IV we find the Cortes at Cordova in 1455 requesting that nothing should be done contrary to the laws and ordinances of the former kings, unless these had been revoked by the Cortes on the supplication of the representatives of the Kingdom.

It is clear that the Cortes of Castile and Leon in the fifteenty century maintained as strictly as those of the fourteenth, that the law was not the expression of the mere will of the King, but that, while it was the King's law, it required also the authority of the great men and of the representatives of the cities. The proper form of legislation is well illustrated in the first clause of the proceedings of the Cortes at Madrid in 1435. They refer to the laws and ordinances made by the King at Zamora, with the advice and consent of the great men of the Council, and of the procurators of the cities and villas of his kingdom. We shall return to the nature and authority of the Cortes in a later chapter, but we think we have said enough to make clear the constitutional conception of the source and authority of law in Castile and Leon in the fifteenth century.

When we turn to the German Empire it is hardly necessary to say anything about the constitutional principles of legislation. We have, however, a very interesting and important general

treatment of the source and nature of the authority of law by Cardinal Nicolas of Cusa, one of the most important thinkers of the fifteenth century.

In the Preface to the third Book of his treatise, 'De Concordantia Catholica', he says that legislation belongs properly to those who are bound by the law, or to the greater part of them; for that which concerns all should be approved by all, and a man cannot excuse his disobedience to the law when he himself has made it. How much better it is that the Commonwealth should be ruled by laws than even by the best man or King ; as Aristotle had said, when the laws are not supreme there is no "Politia". The Prince must therefore rule according to the laws, and is supreme only with respect to those matters which are not clearly defined by the laws. Any form of government, therefore, is just and "temperatus" whether Monarchical or Aristocratic, or controlled by all the citizens, if it is directed to the common good, and is in accordance with the will of the subjects ; but it is "in temperatus" when it is directed to the good of the ruler, and is contrary to the will of the subjects.

In another place Nicolas says that it is the general opinion of all experienced men that the power of making the laws of the Roman people could be taken away from the Emperor, as it was from the Roman people that he received this power. And, in yet another place, while he admits that the King has the right to interpret and to dispense with the law in doubtful cases, for the public good and to secure justice, he insists that this does not mean that he can annul the law without that counsel with which it was issued, but only that he can declare the "ratio legis" in relation to some particular case. We shall have occasion to discuss the principles of Nicolas of Cusa when we deal with the position of the ruler, and the source of his authority, but in the meanwhile it is important to observe that he is clear and emphatic in asserting that the authority of the law is derived from the community, and that it is the law which should be supreme, and not the Prince; his authority is related properly to those matters which are not determined by the law.

If we turn now to France, it must be acknowledged that it is difficult to find much direct evidence in the constitutional documents, about the theory of legislation. As we shall see later, we have a great deal of information about the representative assemblies of the whole kingdom, the States General, and the Estates of the various provinces, and the authority which they claimed or possessed, but we have not found much direct evidence about the formal methods of legislation. There is, however, one great legislative enactment, about the method of which we have direct evidence, that is the Ordonnance establishing the new military organisation of the "Gens d'Armes."

This Ordonnance was issued by the King at a meeting of the States General at Orleans in 1439, after representations made to the King by the members of all the three Estates of the Kingdom; and it was made with the deliberation and "ad vis" of the Princes of the Blood Royal, many Prelates and great Lords, and of the nobles and the men of the good cities.

We are not here properly concerned with the purpose and details of the Ordonnance, it is sufficient to notice its general character. Its immediate purpose was the disbandment of the companies of soldiers raised by many different persons, and the substitution for these of a body of soldiers raised by the command of the King, and under the command of officers appointed by the King. Its ostensible object, and no doubt a real one, was the prevention of the pillage of the people of France by the creation of a body of disciplined troops under the control of the Crown. We cannot here deal with the results of the creation of what was apparently intended to be a permanent royal military force. We are here concerned to observe that this highly important statute was issued by the King, not simply on his own authority, but after a meeting of, and representations from the States General.

While, however, we may not be able to find many clear illustrations of the forms of legislation in France in the fifteenth century, we have, in the works of John Gerson, at one time Chancellor of the University of Paris, and the most important representative of the French Church at the Council of

Constance, some very important statements of his conception of the source and authority of law, and the relation of the King of Franco to it.

In the Tract entitled 'Regulae Moralis' we find him restating the important doctrine of Gratian that law is not instituted until it is promulgated, and that it has no force unless it is approved by the custom of those who are concerned (*moribus utentium*). The same principle is repeated in a Tract, 'Liber de Via Spirituali Animae', and Gerson points out that this means that the people have much authority in making and abrogating laws.

More important, however, are Gerson's statements about the relation of the King to the Law when established. In the Treatise 'De Potestate Ecclesiastica', he enumerates the forms of Government, which, according to Aristotle, are good, and he describes them all, the monarchy, the aristocracy, and the "Politia", as ruling according to Law. In another place he says that the King of France had created the "Parlement", and did not hesitate to submit to its judgment. In yet another place he maintains that even the King cannot slay any man except by process of law. And again, in terms which remind us of Bracton, Gerson urges upon every Prince and Prelate that even if he is said to be "legibus solutus", he should follow the example of Jesus, who accepted the Law of Circumcision, and should submit to the laws which he had made, both as an example to his subjects, and as showing his reverence to God.

We find that the same principle, of the relation of the King of France to the Courts of Law, is expressed by Gerson's great contemporary, Peter d'Ailly, the Archbishop of Cambrai. In discussing the question whether the Pope should submit to the judgment of a General Council, and the saying "Major non judicatur a minore", he continues that this was not always true, for the King of France, who was "major et superior" in his kingdom, was frequently in certain cases judged by his own "Parlement", and judgment given against him.

We shall have more to say about Gerson's conception of the nature of Kingship in a later chapter, but we think that his statements about the relation of the King of France to the law, and his great Court of Law, the Parlement of Paris, are very important.

It is hardly necessary to set out again the evidence as to the general constitutional principles of the source and authority of law in England in the fifteenth century. We must, however, consider briefly the treatment of this subject by Sir John Fortescue, for his works are important not only in themselves, but as illustrating the continuity of political thought. We must not indeed assume that his judgments corresponded completely with all the actual conditions, in England or elsewhere, but it is even further from the historical reality to imagine that they express an eccentric opinion.

We have three important treatises by Fortescue: 'De Natura Legis Naturae', ' De Laudibus Legis Angliae', and the 'Governance (or Monarchy) of England', and they represent the same general principles.

Fortescue cites as from St Thomas Aquinas' ' De Regimine Principum', (but this part of the work is not by St Thomas, but probably by Ptolemy of Lucca), and from Egidius Romanus, the description of the two forms of government, the "dominium regale" and the "dominium politicum". The ruler who has the "dominium regale" governs according to laws which he has himself made, while the ruler who has the "dominium politicum" governs according to laws made by the citizens.

Fortescue, however, adds that there is a third form of "dominium" which is "politicum et regale", and he gives as an example of this, the Kingdom of England, where the King cannot make laws without the consent of his three Estates, and the judges are bound by their oaths to give judgment according to the law of the land, even if the King were to command the contrary; while on the other hand the people cannot make laws without the authority of the kings, who succeed each other by hereditary right.

Fortescue deals with this subject again in other terms in the treatise 'De Laudibus', and contrasts the character of English Constitutional Law with that of the Roman Law, and its doctrine,

"Quod Principi placuit legis habit vigorem", and with the "Regimen Regale" of the King of France; and again, in the "Governance of England", where he suggests that the earliest kings possessed the "Dominium Regale", and that such a government might have been good under good Princes, but when men grew more civilised (*mansuete*) and more disposed to virtue, great communities grew up such as that of those who came to England with Brutus, and incorporated and united themselves into a realm which should be governed by such laws as they should agree upon.

We have thus so far found nothing to suggest that the conception of the source and authority of law was different in the fifteenth century from that of the fourteenth century. The law proceeded from the Prince, no doubt, but it was from the Prince acting with the community. We have indeed observed in the proceedings of the Cortes of Castile and Leon reference to the use by the kings of such phrases as "motu proprio", or "of his certain knowledge and absolute power", but we have also seen that the Cortes emphatically and repeatedly protested against the use of such extravagant phrases, and that the kings repeatedly agreed that they were not to be used in the royal Briefs. The law, not the King, was supreme.

CHAPTER II.
THE SOURCE AND AUTHORITY OF LAW.
CIVILIANS AND CANONISTS.

We have so far considered this subject as it is illustrated in the constitutional documents, and in some of the political writers of the fifteenth century. We must now, however, turn to a body of literature whose traditions were very different, that is, to the work of the Civilians.

They, indeed, like the Constitutional lawyers, accepted the principle that it was from the community that all legislative authority was immediately derived. The Civilians, however, also, and naturally, as they were interpreting the law of the Roman Empire, conceived of this legislative authority as having been conferred by the Roman people upon the Emperor. This conception, as we hope we have made clear, was wholly alien to the normal political theory of the Middle Ages.

We must, however, always bear in mind that, while all the Civilians had accepted the principle that the Roman people had conferred the legislative authority on the Emperor, the Civilians of the twelfth and thirteenth centuries had been sharply divided on the question whether, in doing this, they had completely and permanently alienated the legislative power from themselves, or whether they could, if they wished, still resume it. And especially they were divided upon the question whether, and how far, the custom of the people retained its authority.

We have considered the position of the Civilians of the fourteenth century with regard to these questions in the first Part of this Volume, we must now consider how far there was any important development in the Civilians of the fifteenth century.

The first question we have to discuss is whether these fifteenth century Civilians thought that the Roman people had conferred its legislative power upon the Emperor in such a sense that they had finally and completely lost this, or whether they thought that the Roman people still retained their power of legislation or could resume it.

There is an interesting and important passage in a Commentary on the Institutes, written by Christophorus Porcius, a Jurist of the middle of the fifteenth century, which raises the question very sharply. He is commenting on the words, “Sed et quod Principi placuit legis habit vigorem”, &c., and points out that the gloss indicated that there were two opinions among the Civilians, the one, that the Roman people could not now establish a “general law”, the other that it could still do so. The first opinion was held, Porcius says, by Bartolus, and commonly by the “Citra Montani”, the second by the “Ultra Montani”. The latter was the opinion which Porcius himself preferred, and he gives reasons for this. He cites various texts from the Corpus Juris, and especially urges that the Roman people could create a “general custom”, and could therefore establish a “general law”, and that the Roman people had not transferred (non transtulit) its jurisdiction to the Emperor, but had only granted (concessit) this to him; the word “concessit” signifies the “translatio usus”; not “dominium”, and the people can revoke this. He adds that while they had granted jurisdiction to the first Emperor, this did not mean that it went necessarily to his successor, and the fact that the Emperor was now elected by the Gorman Princes, and confirmed by the Pope, did not destroy the right of the Roman people to revoke the election of the Emperor. Whatever may be the more immediate source of the opinion of Porcius, it is clear that it represents the survival of the conceptions of Azo and Hugolinus and Odofridus, which we have discussed in earlier volumes.

His reference to the “Ultramontani” as having held this opinion and the “Citramontani” as maintaining the other is very interesting, but presents us with considerable difficulty. In the meanwhile we must consider what light may be thrown upon it by an examination of other Civilians of the fifteenth century. We begin with the conception of the legislative authority of the Roman people. Bartholomew de Saliccto, a Civilian of the last years of the fourteenth and the early years of

the fifteenth century, cites Jacobus Butrigarius, an important Civilian of the fourteenth century, as maintaining that the Roman people could still revoke the authority which they had conferred upon the Emperor, and that they thus possessed the power of legislation. Saliceto himself does not agree with Butrigarius, for the election of the Emperor, he says, now belongs to the German Princes, and his deposition to the Pope, and therefore the Roman people could not now make a "general law", even during the vacancy of the Empire, for the power of doing this had passed to the Church or the Pope.

Paulus de Castro, one of the most important Civilians of the fifteenth century, interprets the action of the Roman people in conferring the authority upon the Emperor by the "lex regia", in the same way as Porcius, that is, he describes it as a "concessio" rather than a "translatio", and therefore, he says, the Roman people could, before the coming of Christ, have revoked the "lex regia" and deposed the Emperor. But, with the coming of Christ, this was all changed, for the Empire was then transferred to the Church, and only the Pope could confirm and crown the Emperor, or depose him, for the Church holds the Temporal as well as the Spiritual sword. It is evident that Paulus is stating the extreme Papalist theory, hut we are not here concerned with this. In another passage he sets out his principle in direct terms : the Roman people cannot now make a law or create a "general custom". It is possible that in this last passage he is referring to the actual people of the city of Rome. These Jurists then seem clearly to hold that the Roman people had no longer any general legislative authority.

We turn to the question of the nature of the legislative authority of the Prince. Paulus de Castro, commenting on the words "Quod Principi placuit", &c., says that though the Prince, when making laws, ought to consult the "periti", his laws are valid even though he has not done so, and in his Commentary on the Code he repeats emphatically that the Prince can make laws by his own authority, and without the Counsel of the "Proceres", and he explains the terms of that rescript of Theodosius and Valentinian which seemed to require some consultation of the Senate, as expressing, not necessity but "humanitas". Jason de Mayno, one of the most important Civilians of the later part of the fifteenth century, says the same. We have pointed out that some of the great Civilians of the twelfth and thirteenth centuries, and specially the author of the Summa Trecensis (Irerius?), Roger and Azo, had maintained that the Emperor must, when making laws, follow the method prescribed in Code I. 14, 8, while Bulgarus maintained the opposite.

More important, however, are some statements of Jason de Mayno, with regard to the relation of the Prince to the laws when made. In his Commentary on the Digest he cites Baldus as having said in his treatise on Feudal Law, that the Prince has "plenitudo potestatis", and that when he wills anything "ex certa scientia" no one can ask him why he does it, and in another place again he cites Baldus, as having said that the Pope and the Prince can do anything "supra jus et contra jus, et extra jus". In his Commentary on the Code, Jason cites Bartolus, as having said in one of his "Consilia" that when the Prince does anything "ex certa scientia" he removes all legal obstacles. The impression produced by these passages is only confirmed by Jason's observation on the well-known rescript of Theodosius and Valentinian, "Rescripta contra jus elicita a iudicibus praescribimus refutari" (Cod. I. 19, 7). This does not mean, Jason says, that the Prince had not authority to issue such rescripts, but only that, as there might be a doubt whether they had not been obtained from him "per importunitatem", when the Prince issues such a rescript, he should add a "non obstante" clause. It is, however, true that the effect of these passages is to some extent modified by another citation which Jason makes from Baldus: it is sacrilegious to dispute about the authority of the Prince, but it is lawful to discuss his knowledge and intention, for the Prince sometimes errs; it is always to be presumed that the Prince desires what is just and true, and he wishes his actions to be controlled by the justice of heaven and the Courts of Law (poli et fori). It would seem then that these Civilians

were clear that the Roman people had no longer any legislative authority in the formal sense, while the Emperor had an absolute and unconditional authority in relation to positive law.

There are, however, certain aspects of the relation of the Prince to Law, which require a separate treatment and first, we must consider his relation to Custom, and here we must take account of the Canonists as well as of the Civilians.

John of Imola, who was both Civilian and Canonist, says first that "Consuetudo" may be called that form of law which is established by the "mores" of him who has the power of making law, and that it does not require the knowledge or consent of the Prince; but he adds that this was so because the Pope permitted the development of a custom even if contrary to the law, if it were reasonable, and had a sufficient prescription, and he refers to the terms of the Decretal of Gregory IX on which he is commenting. He adds that the Emperor had also permitted this by the law "omnes populi" (Digest I. 1, 9), and, therefore, custom did not require the knowledge or consent of either Pope or Emperor, in order to be valid.

Bertachinus, in his 'Repertorium' or Dictionary of Law, of the later fifteenth century, cites various emphatic phrases about the authority of custom. Custom and statute have equal authority, a general custom creates the "Jus Commune", a custom of such antiquity, that there is no memory to the contrary, has the force of a "Privilegium" of the Prince; the Emperor is "solutus legibus", but he is not "solutus moribus et ratione", he is bound to maintain the "consuetudines."

That great Canonist of the early fifteenth century, Zabarella (generally referred to as "the Cardinal") treats the subject of the source and authority of Custom at some length, but with such caution that it is difficult to arrive at any certain conclusion. He is commenting upon the Decretal of Pope Gregory IX (Decretals I. 4, 11). Some people had maintained that it was only in former times that custom could make or abrogate law, while others maintained that it did not follow because the people could not now make "law" that they could not make custom. He cites Gul. de Cuneo as maintaining that while the power of making "law" had been transferred to the Prince, the power of making custom neither had been, nor could be transferred. Zabarella does not indeed agree with this last contention, but he is convinced that at least in the case of Canon Law, custom would in some cases prevail against a canon without the consent of the Prince (*i.e.* the Pope).

Another great Canonist of the fifteenth century, Nicolas de Tudeschis, who is generally known as Panormitanus, sets out very clearly the superiority of custom over Positive Law, if it has prescription and is "rational", while it is invalid if it lacks "reason". He maintains that it was thought (by some) that custom could only be created with the knowledge of him who can make law, but he cites the opinion of John (?) as maintaining that the knowledge or counsel of the Pope was not necessary for the creation of custom, otherwise it would rarely or never come into being.

Yet another very important Canonist of the same century, Turrecremata, deals in considerable detail with the whole question of the nature and authority of law, in his Commentary on the Decretals of Gratian. It is natural that his treatment of the nature of law has something of the breadth and scope of Gratian's treatment of the subject. He was also greatly influenced by the profound treatment of the subject by St Thomas Aquinas. We shall discuss his general conception of political authority in another place, here we are concerned with an important passage in which he treats the relation of law to custom.

We may, he says, consider the authority of law from two points of view, the "firmitas authoritatis" and the "firmitas stabilitatis". Laws derive the first from the authority of the legislator, the second from its correspondence with the conditions and customs of those who are subject to it; and laws are therefore void unless are confirmed by their custom. We must, however, observe that in a later passage he seems to maintain that, even when the multitude has not the power of making law, its custom obtains the force of law, but subject to the condition that this is allowed by those who have the authority of imposing laws on the multitude.

We have considered these references to the relation of law and custom, because the subject is one of great importance, but we think that while the jurists are conscious of the great importance of the question it is not easy to derive from them clear and complete conclusions.

There is, however, another conception of the relation of the Prince to the Law, of which we must take account, and with regard to which there is a general agreement among the Civilians. This is the conception that the Prince is bound by any contract which ho has made with his subjects. We have dealt with this as it appears in the Civilians of the fourteenth century, but it has also an important place in the fifteenth century.

John of Imola, in one place, says that while the Emperor and the Pope are not bound by "positive" laws, they are bound by the divine and natural law, and therefore by their "Contract", for this is founded upon natural law. And in another place the Prince is bound by a contract with his subjects, "naturaliter", though not "civiliter."

Paulus de Castro, also, sets out the same general principle, and cites Cynus as having said that if the Prince makes any contract with his subjects he is bound to keep it, just like any private person, and that this also applies to his successor; and he also cites Bartolus as having said that when a Statute passes into a contract, it cannot be revoked by those who made it.

Franciscus Accoltis, while asserting in the same way that the Prince was bound by his contract with his subjects, repudiates emphatically the opinion which he attributes to the "Doctors" (we have just seen that it was held by John of Imola) that the Prince was only bound "naturaliter" and not "civiliter", and he cites Baldus as having maintained the same opinion as himself.

Bertachinus says simply, the Emperor can revoke a "Privilegium" given by his predecessors, unless he received money for it, but he cannot revoke his contract, and cites Cynus and Bartolus.

Jason de Mayno sets out the same principle with some important distinctions. He treats the making of a contract by the Prince as one of the modes of legislation, for his contract has the force of law; and he cites Bartolus and Paulus, as holding that it has even more force than the Law, for though the Prince is not bound by the Law, he is bound by agreement and contract, which belong to the "jus gentium" ; and he cites Baldus as saying that the Pope and the Emperor are bound by the agreements (pacta) which they have made with the "Civitates". He then cites Bartolus as maintaining that while contracts are binding on the Prince who made them, they do not bind his successors, unless they belonged to the nature and custom of his office, as in feudal matters. He himself distinguishes, he agrees with Bartolus in the case of the Emperor and Pope, for they succeeded by election and not by inheritance, but when the King, or other Prince, succeeded by inheritance the successor was bound to maintain all the contracts of his predecessors.

Philip Decius, a Civilian of the later years of the fifteenth century and the early years of the sixteenth century, asserts that the Prince is bound by his contract, and cannot violate it even "de plenitudine potestatis"; and he cites Baldus and Paulus and Peter de Anchorano.

It may appear to some that these discussions of the binding nature of the "Contract" of the Prince are of little more than technical significance, but that is hardly true. The conception was not new in the fifteenth century, but had a considerable place in the work of the great Civilians of the fourteenth century, and it reappears in the sixteenth century in the theory of Bodin. We venture to suggest that the question arose naturally in Italy, in connection with the great treaties which determined the relation of the Emperor to the Italian cities, but it has also a more general significance, as indicating a limit to the theory of the unrestrained authority of the Prince.

We began this chapter by drawing attention to the sharp distinction which was made by Christopher Porcius between the opinions of the "Citra Montani" and the "Ultra Montani" on the question of the continuing authority of the Roman people in making laws. We have, however, not been able to find much which illustrates this distinction. This may be due to the fact that the Civilians whose work we have been able to examine, are all of them Italian; that is what Porcius

presumably means by "Citra Montani". It is true, however, that if we take account not merely of Civilians or even Canonists, but of the great political writers of other European countries, such as John Gerson in France, Nicolas of Cusa in Germany, or Sir John Fortescue in England, we should find that they held that legislative authority belonged properly and normally not to the Prince alone, but to the whole community. How far we may think that Porcius is referring to this, we are, however, quite unable to say.

If we endeavour to summarise our conclusions about the position of those Civilians with whom we have dealt here, it seems to us true to say that they were clear that the Roman Emperor had an absolute and unconditional authority in making "positive" law and that the people of the Empire had no legislative authority in the general sense, and that even if they recognised a certain authority in their custom, this rested upon the sanction of the Prince or Pope. (We are, it must be carefully observed, not dealing with the powers of the great Italian cities to establish municipal laws for themselves; this is a great and complex subject and has been dealt with in detail by many learned writers).

Whether they would all have accepted the somewhat extreme terms cited by Jason de May no from Baldus, that the Pope and the Prince could do anything "supra jus et contra jus, et extra jus", may possibly be doubted. They are all, including Jason himself, clear that when the Prince has entered into a " contract " with his subjects, his authority is limited by the "contract".

It is evident that there was a very sharp contrast between the political theory of most of the writers we have dealt with in this chapter and the general tendencies of the fifteenth century.

CHAPTER III.
THE AUTHORITY OF THE PRINCE : ITS SOURCE AND NATURE. POLITICAL WRITERS.

We turn from the conception of the authority of the law to that of the authority of the Prince or Ruler, and we find a number of important writers, who in different countries deal with the subject in some detail; and as we shall see, they show a remarkable agreement in their judgments.

We begin with Gerson, for he was earliest in time and certainly was not less representative than the others. We cannot here discuss his place in the great conciliar movement, but it seems to us reasonable to say that his attitude to political authority is related to his conception of the authority of General Councils.

In one treatise ascribed to Gerson there is a discussion of the origin of political society, which is interesting as illustrating his relation to the Patristic and Stoic tradition. In the state of innocence man had no laws or coercive justice, it was sin which compelled men to submit to these, and he enumerates in technical language the causes of coercive authority. Gerson, however, adds, a little further on, that man is by nature "Civilis", and needs the help of his fellow men, and was therefore driven to the life of society. The Commonwealth is a society in which men have to command and to obey to the end that they may live in peace and sufficiency, and as the principles of Natural Law are not sufficient for the government of the temporal life, human laws were established; but these must not be contrary to the Natural Law.

This is interesting, as illustrating what we have before suggested, that in spite of the great authority of St Thomas Aquinas, the Aristotelian conceptions had not made any very profound impression.

We turn to Gerson's treatment of our immediate subject, the source and nature of the authority of the King or Prince.

In a work described as 'Sermo ad Regem Franciae nomine Universitatis Parisiensis', which is obviously a short treatise on the nature of Kingship, Gerson describes the monarchy as having been originally created by the common consent of men, and for the good of the whole community. And, he goes on, it is an error and contrary to natural equity and the true character of lordship to say that the lord is not bound by any obligation to his subjects; as the subjects owe their lord help and service, he owes them his protection and defence. The words seem to be reminiscent of the principle of the mutual obligations of feudal law.

Gerson's conception of monarchy is clearly that of an authority derived from the community, and limited by obligations to the community. He repudiates very emphatically the error of those who said that all things belonged to the lord and that he could do whatever he pleased, and the contention of those who misapplied the description of the conduct of the King by Samuel, and neglected the principles of Kingship set out in Deuteronomy, and the sound judgment of natural reason which is never contradicted by the divine law.

This brings Gerson to a discussion of tyranny, which he describes as a poison which tends to destroy all political life; men ought, according to their position, to resist it. He warns them indeed against unreasonable and unjustifiable sedition which may produce results worse than tyranny itself, but he asserts that the tyrant has lost all right to his authority, that he is hated by God and by man, and rarely dies a natural death. He therefore argues that it would be well that the royal authority should be limited and restrained ; and he cites the reply of Theopompus to his wife when she complained that he was leaving a diminished authority to his children; that it might be diminished

but it would be more permanent. It would be more permanent, because it would be more reasonable and more honourable, for true authority is a reasonable authority.

The principle which Gerson sets out here, that the royal authority should be limited and restrained, corresponds very closely with that which he expresses in other works. In the 'Sermo in viaegio Regis Romanorum' of July 1415 he cites the usual definitions of Monarchy, Aristocracy and Democracy, but adds that it would be better still to have a constitution composed of more than one element, as for instance, of Monarchy and Aristocracy, as in France, where the king does not disdain to be judged by the Parliament; while it would be best of all that it should contain all the elements, Monarchy, Aristocracy and "Timocracy". In another work he says that it is intolerable that the judgment of one man should be able to direct the Commonwealth at his pleasure, for the "canon" says most truly that what concerns all should be approved by all, that is by the greater and wiser judgment of all. In another place again Gerson puts this conception into concrete terms, and says it would be well that the nobles, clergy and citizens should be called together from the different parts of France, who know and could set out the miserable conditions of their various provinces. Gerson, that is, preferred a mixed constitution, and this not only in the State but in the Church. In one of his most important works, which was related to the Council of Constance, and in which he discusses at length the nature of authority in the Church, he speaks of the best form of constitution for the Church as being like that of Israel under Moses, a mixed authority, royal, aristocratic, and "timocratic". It is indeed evident that the constitutional conceptions of Gerson about the proper organisation of political authority are closely related to his parallel conceptions about the constitution of the Church.

In other passages to which we have referred in a former chapter Gerson expresses the principle that the royal authority should be limited and restrained, under the terms of the King's relation to the law. In the treatise we have just cited "De Potestate Ecclesiastica" when enumerating the forms of government which, according to Aristotle are good, he describes them all, the monarchy, the aristocracy and the "timocracy" ab being according to law; and again in another place, every Prince and Prelate should follow the example of the humility of Jesus in submitting to the law of circumcision; even if the Prince is said to be "legibus solutus", he should submit to the law which he has made, both as an example to his subjects and to show his reverence to God. In another place again, in a discourse against John of Paris' assertion of the right of tyrannicide, he says that even the King cannot slay any man without due process of law; and in another place in words which we have already cited, that the King of France submits in many cases to the judgment of the Parliament.

Finally, in one passage incidental to his discussion of the authority of the Church in the last resort to depose the Pope, Gerson cites Aristotle as teaching that the community has the power to correct, and even to depose the Prince if he is incorrigible. And he adds, this power cannot either be taken away from or abdicated by a free community, which has the power to determine its own affairs.

We may put beside these judgments of Gerson those of Peter d'Ailly, the Archbishop of Cambrai, as expressed in an important tract which he wrote in connection with the Council of Constance. He contends that it is not expedient that the Church should be governed by a purely regal constitution, and, turning to the State, he admits that the Monarchy in which one man rules according to virtue is the best of all simple forms of government, but a mixed government, in which Aristocratic and Democratic elements are combined with Monarchy is better, for in such a government all have some part, and he maintains as St Thomas and Gerson had done, that this was the nature of the government of Israel as originally instituted by God.

It is also interesting to observe that, in discussing the question whether the Pope was subject to the government of a General Council, he says that the principle that the greater is not judged by the less is not always true, for the King of France, though he is greater than any other in the Kingdom is often, in some cases, judged by the Parliament, and judgment is given against him.

We put beside these theories of the authority of the ruler in Gerson and Peter d'Ailly, those of some of the most important Canonists of the fifteenth century, Zabarella, "Panormitanus", and Turrecremata, for their opinions correspond rather with those of Gerson and d'Ailly than with those of the Civilians.

We may begin by observing that "Panormitanus" is clear that political authority is the result of sin; if it were not for this, all men would be equal. This does not mean that these Canonists conceived of government as coming directly from God. On the contrary, Zabarella, at least, emphatically maintained that normally it was derived immediately from the community. He cites the "philosophers" as saying that the rule (regimen) of the State (civitas) belonged to the congregation of the citizens or its "valentior pars", and he infers that it may therefore he said that the rule of the world belonged to the congregation of the men of the whole world, or their "valentior pars". He refers to the authority of Aristotle for the first part of his statement, hut his reference to the "valentior pars" suggests rather a reference to Marsilius. In another place Zabarella says that a kingdom may arise in one of three ways : by the revealed will of God, by the consent of those who are ruled, or by violence; the third, he says, is not to be justified, it is merely "de facto". The usual method, he evidently means, is by consent.

He applies this principle to the Roman Empire, for the whole "Plenitudo Potestatis" was in the first "universitas", and thus it has been said that the Roman people, while transferring its authority to the Prince, also retained it, for it could not make a law which it could not revoke. Again he says that the Roman people had transferred their authority to the Prince by the Lex Regia, and mentions that he had seen in the Church of the Lateran a brazen tablet which described the powers given by the Roman Senate and people to Vespasian, and he says that it was clear from this tablet that the people had not transferred all their power to the Prince, hut had retained the power of making laws; hut he adds, that however this might have been once, all power had come to be in the hands of the Prince. Government then, while it arose from the Divine institution, is conceived of by him as normally taking its origin from the community; it is therefore valid and legitimate even among the infidels, and he cites the authority of Innocent IV.

These are significant principles, about the nature and source of government, but it is also important to observe that Zabarella held that the Electors of the Emperor acted not in their own names, or as individuals, hut as Lupold of Babenherg had said, as a Collegium, that is they elected the Emperor by a process which represented the "universitas" of the Roman people. The Electors were "surrogati populo Romano", and thus they had the same power as the Roman people had exercised in the case of Nero, of deposing the Emperor, especially with the tacit consent of the Pope.

Zabarella, however, discusses this question further and says that there was a difference of opinion about the power of revoking the authority granted to the Prince. He cites Gul. de Cuneo as maintaining this could be done, and Baldus as maintaining the opposite, because the jurisdiction of the Roman people had been transferred by Constantine to the Pope. He seems himself to agree with Gul. de Cuneo, for the donation only related to the jurisdiction of the Roman people over the City of Rome, not over the world. The Electors, as "surrogati" of the Roman people, can therefore for just cause depose the Emperor. This at least is the case when the Emperor Elect has not yet been crowned and approved by the Pope. This is, Zabarella says, his own opinion, but he submits his opinion to the judgment of those who might be more competent.

These general principles of government, and of the authority of the ruler, are also developed by Turrecremata, and it is worthwhile, at the risk of a little repetition, to put his views together. Turrecremata was commenting, not on the Decretals like the majority of the Canonists of the time, but on the Decretum of Gratian, and this gives him occasion for a more systematic exposition of the theory of law and government. It is also obvious that he wrote under the influence of St Thomas Aquinas, rather than that of the Canonists.

We may begin with his observation, drawn directly from St Thomas (Summa Theologica I. 2, 90, 3), that the ordering of things for the common good belongs either to the whole multitude, or to one who holds authority in the place of the whole multitude, and has the care of the whole multitude. Again he takes from St Thomas the description of the various forms of government, the monarchy, the aristocracy, and the democracy, and the statement that the best form of government is that which is composed of all these elements, and in which the law is made by the "majores natu cum plebibus". In another place he discusses the question whether it is better to be governed by the law or by the best king, and he replies dogmatically that it is better that all things should be ordered by the law, than by the will of any one person. Turrecremata is really touching upon that distinction between the "regimen politicum" and the "regimen regale" with which we have already dealt. He also sets out the general distinction between the king and the tyrant. The king is one who governs rightly and for the common good, while the tyrant rules perversely and for his own profit. It is, however, more important to observe that he follows St Thomas in maintaining that men are only bound to obey their princes as far as the order of justice requires, and therefore subjects are not bound to obey them if their authority is usurped or if they issue unjust commands. In another place and in some detail he follows St Thomas in the discussion of the nature and limitation of men's obligation to obey the law. Laws may be unjust for various reasons, because they are contrary to human wellbeing, or because the ruler imposes burdensome laws on his subjects, not for the common good, but to satisfy his own greed, or because the legislator exceeds the authority which has been given him. Such commands should be called acts of violence, rather than laws, as St Augustine had said, "that is not law which is not just, and therefore some laws are not binding on the conscience".

There is little or nothing in the passages on which Gratian is commenting to suggest this particular mode of dealing with the authority of the ruler and the law; and Turrecremata may have intended to correct an impression which might be derived from these passages in Gratian if taken alone, that obedience was always binding. It is important to observe that the political theory of St Thomas was still understood and treated as having great authority.

We can now turn to Germany and some very significant observations of Nicolas of Cusa.

Every ordered empire or kingdom, he says, takes its origin from election; it is thus that it can be conceived of as set up by the providence of God; and, more broadly still, all ordered superiority arises from an "elective agreement of free submission"; and all authority is recognised as Divine when it arises from a common agreement by the subjects. We are reminded of the sweeping phrase of the Sachsenspiegel "al werlik gerichte hevet begin von kore".

Again, the principle of free election does not arise from positive law or from the authority of any one man, but from the Natural and Divine Law. The Electors, therefore, who were created with the common consent of all the German and other subjects of the Empire in the time of Henry II have their authority fundamentally (radicalem vim) from the common consent of all those who could by Natural law have created the Emperor, and not from the Roman Pontiff, who has no power to appoint a King or Emperor over any country without its consent.

In another place Nicolas lays down the same conclusion, but with even greater breadth; every political order, he says, is founded on the law of Nature, and if it contradicts this, it has no validity. He admits that the wiser and better men should be elected to make laws and to rule according to them, for they are naturally the rulers of other men; but they have no coercive power over the unwilling. For all men are by nature free, and therefore all government (principatus) arises only from agreement and the consent of the subjects (consensu subjectiva); it cannot be created except by election and consent.

In the Preface to Book III Nicolas expressed his preference for monarchy, hut he prefers an elective monarchy to one which had originally been created by election, and was transmitted by hereditary succession. And he goes on to contend that it was right that every human government

should correspond to the type of Christ Himself; he was both God and man, and every government has both a human and a Divine origin. All "majestas" is sacred and spiritual: it comes from God, but also from man; Christ was born both God and Man of the Virgin and with her free consent, and thus all government should arise from the Church or Congregation of men by pure consent, not by violence or ambition or corruption. For Christ was under the law, and came not to destroy but to fulfil it.

From Germany we turn to England, and to the work of Sir John Fortescue. As we shall see, his political principles are developed with special reference to England, but this does not mean that they are not also related to those of the writers whom wo have just been considering and to the political tradition of writers like St Thomas Aquinas.

In what seems to have been his earliest work he takes from St Thomas the definition of the Natural Law as "participatio legis aeternae in rationali creatura", and it is from the natural law that all just kingship is derived. By this law alone ean be determined the "jus regnandi" in any kingdom. This law is the source of all human laws, and they cannot properly be called laws if they depart from it. He repudiates the notion that Kingship could be taken as defined in such terms as are used by Samuel (1 Sam. VIII.); this was not a statement of the "Jus Regis" in general but of the King whom Israel had demanded.

So far Fortescue has been dealing with the general principle that all political authority is founded upon justice and the Law of Nature, but he then turns to the distinction between the "dominium regale", the "dominium politieum", and the "dominium politicum et regale."

We have already dealt with this in an earlier ehapter, with reference to the supremacy of the law, made by the whole community, and above the King, and we need not go into this again. Wo may, however, cite a passage from the 'Do Laudibus Legum Angliae', whieh draws out very emphatically the nature of the authority of the "Dominium Politicum et Regale", as it existed, in Fortescue's judgment, in England.

This work is in the form of a dialogue between the Chancellor and the Prince of Wales. The Prince had asked whether it was the Civil Law or the Law of England which he should study, and the Chancellor rebukes him for such an "evagatio"; for the King of England cannot change the law at his pleasure, his authority is not simply "regale" but "regale et politicum"; if it were simply "regale" he could change the Laws, and could impose talliages and other burdens on his people at his pleasure. This was the meaning of the doctrine of the Civil Law, "Quod principi placuit", but the authority of the Prince who governs "politice" is very different. The people indeed approve the government of the king, so long as he does not become a tyrant, but it was to avoid this danger that St Thomas had desired that the kingdom should be so ordered that the royal power should be restrained by the Law.

Fortescue was, however, well aware of the fact that there had been kings of England who had been impatient of these restraints, and he represents the Prince as asking why some of his ancestors had endeavoured to bring in the Civil Law. Fortescue answers in the person of the Chancellor. The law of England did not sanction the maxim of the Civil Law, "Quod principi placuit", for the King of England was bound by his coronation oath to observe the Law. Some English kings had been impatient of this, for they thought that they had not that freedom of government possessed by those who ruled according to this maxim, who could at their pleasure make and unmake laws, inflict punishments, impose taxes, and even at their pleasure interfere in the Law Courts. Some English kings had therefore endeavoured to shake off the "iugum politicum", not understanding that the real power of both kinds of kings was the same, and that it was not a "yoke", but "liberty", to rule the people "politico", a security to the people and a relief to the king. In order to make this clear to the Prince, he draws out some of the effects of a "regimen tantum regale", as they could be seen in France. He points out how the French people were preyed upon by the gens d'armes, were oppressed by ordinary and special taxation, by the burden of the Gabelle on salt, which they were compelled to

buy, and their consequent poverty, their miserable food and clothing. The nobles indeed were not liable to taxation, but they were liable to be punished and even executed without any proper trial before the ordinary Judges, but in the King's "Camera". In England, on the contrary, no one, not even the King, could take a man's possessions without payment; he could not impose talliages, subsidies or any other taxes without the consent of the Kingdom in Parliament, nor could anyone he brought before any court, except that of the Ordinary Judge; and the people were well clothed and well fed.

The contrast which Fortescue makes between the happy condition of England under a monarchy limited and controlled by law and the miserable circumstances of France is indeed very emphatic, but it is important to observe that Fortescue did not think that this arbitrary and uncontrolled monarchy had always existed in France; in another treatise he speaks of it as the unhappy result of the long war with England. Saint Louis, he says, and indeed the other kings of France, did not impose taxes upon the people without the consent of the three Estates, which had the same character as the Parliament in England. We shall see presently that Fortescue's conception of the actual contemporary constitutional condition of France was very far from adequate.

It is interesting to compare Fortescue's conception of the nature of the French Monarchy with that which was expressed by an important and almost contemporary Frenchman, that is by Philippe Pot, the Sieur de la Roche, as reported by Jean Massclin in his "Diarium" of the States General which met at Tours in 1484. We do not suppose that Masselin's report of de la Roche's speech to the Estates can be accepted as representing in precise terms what he said, but it may be properly taken as expressing the general conceptions of that important section of the Estates to which Masselin and do la Roche belonged.

Jean Masselin was a Canon of the Cathedral, and a representative of the "Bailliage" of Rouen, and he put together in the form of a "Diarium", or Journal, an account of the proceedings of the Estates. There was much discussion, he says, of the powers of the Estates, especially with regard to the appointment of the Council of Regency during the minority of the King (Charles VIII), and he then gives an account of the speech made by the Sieur de la Roche.

De la Roche begins by contending that the decision on this question belonged not to the Princes of the Blood, but to the Estates. The Kingdom was a "dignitas", not an "hereditas", and when the Commonwealth was left without a ruler, the care of it belonged to the States General, not that they should themselves govern, but that they should appoint those most worthy to do this. This leads him to a discussion of the origin and nature of kingship. He had learned, he says, from history and from his ancestors, that in the beginning kings were created by the will of the people, and that they appointed those who were pre-eminent in virtue and industry. Princes do not rule for their own benefit, but, forgetting their own concerns, they should set forward the good of the Commonwealth; those who act otherwise are tyrants. It is of the greatest importance to the people by what law and by what ruler the Commonwealth is to be guided. The "Respublica" is the "res populi" as they had often read.

A little later he appeals to Roman History against those who wished to attribute all power to the Prince, for in Rome the magistrate was created by the election of the people, and no law was promulgated until it had been submitted to the people, and approved by them. He did not, however, here wish to discuss the power of the Prince who lawfully administered the Commonwealth, being of full age. The case before them was that where the King, on account of his minority, or for other reasons, could not take hold of the government.

He had shown then that the "Respublica" was "Res populi", and had been entrusted by the people to the King; those who hold it by other means and without the consent of the people are tyrants, and "alienae rei invasores". It was evident that the King (on account of his minority) could not himself rule the Commonwealth, and it was necessary to provide for its care by others. This

responsibility did not pass to any one prince, nor to several, nor to all of them. It must return to the people who originally granted the authority; the people must resume it, for it was the people who would suffer from the absence of government or from its bad administration. He does not suggest that the "habitus regnandi" or lordship should go to any one but the King; but the guardianship of the kingdom, for the time being, belonged to the people and those elected by them: by the people, "populus", he did not mean the "plebs" alone, but all men, of all conditions, for under the name of the States General were included the princes and all the inhabitants of the kingdom.

De la Roche continued by urging upon the States General that they wore the elected procurators of all the Estates of the realm, and hold the will of all in their hands; they should therefore not be afraid to recognise that they had boon summoned in order that the Commonwealth should be directed by their advice in the minority of the King. He argues that the contention of those who said that the States General only met to grant taxes was in manifest contradiction to the historical facts. The Assembly of the States General was not something now, nor was it unprecedented that they should take hold of the administration of the Commonwealth during a vacancy, and entrust it to upright men; preferably to men of the royal blood, if they were men of character; and he cited various cases which illustrated this. It was the States General which decided between Philip of Valois and Edward III of England. It was the States General who after two years granted the Regency of the Kingdom to Charles (afterwards the Fifth) when King John had been taken prisoner by the English. It was the States General by whose advice the kingdom was ordered in the time of Charles VI. He concluded therefore by urging them to set to the work of ordering and nominating the "Council of Regency".

As has been already said, we do not think it probable that the Sieur de la Roche made a speech whose terms corresponded exactly with all this, but we think that what Masselin reports represents the political and constitutional ideas of some not unimportant number of the members of the States General. It will be observed that what is said embodies three very important conceptions. The first, which belongs to what we may call general political theory, that all authority originally comes from the community, and can come from no other source, and that this authority naturally reverts to the community, when by any accident the government it set up fails. The second, the general constitutional principle that the States General represented the authority of the whole community, and that their authority was not in any way limited to the granting of financial assistance to the Government. The third, that the appointment of the Regency should not be carried out without the advice and consent of the Estates. We shall return to the proceedings of this meeting of the States General in Chapter VI.

There is a very interesting treatise of about 1477 by Wessel of Groningen, which sets out some very important conceptions of the source and the nature of political authority.

The primary subject of the work is the nature and limitations of the Papal and Ecclesiastical authority, and this belongs to the literature of the Conciliar Movement, but in some chapters it deals with the general question of political authority.

In one place Wesselius maintains that the true relation of the subject to the ruler must be carefully considered, for it is not one of an unconditional obligation, rather it is of the nature of a contract with the ruler, and if the ruler does not observe the law of the contract, the subject is not bound by it. This is a very sharp statement of that contractual conception of the nature of political authority which we have discussed in previous volumes. Wesselius, however, not only states the principle, but goes on to explain its rationale. All subjection should be voluntary, and should only be accepted after due deliberation upon the causes of it, and of the results which are to be expected from such subjection; and, inasmuch as it is these which have led men to enter into the contract with a ruler, the contract is terminated if the conditions are not fulfilled. After praising the Franciscan custom of electing their superior from year to year, and urging that the relation between a Bishop and

his diocese is terminable if he prove unworthy of his charge, he goes on to argue that it should be the same with Kings, for in every well-ordered commonwealth the chief magistrate should either be annually elected, or his authority should be restrained by the votes of those who have consented to it. What does election mean, he says, but the freedom of those who have deliberated on it. Kings, therefore, are not to be obeyed in evil things, but rather they may lawfully "in regno turbari", unless this might cause even greater evils.

These are drastic and far-reaching principles which Wesselius sets out, but when we allow for the sharpness of the phrases, there is nothing new in them. The contractual conception was embodied in Feudalism, and in the whole political system of the Middle Ages the principle of election or recognition corresponded with the constitutional practice, while the principles of limitation and deposition were at least perfectly familiar.

This is not, however, all which is important in Wesselius. In another chapter he points out that the real meaning of St Paul's words, "There is no power except from God", requires a careful examination. It is obvious that those who hold temporal or spiritual power may greatly err and lead those who obey them into mortal error. We must, therefore, resist the unrighteous authorities unless we wish to be partakers with them. The words of St Paul (Romans XIII. 1) must therefore be interpreted by those which follow, "There is no power but for edification". The power, so far as it edifies, is from God, but he who "edifies" by resistance also received the power of resistance from God. Wesselius was evidently anxious to correct the error of those who thought that all authority, good or bad, just or unjust, was a divine authority. This conception had indeed been little regarded in the Middle Ages, but there are some traces of it in the fourteenth and fifteenth centuries, and the criticism of Wesselius is therefore of some importance.

It seems to us that it is important to observe at this point that the theory that in the last resort the unjust ruler might legitimately be deposed, had, at the outset of the fifteenth century, an important illustration in constitutional action, that is, in the deposition of the Emperor Wenceslas in the year 1400. This may seem a somewhat unimportant occurrence, but, as we shall see later, it was not forgotten in the sixteenth century.

It is therefore worthwhile to notice the terms in which the electors, that is the Archbishops of Mainz, Trier, and Cologne, and the Count Palatine, expressed their judgment and declared Wenceslas deposed. We do not, it will be understood, pretend to deal with the actual circumstances which lay behind their action, and its merits. We are only concerned with the constitutional principles which they assumed, and the terms in which they justified their action.

They charge him with neglect to act for the peace of the Church and of Germany, with his betrayal of the authority of the Empire, especially in the case of Milan, and with the reckless way in which he had allowed his seal to be affixed to blank forms which he sold to his friends, and they accused him of having murdered many ecclesiastics and others.

They say that they had remonstrated with him in vain, and had finally invited him to meet them at Ober Lahnstein and waited for him, but he had not come. The Archbishop of Mainz therefore, in the name of the electors, and acting as in a court, declared Wenceslas deposed, and notified the Princes, lords and cities of the Empire that they were free from their oath of obedience to Wenceslas, while they continued to be bound by their oath to the Empire and to the person who should be elected King of the Romans.

When we now endeavour to put together the political principles of the writers with whom we have dealt in this chapter, it is evident that there is a substantial agreement among them. They are clear that all political authority is derived from the community, that is, while they conceive of it as coming from God ultimately, directly and immediately it comes from the whole body of the community. It is indeed interesting to observe that Wesselius thought it well to correct the misinterpretation of St Paul's words, "The powers that be are ordained by God". It is clear that,

whether they were ecclesiastics or laymen, they did not recognise the doctrine of what is called the Divine Bight of Kings; they were clear whether they were Englishmen or Frenchmen that the authority of the King was a limited authority. Gorson, d'Ailly, and Turrecremata emphatically prefer a mixed government, that is, a government which included the aristocratic and democratic elements, as well as the monarchical. Gerson and d'Ailly in France, and Fortescue in England, are clear that the legal rights of the subjects are protected, even against the King, by the Courts of Law. Gerson, Zabarella, and Wesselius are even clear that in the last resort the violent and unjust ruler might be resisted and deposed.

These writers, then, know nothing of absolute monarchy; indeed, it is evident that such a conception would have seemed to them irrational and repulsive; they all, like the Medieval writers in general, conceived of monarchy as the best form of government, but it was a monarchy limited and conditioned by the law, and the good of the community for which it existed.

CHAPTER IV
THE THEORY OF THE DIVINE RIGHT.

We have been carefully searching for the appearance of the theory of the absolute Divine authority of the King in the fourteenth and fifteenth centuries, as we have done in other volumes with relation to the earlier Middle Ages.

In our first volume we pointed out that this theory was first explicitly stated by Gregory the Great, and in later volumes, that, in spite of his great authority, there is hardly any trace of it, except in a small group of imperialist writers, of whom the most important was Gregory of Catino, during the great conflict between the Popes and the Emperors in the eleventh and twelfth centuries. The great Mediaeval writers, like St Thomas Aquinas, ignore this theory, and even speak with confidence of the right to resist and even to depose the unrighteous ruler.

The only writer of any importance in the fourteenth century who seems to us to have maintained the doctrine of the absolute Divine authority of the King was Wycliffe, and we have dealt with this in an earlier chapter. It seems to us that the conception was wholly alien to the political thought of the fifteenth century, as we have so far considered it, but it found expression in two quarters, in Spain in 1445, and in a work of Aeneas Sylvius (afterwards Pope Pius II) written apparently in 1446.

We cannot here discuss the circumstances which lay behind the appearance of this conception in the proceedings of the Cortes of Olmedo in 1445, but it is evident that the country was in a highly disturbed and disorderly condition, not indeed uncommon in Spain in the fourteenth and fifteenth centuries, and it was very natural that men should set out in the strongest terms the urgent need of political order and obedience.

However this may be, the principle of the Divine authority of the King, and the wickedness of resistance to him, is expressed in very strong terms. After referring to the wars and revolts caused by some of the King's subjects in his kingdom, the Cortes declared that the Divine Law expressly forbade men to touch the King, who was the Lord's Anointed, or to speak evil of him, for he was the Vicar of God, or to resist him, for to resist the King was to resist the ordinance of God.

This statement is rendered more significant when we observe that the Cortes went on to say that the revolters affirmed in their justification that they were acting in the King's own interest, and in accordance with the law of the kingdom as expressed in the 'Siete Partidas' of Alfonso X. The passage from this law book, which they quote at length, certainly seems to suggest that the subjects should guard the King not only against themselves and foreigners, but also against himself, not only by good counsel, but by preventing him from committing any act which might dishonour him, and injure his kingdom. Cortes urged that the revolters were misinterpreting the passage; they cited a number of other passages from the 'Siete Partidas' on the nature of the authority of kings, which seemed to them to forbid such actions as those of the insurgents, and they contended that these should not be tolerated. It would, they said, be abominable and contrary to God, and Divine and Human Law, that the King should be subordinate to his vassals and subjects, and should be judged by them; for the King is the Vicar of God, who holds his heart in his hands; he is the head and heart and soul of his people, who are his members, and owe him reverence and obedience; his authority is so great that all laws are subject to him, for he holds his power from God and not from men.

After further citations from the "Fuero de las leyes", the Cortes urged that if anything in the 'Siete Partidas' was contrary to these principles, the King should revoke it "de su cierta çiencia e proprio motu e poderio absoluto", so far as it might be contrary to the aforesaid laws of the "Fuero" and "Ordinamiento."

It would be difficult to find a more emphatic assertion of the doctrine of the "Divine Right" of the King, and of his absolute authority as above the Law. It is possible that this may be related to the attempt made by Juan II at the Cortes of Palencia in 1431 to annul the provisions of the Cortes of Bribiesca in 1387 and to give his Briefs the authority of law, which we have already considered; but as we have seen, Juan II had been compelled to withdraw from this position.

We have another example in the fifteenth century of the assertion of the "Divine Right" in a treatise of Aeneas Sylvius: 'De Ortu et Auctoritate Imperii Romani', written, as we have said, apparently in 1446.

This treatise is indeed primarily an exposition of the nature and authority of the Empire, and it is only incidentally that it touches upon the "Divine Right", and it is perhaps worthwhile to observe its more general principles. Aeneas Sylvius begins by tracing the origin of monarchy to the conflicts among men; its purpose therefore is to secure peace and justice. The conflicts of nations compelled men to accept some supreme authority; this was the origin of the various Empires of the ancient world, and finally of Rome. In Rome itself men were driven by similar causes to agree that the Government should be placed in the hands of one man; the Prince was created and it "ratum esset quicquid ab eo constituitur". All peoples are subject to the authority of the Empire, for the purpose of the Empire is universal peace. These, however, are little more than commonplaces; we are concerned to know what in the view of Aeneas Sylvius was the authority of the Emperor. The Emperor has authority to make law, to interpret law and to abrogate law where there is reasonable cause. In another chapter he deals with the question of appeals from the Emperor alone to the Emperor acting with the Princes; he flatly denies that any such appeal can be made, and adds that the Emperor has just as great an authority when acting alone as when acting with the Princes. We are not here discussing the constitution of the Empire, but it is obvious that Aeneas is speaking under the terms of the interpretation of Roman Law by the Civilians rather than under those of the actual constitution of the Empire in the Middle Ages.

The Emperor has supreme legislative power, but we are also concerned to know what Aeneas thought was his relation to the actually existing law. It is right that he should live, and judge, according to the law, and he cites the 'Digna vox' (Cod. I. 14, 4),3 but he adds that while it is honourable to say this, it must not be asserted that the Emperor is subject to the law, for he is "legibus solutus". Aeneas may not, however, have meant by this much more than to assert the dispensing power of the Emperor, that he had authority to temper the rigour of the law by Equity.

It is, however, when we turn to Aeneas' discussion of the relation of the subject to what might be the unjust actions of the Prince that we come to the matter with which we are here specially concerned. We must always, he says, presume that there is a rational cause behind the action of the Prince, and therefore, even if he should unjustly annul, or derogate from some "privilegium", we must not revile or resist him, for there is no one who can judge his temporal actions. Whatever the Prince docs must be patiently endured, however unjust it is, and we must look for some amendment of his action by his successor, or to its correction by that heavenly judge who does not suffer violence and injury to be perpetual. We must remember that whatever the Prince does, is done by the permission of God, for the heart of the King is in the hands of God, who turns it whither he wills.

Aeneas was setting out in dogmatic phrases the doctrine of passive obedience, and relating this to the conception, that whatever the Prince does is done by the permission of God. He returns to this again in a passage of which wo have already quoted a part, in which he deals with the question of appeals from the judgment of the Emperor. He admits that sometimes unrighteousness and an unjust judgment might proceed from the highest authority, but there can be no appeal, for there is no judge who can examine the temporal actions of Caesar. Men must recognise that they are subject to the Prince, and must reverence the Emperor and Lord of the world, for he rules over temporal things in

God's place, and as men must do what God commands, they must also accept the commands of Caesar, "sine repugnatione".

It is clear that Aeneas was concerned in this treatise to assort the absolute authority of the Emperor, both as supreme Legislator, and as being above the Law, and his references to this unchallengeable Divine authority are of some importance.

It is then, we think, true to say that in the statements of the Cortes of Olmedo and of the treatise of Aeneas Sylvius we have a clear and sharp re-statement of a political doctrine which had little importance in the Middle Ages, but which, as we shall see later, was developed by some writers in the sixteenth century.

CHAPTER V.
TAXATION.

We have in a previous chapter dealt with this subject, as related to the fourteenth century, in some detail. We must now examine it in relation to the fifteenth century, for there appears to have been some confusion about this: naturally enough, for there are some statements by important writers of the fifteenth century which if uncontrolled by a more precise examination of the actual facts, might produce, and indeed have produced, a somewhat incorrect judgment: Sir John Fortescue, for instance, in his 'Governance of England', attributed the poverty-stricken condition of the French people to the arbitrary power of taxation of the King.

We must therefore consider carefully the evidence as to the constitutional principles, and the actual practice of taxation in the fifteenth century, and we begin with France, for it is here that there seems to have been most uncertainty. As we shall see, there is evidence that from time to time the French Crown endeavoured to impose taxation without the consent of the Estates, Provincial or General, but we think that it is also clear that the legal right to do this was not recognised, and that normally, when the Crown needed more than it received from its ordinary fixed revenues, it asked for Aids or Subsidies, either from the Provincial Estates or the States General.

It is unnecessary to enumerate all the occasions on which the kings of France asked for Aids from the States General or Provincial Estates; we deal with some of the more important examples.

The Treaty of Troyes of 1420, by which the unhappy King Charles VI recognised Henry V of England as his successor, contains a clause providing that Henry was not to impose upon the Kingdom of France any taxes without reasonable cause, and that these were to be in accordance with the laws and customs of the Kingdom. According to Juvenal des Ursins the Three Estates met in Paris later in the same year, and were asked for an Aid, and after deliberation expressed themselves as prepared to grant whatever the King and his Council should command.

These proceedings were, it may be urged, taken, not under the legitimate government of France, but under the English usurpation, and we turn to the legitimate government. In a letter of Charles VII of 1423 we find him mentioning that the Three Estates of the Kingdom had granted him an Aid at their meeting in Bourges. In 1425 the States General meeting at Melun granted Charles VII a Taille, but attached to this the condition that he should inform them what measures he proposed to take to put an end to the disorders caused by the soldiers, otherwise they would not make a grant. In 1423, as we learn from another letter of Charles VII, the Three Estates of Languedoc had met in April and May at Carcassonne, and had granted him the sum of 200,000 "livres toumois".

What is, however, more significant is the account given in a letter of Charles VII of December 1427 to his Lieutenant in Languedoc, of the complaints made by the Estates of Languedoc. At their meeting in that year they had protested that it had always boon part of their liberty that no Aid or Taille, &c., should be imposed upon them by the King, until ho had called together the Council or the Deputies of the Three Estates, and they complained that, in spite of this, the Lieutenant of the King, in virtue of a simple "letter patent", had imposed upon them a new Aid of 22,000 "livres tournois", over and above the Aid of 150,000 francs which had been imposed with the consent of the Three Estates. The King accordingly ordered the levy of the now Aid to be suspended until the meeting of the Three Estates which had been summoned for the following January.

In a letter of Charles VII of Ootober 1428 there is a reference to a meeting of the States General at Chinon which had granted him an Aid of 500,000 francs, part for the Langue d'Oc, part for the Langue d'Oil. According to Vaissette's 'History of Languedoc', the King laid down, at this time, the general principle, at least for Languedoc, that for the future no one should impose any Aid

or Subsidy without his express command and without calling together the three Estates, as had been the custom.

We have again references to grants of money by the Estates of Languedoc in 1431, 1434, and 1435, and to the imposition by the King with the consent of the Three Estates of his "obedience" (presumably the whole kingdom) of a variety of Aids which had been levied for the War but had been abolished when the King left Paris.

It is then evident that during the first part of the century it was in virtue of a grant by the States General, or the Provincial Estates, that Aids and Subsidies were normally levied by the King. We have, however, found a few cases in which there is no indication that the Estates had been consulted. This does not, however, amount to much more than the possibility that in the disturbed conditions of the early years of the fifteenth century the government of France may have occasionally levied taxes without taking account of the normal constitutional custom.

We must now consider how far the constitutional practice of the earlier part of the century gave place to another system in its later part, and we must first examine the significance of the important ordinance issued after the Meeting of the States General at Orleans in 1439. We have already referred to this Ordinance in an earlier chapter, but must now examine its relation to taxation.

Its main purpose was, as we have already seen, the establishment of a body of royal "Gens d'Armes" and the prohibition of the levy of all private forces. It was in order to carry this out that, as we should infer, the King, with the consent of the Three Estates, imposed a Taille, which was presumably intended to be continuous, at least for the period of the War.

The most important clauses of this "Ordonnance" are, for our present purpose, two: the first says that, in spite of the imposition of a Taille by the King with the consent of the Estates, some of the Lords, Barons, and others hindered the raising of the Taille or other Aids on their lands, and sometimes appropriated them on the pretext that the King was in debt to them. The Ordonnance commands that this must cease. The second forbids men of any condition or estate to raise any "Taille" or "Aid" or tribute from their subjects under any pretext whatever, without the authority of the King given in his "letters patent", and declares that for the future any place or lordship where such "Tailles" or Aids had been imposed without his permission, was to be confiscated to the King.

It is not within the scope of this work to deal with the complex question of the various forms of taxation in France. It has been held by some historical writers that the provisions of this Ordinance represented a far-reaching change in the royal power of taxation, by giving the King the power of levying "Tailles" on his own authority; others do not go so far. We think that however important the provisions of the Ordinance may have been with regard to certain forms of taxation, it would be a very serious error to think that it established the principle that taxes in general could be imposed by the King without the consent of the Community.

There is an interesting account by Monstrelet of the demands put forward by an Assembly of the Princes and Nobles at Nevers in 1441, and the answer of the King. They urged that the Lords and the Estates of the Kingdom should be called together to impose "Tailles" and "Impositions" on the Kingdom. The King replied that the Aids had been imposed upon the Lords with their consent, but that the King could impose the Tailles by his royal authority, in view of the circumstances of the Kingdom. There was no need to call together the Three Estates for this purpose; that was only a burden upon the poor people who had to pay the expenses of those who attended.

In the Ordonnances, however, from 1439 to the time of the meeting of the States General in 1484 we find frequent references to formal grants of money by the Estates of the several provinces, while we also find frequent complaints about taxation without their consent. In February 1443(4) we find Charles VII referring to a statement of the Three Estates of Languedoc that they had voluntarily and freely granted him large sums of money by way of Aid for the War; and so again in 1448. In 1456 Charles asked the same Estates for an Aid of 130,000 "livres tournois"; they replied that their

province was greatly impoverished, but they made a grant of 116,000 livres for one year. In 1458 the people of Normandy complained of the violation of their laws and liberties, and Charles replied by confirming their Charter, and promised that no Tailles, subventions or exactions should be imposed on the people of the Duchy beyond the customary "redditus, census, et servitia nobis debita" except for some clear and urgent need, and then only by a meeting of the Three Estates of the Duchy, as had been customary. It should be observed that "Talliae" are included in the taxes which are not to be levied without the Estates. In March 1462, we find Louis X referring to the fact that the Three Estates of Normandy had granted him 400,000 "livres tournois" as representing all Aids, Taillages, &e., for the previous year. In an Ordinance which as the Editors think belongs probably to 1463, we find that the Estates of Languedoc had granted an Aid, but complained that the Receiver of Taxes had taken more than the Estates had granted. In 1476 we have a letter of Louis XI, relating to the Government of the Duchy of Burgundy, which had fallen to the French Crown on the death of Charles the Bold, and Louis declares that no Aids or Subsidies should be levied in the Duchy unless they had been granted and authorised by the Three Estates of the Duchy.

We have found direct evidence in a few cases of an attempt by Louis XI to over-ride the Estates, and to levy taxes, if necessary, without their consent. The most important is a letter of 1469 to the royal officers in Dauphiné : Louis instructs them to request the Three Estates to make a grant of money for the year, but if the Estates refuse or delay to do this, they are to impose the tax and to levy it by the methods used in cases of debts to the Crown, notwithstanding any privileges or exemptions granted by himself or his predecessors. It must, however, be observed that Louis adds, that this was to be done without prejudice to such privileges or exemptions for the future.

In 1478 we find a declaration of Louis XI that he had ordered the imposition of a tax throughout the Kingdom, and he demanded 1300 "livres tournois" from the people of Périgord, but, it should again be noticed, that he did this without prejudice to their privileges for the future.

What conclusion then are we to draw? It seems to us clear that, whatever may have been the significance of the provisions of the Ordinance of 1439 with regard to the "Taille", it was still recognised as a general principle that Subsidies and Aids could not be imposed without the consent of the Estates, Provincial or General.

We turn to the proceedings of the great States General held at Tours in 1484 at the accession of Charles VIII. When the Estates came to deal with the financial business, the officers of the Crown attended and laid before them the actual condition of the finances of the country and the demands of the Crown. The Estates as Masselin reports in his 'Diarium' were not satisfied that the statement of the revenue was correct, and it was proposed to grant the King the same amount as had been given to Charles VII, but only for two years, when the Estates were to meet again. The Chancellor, as representing the Crown, was not satisfied, and while offering to reduce the amount of taxation, demanded 1,500,000 livres. Masselin reports that a number of the Princes and Lords attempted to persuade them to submit to the demands of the Crown, and asserted dogmatically and in threatening terms that the King had the right to take his subjects' goods to meet the dangers and necessities of the Commonwealth, and that many thought that the amount demanded should be imposed and levied even if they were unwilling.

The Estates finally decided to offer 1,200,000 livres for two years, and 300,000 for one year, for the expenses of the coronation, but accompanied this with the following statement. They grant the King the same amount as had been levied in the time of Charles VII, but they do this as a gift, and "obtroy", not to be called "tailles", and they do this for two years only. They also grant the sum of 300,000 "livres" for one year, on his accession to the Crown. They also petition the King that he should call together the States General within two years, for they do not contemplate (n'entendent point) that for the future any money should be raised without their being summoned and without

their will and consent. They beg him to maintain the liberties and privileges of the Kingdom and to abolish the novelties and grievances which had been introduced.

It is clear that while some persons, representing the Court, made large statements about the power of the King to raise taxes at his pleasure, the States General were quite determined and firm in maintaining the principle that this was contrary to the tradition and custom of the Constitution, and it would appear from Masselin that the King promised to call together the States General within two years.

We have then examined the evidence as to the constitutional usage of France with regard to taxation in the fifteenth century, but we must also take account of some very important statements of Comines in his 'Memoires'.

In one place he sets out the general principle that if any king or lord were to impose any tax upon his subjects outside of his domain without their consent, his action would be mere tyranny. In another place, he says that neither the King of France nor any other Prince had the right to impose taxes on his subjects at his pleasure. Those who say that he could do this, do the King no honour, but rather make him to be feared and hated by his neighbours, who would not on any account become his subjects. If the King would recognise how loyal his subjects are, and how willing to give him what he asks, instead of saying that he would take whatever he wished, it would be greatly to his praise. Charles V. never said this and Comines had not heard any king say it; he had heard their servants say it, but they only did this out of servility, and did not know what they were talking about.

We shall return to Comines when we deal in the next chapter in more general terms with the position of representative institutions in the fifteenth century. In the meanwhile it is obvious that his evidence about the principles of taxation is of great importance, especially in correcting the impression which such statements as those of Sir John Fortescue might produce.

Comines does not indeed say that there had been no arbitrary taxation in France, but he confirms the judgment (which we should derive from the study of the "Ordonnances") that it is impossible to maintain that the King of France had any recognised and constitutional right to impose taxation at his discretion. That he frequently did so is clear, and the right to do so was from time to time asserted by some persons, but it is also clear that the right was emphatically and constantly denied, and that the King from time to time and in quite unequivocal terms recognised that taxation should not be imposed without the consent of the Provincial or General Estates.

The evidence we have found in the proceedings of the Cortes of Castile with regard to the constitutional method of taxation during the fifteenth century, is curiously enough scanty, but what there is, is important. In the year 1411 we find a request made to the Cortes by the Guardians of the young King for the grant of a sum of money for the war against the Moors. The Cortes authorised the levy of the amount asked for, but they attached to the grant the condition that the Guardians should take an oath in the presence of the Cortes that the amount granted should be strictly appropriated to the expenses of the war, and to no other purpose.

In 1420 the Cortes of Valladolid represented to the King that they were much disturbed by the fact that he was raising money without consulting the Cortes, and without their consent. The King replied that he would not levy such taxation till it had been authorised by the Cortes.

There is also a very important and carefully drawn-out statement by the Cortes of Ocaña in 1409. The Cortes expressed themselves as willing to contribute to the necessities of the King by a grant of money, but, as it appears, they were not satisfied with the financial administration, and they therefore proposed that the amount raised should be placed under the control of persons to be appointed by the Cortes, who should hold it for the King and should only expend it for the restoration of the royal patrimony and the Crown, and other purposes authorised by the Cortes. They also proposed that no payment should be made except under a writ signed by the King himself and at least two members of his Council, and certain persons to be appointed by the Cortes. They also

proposed that the King should swear to maintain these provisions, and should request the Pope to excommunicate him if he did not do so. The King assented, except to the clause about the Pope.

It would appear that, whatever may be the exact significance of some of these complicated provisions, the Cortes not only was the body which authorised the imposition of taxes, but that they considered themselves entitled to see that the amounts raised should be appropriated strictly to the purposes for which they granted them. We see no reason to doubt that the constitutional principles of the fourteenth century, which we have discussed in Part I. of this volume, were maintained in the fifteenth.

It is obviously unnecessary to discuss the question of taxation with regard to England in the fifteenth century, for there cannot be any doubt that it was recognised that Parliament alone had in normal cases the right to levy taxation.

CHAPTER VI.
REPRESENTATIVE INSTITUTIONS.

We have in previous chapters dealt with the history of law, its source and authority, and with the theories of the nature and limitations of the authority of the Ruler: we must now consider the development of the authority of the community as embodied in and finding expression in representative institutions.

We venture to say that this is the proper method of approaching the development of Parliamentary or quasi-Parliamentary forms. The phrases which are sometimes used, such as that of the "Sovereignty of the People", may be well meant, but are in our judgment somewhat misleading. The term "Sovereignty" itself has often been used so carelessly that it is better to avoid it, and the term "People" is almost equally ambiguous. It would be better to speak of the authority of the "Community", the "Respublica" or "Universitas", for these are more strictly the Mediaeval terms, and whatever ambiguity may belong to them, they have at least not become the catch-words of sometimes ill-considered controversy.

We have seen that it is true to say that the normal Mediaeval conception, which was only reinforced by the revived study of the Roman Jurisprudence, was that the community was the source of all political authority, which was indeed derived ultimately from God, but immediately from the community. The community was the source of law, and of the authority of the Ruler, Emperor or King; and it is also clear that, while the Prince was conceived of as having, subject to the law, a large discretion in the exercise of his authority, in fact the Medieval Prince normally acted with the counsel and advice of some body of councillors, the chief men of the Community, who were conceived of, however vaguely, as having some kind of representative character.

There is nothing therefore to surprise the historian in the fact that this vaguely representative institution should have assumed a more precise and definite character in Spain in the twelfth century, in England and France and other countries in the thirteenth and fourteenth centuries.

We endeavoured to trace very briefly the development of representative institutions in the twelfth and thirteenth centuries in our last volume, and in the first part of this volume we have set out something of their development in the fourteenth century. We must now consider this in the fifteenth, and especially in Spain and France.

It is important to observe that while the Cortes of Castile and Leon did not meet every year, they met very frequently. It is not going too far to say that the Cortes in the fifteenth century continued to he, as in the fourteenth century, a normal part of the system of government.

It is also evident that the Cortes were clearly conscious of their representative character, and greatly concerned to maintain this. We find them repeatedly throughout the century protesting against any interference by the King with the election of representatives. In 1441 they demanded that the King, when he issued his summons to the cities and estates to send their Procurators to the Cortes, should not nominate any particular persons ; for the cities should elect freely according to use and custom. The King replied that he would not nominate any persons to be sent as procurators. In 1442 the Cortes of Valladolid renewed this demand even more emphatically, and added the very important claim that in the case of a disputed election the Cortes itself should consider and decide the question, and not the King or any other "justicia". The King again assented to their demand that he should not nominate any person for election, but his answer to the second point was, as we understand it, that in case of a disputed election they should ask his permission before determining upon it. In 1447 the Cortes again protested against the interference of the King, but on this occasion, though accepting the general principle, the King reserved his right to take such action on his own initiative, if he thought it desirable. In 1462 again the Cortes at Toledo demanded that the King,

Henry IV, should not interfere in the elections, and that any person who produced royal Briefs for his election in any city, should be perpetually disqualified for holding any office or "procuration" in that city. The King replied that this was already provided for by the laws, especially those of Juan II.

This jealous insistence on the freedom of the elections by the Cortes is of great significance, as we have said, in showing that they were much concerned to vindicate their representative character, and the fact that the Crown was evidently from time to time attempting to control the elections, is significant of the continuing importance of the Cortes.

We have in an earlier chapter considered the functions and authority of the Cortes with reference to legislation, and in the last chapter we have dealt with their authority in taxation, but it must be carefully observed that the Cortes did not conceive of their function and authority as limited to finance and legislation, but claimed that they should be consulted on all the more important affairs of the Commonwealth.

There is an excellent illustration of this in the early part of the century. The Cortes in 1419 represented to the King, Juan II, that when his predecessors ordained anything new or of general importance for the kingdom, they were accustomed to call together the Cortes and to act with their advice, and not otherwise; they complained that this had not been done since his accession, and that this was contrary to custom and law and reason; and they therefore petitioned him that he should do this in the future. The King replied that he had always done this in important matters, and that he intended to do it in the future.

In 1469 wo have a statement by the Cortes as emphatic as that of 1419. They protested to Henry IV against an alliance with England instead of with France, and represented themselves as aggrieved for several reasons, of which the first is important from our present point of view. They maintained that according to the laws of the kingdom, when the kings had to deal with any matter of great importance, they ought not to do this without the counsel of the principal cities and "villas" of the kingdom, and they complained that the King had not observed this, but had acted without the knowledge of the greater part of the grandees, and of the cities and "villas". It is true that the answer of the King was, as it seems to us, evasive; he only promised to consider their petition with his Council, and to take such action upon it as might seem best; but this dogmatic statement of the Cortes of their claim to be consulted on all important matters, and their assertion that this was in accordance with the laws, remains very important.

We turn to the character of the representative system in France in the fifteenth century, but we must again notice that in considering this we must remember not only the States General, but also the Estates of the great Provinces. If we could take account of them we should recognise more clearly the importance of the representative system in France, for though the meetings of the States General in the fifteenth century were important, the meetings of the Provincial Estates were, as we should judge, much more frequent.

What were the matters with which they were concerned? We have already dealt with some of these, especially legislation and taxation, but we must observe that, besides these, they were concerned with all the important affairs of the kingdom.

In the first part of this volume we have pointed out that the attitude of France to the great Schism in the Papacy was determined in some kind of great council of the kingdom.

It does not seem that we can call the Assembly, at which in 1408 it was determined that France should be neutral as between the rival claimants to the Papacy, a meeting of the States General, but it had at least something of the character of a National Assembly. The King speaks of the decision as being made after great and mature deliberation with the Princes of the Blood, the great Council and others, both clerical and lay.

We are on clearer ground when we observe that the Assembly summoned to meet in Paris in 1413 in the name of Charles VI, was composed of the Princes, Prelates, representatives of the

University, and those of the good towns. The business of this Assembly was to deliberate on the great affairs of the kingdom, and especially on the reform of the Royal officials.

In the Treaty of Troyes by which in 1420 Charles VI gave the actual administration, and the future succession to the French Crown to Henry V of England, it was specially provided that the Treaty was to be confirmed by the oaths not only of the great Lords, but also by those of the Estates of the kingdom, spiritual and temporal, and the cities and communities of the kingdom. In another clause of the Treaty it was provided that Henry was to endeavour to secure that, by the advice and consent of the three Estates of the two kingdoms, the union of the crowns of England and France in one person should be perpetual. It was no doubt in accordance with these provisions of the Treaty that the Three Estates were called together in Paris in December of the same year. We have unfortunately only an incomplete account of the proceedings in Juvenal des Ursins' 'Histoire de Charles VI', but if we could trust a document printed by Rymer in the 'Foedera', whose source is unknown, we have an important statement of the composition and proceedings of the Estates. They are described as composed of the Bishops and Clergy, the "Proceres", nobles, citizens, and burgesses. After the Chancellor had read the Treaty to them, and the King had declared that he had sworn to observe it, the Estates were adjourned for a few days, and on their reassembling they reported that they approved, accepted and authorised the Treaty and all its provisions.

To return to the legitimate government of France, we have a reference to a meeting of the States General at Chinon, in a letter of 1426. We have already dealt with the very important meeting of the States General at Orleans in November 1439, and we need only point out again that it was with the advice of the Estates that Charles VII created the new military organisation of France.

In April 1468, Louis XI called together the States General to deal with a great constitutional question; that was—the demand of his brother Charles that the Duchy of Normandy should be separated from the Crown of France, and held by himself. The Three Estates agreed that it could not be thus separated, but must remain inseparably united and joined to the Crown. It is also significant of the constitutional authority of the States General that on the same occasion, in view of the attacks made by the Duke of Brittany in Normandy, they gave the King authority to take such action as should be necessary to maintain the statutes and ordinances of the kingdom without waiting to call together the Estates.

It is, we think, evident that the States General in France were conceived of, not merely as a body which should sanction taxation, important though this was, but as, in some sense and degree, representing the whole community of the nation, whose approval and support it was desirable that the King should obtain in matters of great political importance. It is only with this in our mind that we can understand the constitutional attitude of the great States General of Tours which met in January 1484, on the accession of Charles VIII.

We have already dealt with some important questions which arose in the course of their meetings, and here, therefore, we only deal with some other of the most important of these. When the States General met, they conceived their function as being primarily to consider the abuses which had grown up during the last reigns, and secondly to consider and provide for the government of the country during the minority of the King.

The first they proceeded to deal with by arranging the Estates in six divisions, representing the six groups of provinces; each of these divisions was to prepare a statement of grievances and remedies. They then created a commission of six members of each division to prepare a general statement on this basis. We are not here concerned with the details of these statements, but it is important to observe that they covered almost the whole range of the government of the country, not only in matters of finance, but also of the administration of justice.

The question of the Council of Regency was the subject of protracted discussion. It is evident from Masselin's account that there was much difference of opinion among the members of the States

General, some maintaining that it was for them to appoint the Council, for the care of the State had now (in the King's minority) come to them, while others maintained that the appointment of the Council belonged to the Princes of the Blood. The final result seems to have been that the Estates did not maintain the right to appoint the Council of Regency, but they requested the King and his Council to add to it twelve persons, to be chosen from the six divisions of the Estates.

It is no doubt probably true that behind the controversy in the Estates about the composition of the Council of Regency, we can see the influence of different factions among the Princes and great nobles, but we are not attempting to write the history of the times.

We turn again to Commines and to his attitude to the States General. His opinions have a special value, not only because he was a man of great experience in political and diplomatic affairs, but because he was a great servant of the French Crown, and cannot be suspected of any desire to depreciate its authority. We have in the last chapter cited his important statements about taxation, but these are only incidental to his treatment of the importance of reasonable relations between the King and his subjects. It is not only with reference to taxation that he thinks that the King should act with the consent of his subjects. After the general condemnation of the attempts of kings to impose taxes upon their subjects without their consent, as being mere tyranny, which we have cited, he continues, that even in the case of war it was much wiser for kings to act after consulting the assemblies of their people, and with their consent, and that this would greatly increase the King's power. Commines is obviously referring to the Estates when he speaks of the assembly, and a little later on be speaks of them with special reference to the States General of Tours in 1484. He describes contemptuously certain persons who spoke of this assembly as dangerous, and denounced it as being treason (leze majesté) to speak of calling together the Estates, and argued that this would diminish the authority of the King ; such persons, he says, were really guilty of a crime against God and the King; they were men who held some undeserved authority, and talked thus foolishly, because they were afraid of the great assemblies, and feared that they would be known for what they were, and be censured. It is clear that Cornmines looked upon the States General, that is, the meeting of the representatives of the community, and its consultation by the King, as being a useful and normal part of the organization of a political society, necessary for taxation, and desirable for the effectiveness of public action.

We do not need to discuss in detail the character of the representative Assembly of the Empire, for it is clear that the Emperor was the bead of a political body which was tending to become a federal system rather than a unified monarchy, and that the final authority in this system belonged rather to the Diet than to the Emperor.

It is, however, important to observe the terms in which the Diet is described by Nicolas of Cusa. The Council of the Empire, he says, consists of the Emperor, the principal Rulers of the various provinces as representing these, and the heads of the great communities (Universitates); and, he adds significantly, when these are met in one representative body, the whole Empire is gathered together.

We may put beside this the terms in which at the Diet of Worms in 1495, a new Court of the Empire, the "Reichs Kammergericht", was established. Its creation was a part of the attempt made in the last years of the fifteenth century to reorganise the constitution of the Empire. The creation of this new Court is represented as being related to an attempt to establish a "Common Peace" for the whole Empire, and it vas with the consent of the Electors, Princes, Counts, Nobles, and Estates that the Peace and the Court were established. And it was with the counsel and will of the Diet that the Emperor was to appoint the judges of the Court.

We do not discuss the development of the representative system in the fifteenth century in England, for this has been done by the great historians, but it is worthwhile to put beside Nicolas of Cusa and Commines, some of those passages which we have already cited in which Sir John

Fortescue describes this, and also some observations on what he understood to have been its history in France.

He deals with it first in his treatise on the Law of Nature, where he treats the English constitutional system as embodying the "dominium politicum et regale", for no laws can be made, nor taxes imposed without the consent of the Three Estates of the Kingdom, while on the other hand the subjects could not make laws without the authority of the King. He deals with it again in the treatise, 'De Laudibus Legis Angliae', where he points out that the laws of England do not proceed from the mere will of the King, for laws which are made by the Prince alone might often be directed to his private advantage and turn to the injury of his subjects, while the laws of England are made by the wisdom and prudence of more than three hundred elected men, that is by the assent of the whole kingdom, and for the good of the people.

In his 'Government of England' Fortescue contrasts the unhappy condition of the French people under a "Dominium Regale" with that of the English under a "Dominium Politicum et Regale", as he had done in his 'De Laudibus Legis Angliae', but he also says that though the French King now reigned "Dominio Regali", this had not always been so, for neither St Louis nor his ancestors imposed taxes on the people without the assent of the Three Estates, which were like the Parliament in England, and this had continued till the time of the wars of England against France.

We have, we think, said enough to justify our own conclusion that that representative system whose beginnings in the twelfth and thirteenth centuries we have traced in the last volume, and whose continued importance in the fourteenth century we have illustrated in the first part of this volume, continued to be a normal part of the political civilisation of Western Europe in the fifteenth century. As we have often said, we are not writing a constitutional history of Europe, and we are only concerned with the representative system as illustrating the conception that political authority was understood to be the authority of the community, primarily indeed through the law which was the expression and the form of its life, but secondarily and in these later centuries especially, as embodied in the Assemblies, Estates, or Parliaments which were accepted as representing the whole community.

We have examined the political and legal literature of the fifteenth century, and we have compared it with the constitutional practice especially of Spain and France, and we think that it is clear that there is little trace of the development of any political conceptions which were different from those of the fourteenth century, or of the Middle Ages. It seems to us evident that the political thought of the time was still dominated by the conception of the supremacy of law and custom, that is, if we use the rather unhappy terms of some modems, it was not the Prince, but the Law, which was conceived of as sovereign.

The Prince was indeed thought of as august, and was treated with profound deference and respect, but he was not absolute, and his authority was derived from the community. His authority was limited and even terminable if he violated the laws and liberties of the community.

It is true that when we turn from the general political literature to the Civilians we find that they generally represented another mode of thought, and we have come across a few statements of the theory of "Divine Right", in the fourteenth and fifteenth centuries, but there is very little evidence that these absolutist theories had any appreciable influence on the general character of the political ideas of the fifteenth century.

PART III
THE EARLIER SIXTEENTH CENTURY.

CHAPTER I.
THE THEORY OF A LIMITED MONARCHY.

We have so far considered the character of the political theory of the fourteenth and fifteenth centuries, and its relation to the actual constitutional conditions of some of the greater European countries. We have now to examine the question how far, and in what respects, we can trace the appearance and development of any new and important political conceptions in the sixteenth century. We have to consider how far the great political and religious movements of the century, or that great but indefinable movement which we call the Renaissance, may have brought with them new conceptions of the nature and principles of political society and authority. If, however, we are to approach the subject seriously, we must begin by putting aside all preconceptions and must not allow our judgment to be swayed by any traditional notions, or assume that those great movements were or were not important in the development of political ideas or principles.

We have a work of the early years of the sixteenth century which is of the highest importance both as representing the experience of the past and as anticipating future developments. This is the work entitled 'La Grant Monarchie de France', which was written in the first quarter of the century by Claude de Seyssel, the Archbishop of Turin, who, though a noble of Savoy, had been for many years, from 1497 to 1517, in the service of the French Crown, under Louis XII. It is the work, therefore, of a man who had a large practical political experience, and though it may be described as a work of political theory, it is rather of the nature of the recorded observations of a practical statesman on what he had seen.

This is indeed a remarkable work, both for its shrewd and penetrating observation of the actual character of the political system, and for the sharp contrast it presents to the work of another important French writer, of the latter part of the century, that is the ' De la République' of Jean Bodin, first published in 1576. Wo shall have much to say about this in a later chapter, but we may at once contrast Bodin's dogmatic and abstract conception of the nature of the political authority, which he calls "Majestas", which we should call Sovereignty, with the cautious and tentative conception of de Seyssel, that in the actual fact of human experience, political authority is conditioned and limited by forces, sometimes intangible, but none the less real.

At the outset of the work do Seyssel says that the French monarchy was the best of all monarchies, because it was neither completely absolute, nor too much restrained; it was regulated and restrained by good laws, ordinances, and customs which were so firmly established that they could scarcely be broken. The absolute power of the kings of France was regulated by three restraints (freins), Religion, Justice, and what de Seyssel calls "la police". In a later passage he says that it is by these "freins'' that the absolute power of the monarch, which is called tyrannical when it is exercised against reason, is reduced to "civilité", and if he sets aside these limits, and follows his uncontrolled will, he is held to be an evil tyrant, cruel and intolerable, and earns the hatred of God and of his subjects.

We must consider these "freins" a little more closely. About Religion he does not say much which is of importance for our present subject except that the people would hate the king if he were notoriously irreligious, and would hardly obey him. Of the second, "la justice", he has much to say which is of the greatest importance. This, he says, was more highly developed in France than in any other part of the world, under the form of the "Parlemens" which had been created chiefly for the

purpose of restraining the absolute power which the king might desire to exercise. In respect of distributive justice the kings had always been subject to this, so that in civil matters every man could obtain justice against them, just as much as against other subjects, and the king's letters and rescripts are subject to the judgment of the "Parlemens". In regard to criminal matters the kings' "graces et remissions" are subject to such discussion in these courts, that few would venture to do evil in hope of them.

And then, lest it should be imagined that judges are after all under the king's control, he adds that their office was not temporary but perpetual, and that the king could not remove them "sinon par forfeiture", and that judgment upon thorn belonged to the courts themselves. And thus, the judges, knowing that they could not be removed, except for a definite fault, can give themselves with more confidence to the administration of justice, or are inexcusable if they do not do so. The significance of this will be obvious to all who remember the importance of the principle of the mediaeval constitutional system of the supremacy of the law and the courts over the prince.

We must turn to de Seyssel's treatment of the third "frein" upon the royal authority in France, that is, "la police". It is difficult to define in precise terms what he means by this, but it would appear that he uses it to describe the system and order of the State (probably as equivalent to "Politia"). He describes, as belonging to it, first the laws and ordinances which had been made by the kings themselves, and confirmed from time to time, and which tend to the preservation of the kingdom. These had been observed for so long a time that the princes do not attempt to "derogate" from them; if they did, they would not be obeyed. He returns to the subject in a later chapter, when he says that the king knows that it is by means of the laws, ordinances, and laudable customs of France concerning the "police", that the kingdom has come to its greatness, and the king must keep them and cause them to be kept, to the utmost of his power, remembering that he is bound to do so by the oath which he swore at his coronation. If he were not to do so, he would offend God and his own conscience, and would incur the hatred and ill-will of his people.

This, however, is not all that de Seyssel treats of under "la police". There are, he says, three estates in the kingdom besides that of the Church—the nobles, the middle classes (le peuple gras), and the lower classes (le peuple menu), and each of these has its own "preheminences" according to its quality, and these must be carefully preserved.

In the second book of the treatise he goes on to say that the king should take counsel, and he describes the Great Council, which he distinguishes from the ordinary Council. The Great Council is composed of the good and notable men of the various estates, both secular and ecclesiastical, the Princes of the Blood, the Bishops, the chief officers, and, if the business is important, the Presidents of the Sovereign Courts (Parlemens), the principal counsellors of those courts, and other wise and experienced persons. This is not a body which should be called together frequently, but only when there are some grave and important matters to consider, such as the declaration of war, the making of laws and ordinances for the whole kingdom, and other like matters. He adds, a little grudgingly apparently, that it is sometimes expedient to summon to the Council some small number of men from the most important cities of the kingdom.

It will be observed that this can hardly be described as the "States General", it is more of the nature of an Assembly of Notables, and it is evident that de Seyssel had no great interest in strictly representative institutions, but he is clear that the king should be advised by a body of men who represented the political intelligence of the community.

We have said enough to indicate why it is that this treatise is of great importance, for it expresses the judgment of an experienced officer of the French Crown on the nature of what we should call the constitutional system of France. It is evident that its emphasis lies just on those principles of political order which had been most characteristic of the Middle Ages, that the king was controlled by the Law, and that in all matters concerning the rights of his subjects he could only act

by process of law and in the courts. If de Seyssel does not express the first principle in the precise terms of Bracton or Fortescue, his meaning is clear, and the second principle is stated by him in terms which are not far removed from those of Magna Carta and the great Feudal Lawyers. It is indeed the confidence with which he affirms the complete independence of the courts from the authority of the king, which is most remarkable.

It is interesting and important to observe that the most famous political writer of the sixteenth century, that is, Machiavelli, made some observations on the government of France, which correspond in important points with the opinion of do Seyssel. In one place in his Discourses on Livy, he contends that when a people knows that the prince will not on any account violate the law, they will live secure and contented, and ho gives as an example the kingdom of France which lives in security because the kings were bound by many laws which formed the security of all their people. In another place he points out the good effects in France of this; that kingdom lived more completely under law than any other, for their laws were maintained by the Parlements, and especially by that of Paris, which would deliver judgment even against the king.

These conceptions of the nature of the French monarchy may seem at first sight rather strange; they do not correspond with the impressions of Sir John Fortescue, as we have seen, but after all de Seyssel was in a better position to judge the real nature of that government than an observer in England, however intelligent he might be.

It is clear that in the judgment of de Seyssel the French monarchy was a monarchy limited by law and custom. We shall have to consider the development of the theory of an unlimited monarchy, so far as it is to be found in the sixteenth century, but it is clear that it was unknown to de Seyssel.

CHAPTER II.
THE SOURCE AND AUTHORITY OF LAW.

We have, in the last chapter, drawn attention to the work of de Seyssel, because it seems to us important as representing the judgment of a man of affairs, an experienced official of the French Crown, on the real nature of the government of France. Our task is, however, to examine the political theory which lay behind the actual institutions of European society, and we must therefore turn to a more detailed examination of the various aspects of this.

We must begin with an examination of the theory of the nature, the source, and the authority of law. As we have often said, and we are convinced that it is a right judgment, the supreme authority in the Mediaeval State was the Law, not the prince, and as we have seen in the earlier parts of this volume, this continued to be the normal judgment of the fourteenth and fifteenth centuries; we must now consider whether this continued in the sixteenth century, or how far it gave place to that theory of the supremacy of the monarch which became common in continental Europe in the seventeenth and eighteenth centuries.

We have not found, in the literature of the earlier part of the century, very much discussion of the nature of law in general, but there is enough to indicate its general character, and to illustrate the continuance of the tradition of St Thomas Aquinas. Wo find examples of this in the work of an eminent English Jurist, St Germans, writing about 1539, in that of the Dominican Professor of Salamanca. Soto, who had been the confessor of Charles V and in that of Calvin.

St Germans' work is in the form of a dialogue between a Doctor of Civil Law and a Student of English Law, and he begins with a brief statement by the Doctor on the first and general principles of all law. The Eternal Law, he says, is nothing else but the supreme reason of the Divine Wisdom, by which God wills that all things should be moved and directed to their good and proper end.

God reveals the Eternal Law to the rational creature in three ways: first, by the light of the natural understanding; secondly, by Divine Revelation; and thirdly, by the reason in the prince or other ruler, who has power to impose law upon his subjects. The "Lex Naturae" is that which belongs to the rational human being; the "Lex Divina'' directs men to eternal felicity; while the "Lex Rationis" directs men to felicity in this life. The "Lex Humana", in order to be just, requires two things in the legislator: "prudence", that he may direct the community in accordance with right practical reason; and authority, for he must have authority to make law. The Lex Humana will be called just, "ex fine", when it is directed to the common good, "ex authore" when it does not go beyond the authority of him who made it, "ex forma" when it imposes burdens on the subjects in due proportion to the end of the common good, for if these burdens are unequally imposed upon the multitude, the law, even if it is directed to the common good, will not be binding upon men's consciences. He adds finally, that, as Aristotle had said, it is better that all men should be ruled by a certain and positive law, than that the judgment should be left to man's will.

It is not necessary to illustrate at length the relation of the general theory of law in Soto to that of St Thomas Aquinas, as it is obvious that in his treatise, 'De Justitia et Jure', he was illustrating and expounding the principles of St Thomas; as, however, the question of the continuity of these conceptions is highly important in the history of political theory, we may take note of a few passages.

The Eternal Law of God is, he says, nothing else than the eternal reason by which he governs the whole world; and the Eternal Law governs man by the Natural Law, which is a participation of it. The Natural Law is written in man's mind, without any process of argument; the Jus Gentium is derived from it by a process of reasoning, but without any assembly of men; while the Civil Law is

derived from the judgment of men assembled in Council, that is, from the Commonwealth or from him who is its Vicar, and has its authority.

The general correspondence of these principles of St Germans and of Soto with these of St Thomas Aquinas is obvious.

The terms in which Calvin states his general conception of law are not formally the same, but it appears to us that they are not substantially very different. The Moral Law which is the true and eternal rule of justice is binding upon men in all places and times, who desire to order their lives by the will of God. Subject to this, every nation is at liberty to establish laws for itself, as it finds best; they may vary in form, but they must have the same principle (ratio). This, he says, will be done if we will distinguish between law and equity (aequitas) upon which law depends. Equity, because it is natural, is the same among all men; constitutions (*i.e.*, positive laws), because they are determined at least in part by particular circumstances, may well differ, so long as they are directed to the same end, of equity. The Moral Law of God is nothing else than the testimony of Natural Law, and the whole principle of equity is contained in it.

We must turn to the consideration of the Positive Law of the State or Commonwealth, and we begin by discussing the conception of the nature of this, as it appears in the proceedings of the Cortes of Castile and Leon, in the last years of the fifteenth century and the first part of the sixteenth. The Introduction, or Preface, to the proceedings of the Cortes, called by Ferdinand and Isabella at Toledo in 1480, seems to us to set out very clearly the recognised principles of the method of legislation. The Sovereigns, it says, have found it necessary to provide for the circumstances of the time, by making new laws, as well as by securing the execution of the old ones, and they have therefore summoned the "procurators" of the cities and "villas" of their kingdoms, not only to take the oath to their eldest son, but to provide by legislation for the good government of the kingdoms. The "procurators" have presented various petitions, and in accordance with these petitions Ferdinand and Isabella, with the consent of their Council, order and establish the laws which follow.

This seems to us to be a very clear recognition of the necessity of consulting the Cortes before legislation and a statement of the normal method of such legislation.

In the proceedings of the Cortes, which met at Valladolid in 1506, under Queen Juana, we have an explicit statement of the same principle. The Cortes maintained that the former kings had laid it down that when new laws had to be made, the Cortes should be summoned, and it was then established by law that no laws could be made or revoked except in Cortes, and they therefore petition that from henceforth this rule should be kept. They complain that many "Pragmatics" had been issued without this process, by which the kingdoms felt themselves aggrieved, and ask that these should be revised and the grievance removed. The Queen assented to the petition. This statement of the proper method of legislation is not only important in itself, but as affirming that this was traditional and legal.

With this wo may compare a clause in the proceedings of the Cortes of Valladolid in 1523, in the reign of the Emperor Charles V. This provides that the answers made by the King (Charles V) to the petitions of the Cortes were to be registered (yncorparados) and observed and executed as laws made and promulgated in Cortes. And again we may compare a petition made by the Cortes of Madrid in 1531, and accepted by Charles V, that the "Capitula" made in former Cortes, and in the present one, were to be held as laws, and put together in one volume with the laws of the "Ordinamiento", and that a copy of this was to be kept in every city and "villa". It seems to be clear that in Castile, in the early sixteenth century at least, it was assumed as a normal constitutional principle that legislation was a function not of the king alone, but of the king in, and with, the Cortes, as the representative body of the kingdom.

It is equally clear that the King of Castile had no authority to ignore or set aside the laws. We find repeated examples of the tenacity with which this principle was held, in the repeated protests

made by the Cortes in the sixteenth, as in earlier centuries, against the issue of royal briefs which interfered with the ordinary course of justice. At Valladolid in 1518 and 1523 the Cortes petitioned King Charles V to revoke all "Cartas e cedulas de suspenzyon" whether granted by himself or by the Catholic Kings (Ferdinand and Isabella), and not to issue them in the future. The King complied with their request, and this was repeated in the Cortes of Madrid in 1534.

When we turn from Castile to England it is obviously unnecessary to illustrate in detail the normal methods of legislation. We have, however, a very important discussion of the subject in that most interesting treatise on English Law by Christopher St Germans, to which we have already referred in dealing with the theory of the nature of law in general.

This treatise is in the form of a dialogue between the "Doctor", that is, the Civilian, and the "Student", or representative of English Law, who gives an account of the nature of this. He enumerates the six foundations of English Law—the Law of Reason, the General Customs of the Country, certain "Principia" which are called "Maxima", certain particular Customs, and, finally, the Statutes made by the Common Council of the Kingdom, that is, the Parliament.

One of the most important aspects of St Germans' work is his treatment of law as custom, for he includes under this not only the general customs of the country and the particular customs of different localities, but also the "Maxims" of the courts, for he says of these that they might be reckoned among the general customs of the kingdom—their sole authority was ancient usage.

He defines the general customs as being those which from ancient times had been used by the king and his councillors, and had been accepted and approved by their subjects. These are neither contrary to the Divine Law, nor to Reason, and as they are considered to be necessary for the common good of the kingdom, they have the force of law, and it is these which are properly called the common law (Lex Communis). It is the judges who decide what are general customs, and it is these, together with the "Maxims", which form the greater part of the law of England, and the king, therefore, at his coronation, swears that he will faithfully obey them.

The fifth foundation of the law of England St Germans finds in the local customs of different parts of the country, and these have the force of law even against the general customs and maxims, inasmuch as they are not contrary to Reason and the Divine Law. They are determined not by the judges but by the "Patria", and he cites as examples the customs of Gavelkind and Borough English.

It is deserving of notice that St Germans maintains that it is from custom that the great Courts, the Chancellor's, the King's Bench, the Common Pleas, the Exchequer, and also certain lesser Courts such as those of the manor and the county, have their origin and authority; there is, he says, no written law concerning their institution, but they belong to the ancient custom of the country and could not be changed except by Parliament. And it is equally important to notice that he maintains that it was by the custom of the kingdom that no one could be judged except according to the "lex terrae". This custom was confirmed (not made) by Magna Carta.

Finally, St Germans states the sixth foundation of English law as consisting of various statutes made by the king and his ministers, the Lords Spiritual and Temporal, and the "Communitas" of the whole kingdom in Parliament, when the Law of Reason and the Law of Customs and Maxims are not sufficient.

St Germans' treatment of English law is then highly important for several reasons. He has the same conception as Bracton that law is not primarily an enactment, but a custom; and while he is clear, with Bracton and Fortescue, that the deliberate judgment and will of the whole community, the king and nobles, with the representatives of the people in Parliament, can make laws, and can change ancient customs, it is only the whole community which can do this; the king has indeed his part, but he cannot legislate alone.

When we turn to France, the evidence is more complicated, especially for the reason that in France we must always take account of the Provincial Estates as well as of the States General.

We may at once notice some references to the customs and constitutions of the great provinces. In the Letters Patent, issued in 1498 by Louis XII on the occasion of his marriage with Anne of Brittany, he confirms the rights and liberties of the Duchy, and assures them that if there were good reason for making some change in their customs and constitutions, it should be done by the "Parlements" and assemblies of its Estates as had always been the custom.

In the Ordinances issued by Louis XII in 1499 for the reorganisation of the Exchequer Court of Normandy, it is said that for this purpose he had summoned an Assembly of prelates, barons, lords, the greater part of the "Baillifs" of the province, and the men of the three Estates. In 1501 Louis XII issued an ordinance about "Weights and Measures" in Languedoc, after deliberation with his Council, by his full power and royal authority, but it should be observed that he does this on the petition of the three Estates of Languedoc.

Perhaps, however, the most significant reference to the nature and source of law in France is contained in the Ordinances of Charles VIII and Louis XII, providing for the collection and publication of the customs of the different parts of the kingdom. Charles VIII in 1497 appointed a Commission to collect, correct, and adapt these customs, but they were to be collected with the advice of the men of all classes in each district, and to be published with the consent of the three Estates of each district or the larger and wiser part of them. In 1505 Louis XII again appointed a Commission to carry this out, for it apparently had never been completed. The three Estates were to be called together in each Bailliage, and the king declared by his full power and royal authority that the customs, as agreed upon by these Estates, should be perpetually kept and observed as laws.

This treatment of the customs of different parts of France, as determined by the representatives of the different localities and acknowledged as laws by the king, would seem to show that in France, even in the sixteenth century, the source of legislation must not be thought of as being simply the royal authority.

We must, however, notice that we find some indications of another conception of the relation of the King of France to the law. There is a well-known declaration of the President of the Parlement of Paris made in the year 1527 at a "Lit de Justice" held by Francis I. The occasion of this was a complaint made by the Parlement about the evocation of cases, which had been brought before it, to the Great Council of the king. The President maintained that this was an innovation of the reign of Louis XI, which had been condemned by the States General of Tours in 1484; but, he went on to say, the Parlement did not intend to throw any doubt upon the royal authority; this would be a kind of sacrilege, for they knew well that the king was above the laws, and that laws and ordinances could not constrain him. They did, however, intend to say that the king ought not to do anything that he had the power to do, but only that which was reasonable, good, and equitable—that is, Justice. The king commanded the Parlement not to meddle with anything except matters of justice, and not to impose any modifications upon royal ordinances, edicts, or briefs.

We find, however, another example of the relation of the King of France to the law, in a letter of Louis XII of December 1499, which expressly forbade the Parlements of Paris, Toulouse, and other Courts to pay attention to any dispensation which he might grant from the terms of the Ordonnance for the administration of justice, which ho had issued in March 1499. They wore to ignore such dispensations, and in virtue of the authority of this Declaration, to annul them, as he himself now declared them annulled and revoked. This is clearly parallel to similar provisions in Spain.

CHAPTER III.
THE SOURCE AND NATURE OF THE AUTHORITY OF THE RULER.

With the principles of the nature and supremacy of the Law, which we have considered in the last chapter, in our minds, we can now turn to the conception of the source and nature of the authority of the Ruler or Rulers, as we find it in the earlier part of the sixteenth century in France, in Italy, in Spain, and in England.

One of the most interesting writers, for our purpose, is James Almain of Sens, whose work seems to us to have been somewhat overlooked. Little seems to be known of him, except that ho was a teacher in the College of Navarre in the University of Paris, and that ho received the Doctor's degree in 1511 and died in 1515.

In various treatises he dealt not only with the particular question with which we are now concerned but with the whole nature of political society and authority, and in order to do justice to his principles we must take some account of his political theory as a whole.

He distinguishes between that "Dominium Naturale" which was given to men by God over all things, and the "Dominium Civile" which was added after sin came into the world, by which man has "civil" property and "jurisdiction", that is, the authority to use the material sword.

It is interesting to observe that Almain represents the Stoic and Patristic conception of the origins of political society, for he thinks of political authority and property as consequences of sin.

This does not, however, mean that Almain denied that political society and authority were of Divine institution. On the contrary, he insists dogmatically in another treatise that the lay power was just as truly derived from God as the ecclesiastical. The sacred character of political institutions was not confined to Christian communities, and he repudiates contemptuously and as savouring of heresy the theory, which he attributes to Innocent, that there was no legitimate political authority outside of the Church. Political society and authority were then in the view of Almain consequences of sin, but also, as the Patristic tradition held, a Divine remedy for sin.

Almain had, however, no belief in the absolute King, or in the "Divine Right" of the monarch. On the contrary, he develops the conception of the constitutional authority of the Community very dogmatically. In the treatise which we cited first he maintains that a Community of men, united with each other to form one body, has by natural law the power of removing, even by death, any person who disturbs the Community; and no Community can abdicate this power any more than the individual can renounce his right of self-preservation; the prince cannot slay any man by his own authority; as William of Paris had said: the "dominium jurisdictionis" of the prince in relation to the Community is a ministerial authority, as the authority of the priest is in relation to God. The Community cannot renounce the authority which it possesses over the prince whom it has established, and by this authority it can depose him if his rule is not for edification, but for destruction, and he cites a gloss on the "Decretum" of Gratian. He concludes that the Community cannot in any case bestow a monarchy, "pure regalis", that is, a monarchy in which one alone rules, and is subject to none.

The same conception of political authority, as not merely derived from, but inherent in the Community, is repeated by Almain, in the first chapter of his work, 'De Auctoritate Ecclesiae', where he adds a more developed statement of the principle that the prince has no authority of himself, nor from God immediately, but only from the Community. In the first chapter of his work, 'De Potestate Ecclesiastica et Laica', he affirms in more general terms that the secular power is derived from the people, whether it passes by hereditary succession or by election; in some exceptional cases God may have bestowed it upon some man, but, regularly, God does not do this. In

another place in this work he asserts, incidentally, that the legitimate kingdom in France was established by the agreement of the people.

These conceptions of Almain are obviously very significant; he does not merely repudiate the theory of what we call the "Divine Right", but he looks upon political authority as properly inherent in the Community, in such a sense that it is really inalienable, and that an absolute monarchy cannot properly be created by the Community. The Community always has such authority over the prince whom it has created that it can depose him if his rule is for destruction, otherwise it would not have power adequate for its self-preservation. It was this authority which the Community of the Gauls used when they deposed the king (Chilperic), not so much for any crime as because he was incapable. And it was the same authority which the Israelites used against Rehoboam, for even when God had given authority immediately, as seems to have been the case with Saul and David, such princes remained subject to the whole Community if they used their authority to the destruction of the Community.

This does not mean that Almain was an enemy of monarchy. In another treatise he cites the usual definition of the various forms of government, but adds that of these the best is the monarchy, the worst what he calls the "Censupotestas". And again he adds that there is no form of government which may not be changed into another, for the form of government belongs to the "Jus Positivum". A little further on, he goes some way towards defining what he understood by the monarchy. A monarchy is that form of government in which normally one man rules, but this does not mean that there is no assembly which is over him, and can depose him, but while in the "Communitates" the assembly is constantly in being, and ruling, that is not so in the monarchy.

In a later passage he sums up some of the functions and limitations of the best prince. He is to render to every man what belongs to him, that is, to administer justice, to establish law, to appoint the inferior judges and officers, but especially to correct and punish the transgressors. The prince must rule for the common good, he must remember that he reigns over free men and not slaves; it is inconsistent with the best princely authority that ho should have absolute power (plenitudo potestatis), that is, that he should have authority to transfer one man's property to another, without fault or cause, or to do whatever he pleases, so far as it does not conflict with the laws of nature and of God.

It is perhaps worth while to notice that Almain in the same chapter represents the person whom he cites as "Doctor" as saying that it was not inconsistent with the best "principatus" that there should exist in the Community a juridical (legal) authority, which in no way depends upon, or is created by, the Supreme Prince; and he mentions, as an illustration of this, that, in some countries, in Aragon, as it is said, there are jurisdictions which the king does not create but which descend by hereditary succession; the sons succeed the fathers as judges and the king cannot deprive them of their authority; rather, they are over the king, in respect of this jurisdiction.

The whole position of Almain is exceedingly interesting. He has the same preference for the monarchy as that which we normally find in the medieval world, but he is also quite clear not only that the source of political authority is the Community, hut that the ultimate authority always remains in it and must in the nature of things do so, and though the monarchy is the best form of government, it is strictly limited by the purpose for which it exists, the furtherance of the common good and the maintenance of justice; an absolute monarch is to him impossible.

The character of the political theory of John Major is very close to that of Almain; indeed, it would seem that he was either directly influenced by Almain or that they were both under the influence of some common tradition. John Major was a Scotsman, but taught for many years in the University of Paris, and the work with which we are now dealing was apparently published in 1518. It is primarily concerned, like those of Almain, with the ecclesiastical questions of the relation

between the Pope and the General Council, but we are here only concerned with its political principles.

The king has no authority except that which is derived from the kingdom, for he himself or his first predecessor was elected by the people; the king is over every individual person in the kingdom, but he is not over all the kingdom, "regulariter et casualiter", he is "regulariter" over the whole kingdom, while the kingdom is over him "casualiter". This is sharply stated, but the principle is even more completely expressed in another passage. The King of France is over all France, but the "praecipua pars" from which he derives his authority is over him, and can depose him for reasonable cause. The people is "virtualiter" over the king, and in difficult matters the three Estates of the Realm are called together and direct him, and a free people has the power, for reasonable cause, to alter the form of the Constitution.

He expresses the same principle again in another place. In France and Scotland it may be said that the supreme power is in the king, but it would be better to say that there are two powers of which one is supreme and more unlimited than the other. In the kingdom and in the whole free people there is a supreme power which is the ultimate source of all authority, and which cannot be abrogated, while the king holds a power, honourable, indeed, but ministerial.

It is interesting to compare the position of Almain and John Major with that of Machiavelli in Italy. We are not here discussing the character and significance of his discussion of statecraft in the administration of government as it is set out in 'The Prince'. Indeed, we venture to say that there is but little relation between this and the history of the development of political civilisation as embodied in the laws and institutions of the countries of Western Europe.

It must not be thought that we are undervaluing the importance of Machiavelli in history, or attempting to estimate the significance of his penetrating analysis of the forces which, rightly or wrongly, consciously or unconsciously, have determined in so great a measure the relations of the autonomous Communities of Europe; but the history of these relations does not come within the scope of this work, and it would be absurd to discuss them merely incidentally. We deal, therefore, with certain aspects of his political theory which are to be found mainly in the 'Discourses on Livy', and these are for our purposes very interesting and significant.

Machiavelli sets out the traditional definition of the three good forms of State, Monarchy, Aristocracy, and popular government, and their three corrupt counterparts, the Tyranny, the Oligarchy, and the corrupt Democracy. He adds that the good forms of government had a fatal tendency to turn into the corrupt ones, and points out that the wise founders of States had therefore endeavoured to establish a constitution which had something of all the good forms, something both of monarchy, aristocracy, and popular government; and he cites, as examples, Sparta and Rome. This conception of the virtue of a mixed constitution was, as wo have seen, not only known to the ancient writers, but was also current among the medieval.

We come to a more complex subject when we endeavour to ascertain what it is that Machiavelli meant by Liberty. He looks upon it as being among the chief ends of government; in one place he says expressly that to those who ordered the Commonwealth with prudence, among the most necessary things was the establishment of a protection for liberty.

What liberty meant to Machiavelli is not easy to define, but it is possible to arrive at some conclusion as to his meaning by putting together various passages. The words we have just cited are followed by a discussion of the question whether it is better to entrust the protection of liberty to the nobles (Grandi), or to the people (Populari); and he concludes that it is clearly better to put it in the hands of the people, for the nobles desire "dominare", while the people only desire not to be dominated, and have therefore a greater desire to live in freedom.

Machiavelli does not, so far as we have seen, relate the conception of liberty directly to that of the supremacy of Law, but we may reasonably judge that he implies it. He compares the character of

the good Ruler, who lives according to the law, with that of the tyrant, and in another place he says that Tarquin was driven from Rome, not because Sextus had violated Lucretia, but because he had broken the laws of the kingdom and ruled as a tyrant, and had thus deprived Rome of that liberty which it had possessed under the earlier kings.

Machiavelli certainly looked upon the subordination of the Rulers to the Law as a matter of the first importance to a free Commonwealth. We have pointed out in a previous chapter that Machiavelli refers to France as an example of the good results of this, and we repeat this here. The kingdom of France lives in security, for the kings are bound by many laws. Those who ordered that State provided that the king should have the control of arms and money, but that in all other matters they should only act as the Laws directed. In another place he deals with this in more detail, and points out how good was the effect in France, that that kingdom, more than any other kingdom, lived under the control of the laws. The "Parlemens", and especially that of Paris, enforced these, and even delivered judgments against the king.

It seems to us to be clear that Machiavelli held that the prince should be subject to the Law, and that he related this to the conception of liberty.

Wo find also in Machiavelli a very interesting discussion of the ultimate foundations of a healthy political system. He contrasts the success of Rome, in establishing and maintaining liberty after the expulsion of the Tarquins, with its inability to restore it when the opportunity was given by the deaths of Caesar, or Caligula, or Nero, and he contends that the reason of this was that in the time of the Tarquins the Roman people was not yet corrupt, while in the later times it was most corrupt. And he adds that the same thing could be said of his own time. Nothing, he says, could ever restore liberty in Naples or Milan, the corruption of the people had gone too far, and this could be seen in the fact that, on the death of Filippo Visconti, Milan wished to recover its liberty, but could not maintain it.

We must not, indeed, interpret Machiavelli's conception of the corruption of the Community as related to what wo should call private morals; it has reference rather to what wo might call public spirit and honour. The importance of Machiavelli's conception, from the point of view of our subject, is that he is clear that the prosperity of a State and the character of its government depends in the long-run on the qualities, not merely of the Ruler but of all the members of the Community.

The truth is, that though he asserted the principle that the mixed or tempered constitution was the best, he held that the people as a whole, if they accepted the control of the Laws, were wiser and more prudent and less variable than a prince. In one chapter he discusses at some length the opinion of Livy and other historians that the multitude is inconstant, and declares that this might be said equally of princes, when they are not restrained by the Laws. A people which is well ordered will be constant, prudent, and grateful as much as, or more than, a prince, even a wise prince; while a prince, who is not subject to the Laws, will be more ungrateful, more variable, and more imprudent than the people. There is some ground for the comparison of the voice of the people to the voice of God.

The people is much wiser than the prince in the appointment of the magistrates, and is more constant in its opinions. The, truth is that the government by the people is better than that of the prince; if we compare the government of a prince bound by the Laws with that of a people equally bound, there is more excellence (virtu) in the people than in the prince; while, if we compare the errors of the prince with those of the people, the errors of the people are fewer and less serious, and more easily remedied. The truth is, Machiavelli adds, that the common depreciation of the people arises from the fact that everyone speaks evil freely, and without fear, of them, even when they govern, while of princes, men only speak with fear and deference.

It is clear that Machiavelli's political conceptions, as represented in the 'Discorsi', are related primarily to the tradition of the Italian City States, but it is significant that he represents the same

position as other mediaeval writers, that the foundation of a civilised political life is the supremacy of Law.

We turn to Spain, where we find in Soto a writer whose work was not indeed published till after the middle of the century, but who seems to us to belong in character to its earlier part; for ho does not seem to be affected by the great political movements of the latter part of the century. Indeed, the work of Soto is in the main a careful restatement of some of the principles of St Thomas Aquinas, with occasional modifications, no doubt.

We have already noticed Soto's conception of Law in general; we are now concerned with his conception of the prince. Kings, he says, do not derive their authority immediately or directly from God, except in some special cases, such as those of Saul and David; they are normally created by the people, and their authority is derived from the people. Such words as those of the Proverbs, "By me kings reign", only mean that God, as the source of Natural Law, has granted to mortal men that every Commonwealth has the right to govern itself, and if reason, which is itself an inspiration (spiramen) of the Divine, demands it, to transfer its authority to another.

The authority of the king is, however, conceived by Soto as being very great. In a passage dealing with the practice of selling public offices, he is met with the contention that the king cannot do this, for he is merely "dispensator officiorum"; he emphatically disputes this, and says that the king is not merely a "dispensator", but he is the Respublica, not a mere vicar of the Respublica, like the Doge of Venice. The people, in Ulpian's phrase, has conveyed to him all its authority and force, and neither he nor his heirs can be deprived of this, except for manifest tyranny. Therefore, the kingdom is his, as the house of a private citizen belongs to the citizen, and every power and right (Jus) of the Respublica belongs to him. Only, the Respublica was not made for him, but he for the Respublica, and he must therefore consider everything from the point of view of its good. In another passage Soto speaks of the power of the prince in making laws; and says emphatically that he is superior, not only to all individuals, but to the whole State.

It should be observed that with all his emphasis on the authority of the king, he is equally clear that he must use it for the good of the State, and if he uses it tyrannically he may be deposed. This is not merely an incidental judgment, but is carefully developed, with due qualifications, in another passage, where he discusses the question of tyrannicide. He makes a distinction, with which we are by this time familiar, between the tyrant by usurpation and the tyrant by practice. As to the first there is no doubt; he may be slain by anyone, for he is making war on the Commonwealth. The case of the second is more difficult, as he has a lawful right to the kingdom; he can therefore only be deprived of this by public judgment, but when this has been pronounced, anyone may be appointed to carry it out. If the Commonwealth has a superior, ho should be requested to provide a remedy, but if there is none, the Commonwealth may take arms against the tyrant. It is noteworthy that he interprets the Decree of the Council of Constance concerning tyrannicide as referring to the action of a private person. It is clear that, with all his reverence for the authority of the king, Soto holds that, as it is derived from the Community, he may justly he deprived of it by the Community if he uses it unjustly and tyrannically.

Soto's treatment of the relation of the king to the Law is rather different. He discusses this in detail in a chapter in which he asks whether all are subject to the Law, and points out the difficulty raised by the words of St Paul, "Law is not made for the righteous man", and by those of Ulpian, "Princeps legibus solutus est". We cannot here enter into his discussion of the first passage, but his observations on the second are important for our purpose. The prince is subject to the directing force (vis directiva) of the Law, but is not subject to its coercive force; this, he says, is obvious, for he cannot apply force to himself; the prince should not, however, think of this as a privilege, but rather as an unhappy circumstance, for subjects are both illuminated by the light of the Law and driven by its penalties; the prince lacks the second, for there is no one who can compel him or even dare to

reprove him. And, therefore, the king should be the more careful to listen to reason and the Divine voice, and to hearken to the laws which he has made for others, and Soto cites the words of the Imperial Constitution, "Digna vox est majestatis regnantis, legibus alligatum se principem profiteri".

Soto then, on the one hand, ascribes to the prince a great authority; he looks upon him as normally the source of Law, and as, technically, above it, though he is conscious of the danger of this conception; but, on the other hand, he maintains very emphatically that it is from the Community that his authority is derived, and that if he abuses this authority he may be deposed.

It is hardly necessary to point out that in England St Germans represents the tradition of Bracton and of Fortescue, that the authority of the king was limited by the Law, and that the Law was not made by him alone. It is obvious, from what we have said in an earlier chapter, that in the opinion of St Germans it was from the custom of the Community that the Law was originally derived, and that the only authority which could change these customs was that of Parliament, including, no doubt, the king, but also representing the whole community. The sixth foundation, as he says, of the law of England was to be found in the Statutes made by the king or his ancestors, by the Lords Spiritual and Temporal, and by the community of the whole kingdom. He knows no source of English law except the Divine Law, the Law of Reason, the general and particular customs of the country, and the Statutes of Parliament. To the observance of these laws the king is bound by the oath which he takes at his coronation, and it is by the customs embodied in Magna Carta that the person and property of the Englishman is legally protected.

There is, however, another English work of this time which deserves some notice. This is the 'Dialogue between Cardinal Pole and Thomas Lupset', written by Thomas Starkey, not later than 1538, for he died in that year. The greater part of this work is indeed occupied with a description and discussion of the social and economic conditions of England with which we cannot deal here, but from time to time there are important observations on the authority of law and of the Ruler.

Pole is represented as saying that originally "man wandered abroad in the wild fields and woods, none otherwise than you see now the brute beasts to do". At last certain wise men persuaded them to forsake this rude life and to build cities in which they might live. "Thereafter they devised certain ordinances and laws whereby they might be somewhat induced to follow a life convenient to their nature and dignity".

The forms of government, Pole defines in the Aristotelian tradition, as that of one, a king or prince, or a few wise men, or that of the whole body and multitude of people, "and thus it was determined, judged, and appointed by wisdom and policy, that ever, according to the nature of the people, so, by one of these politic manners, they should be governed, ordered, and ruled". He also repeats the Aristotelian principle of the difference between a bad and a good government; the good government is that which is directed to the wellbeing of the whole Community, while the evil government is that which is directed to the advantage of the Ruler.

So far there is nothing of much importance, but in the last paragraph of the third chapter Pole turns from the discussion of the economic and social evils of England to the "mis-orderings and ill-governance which we shall find in the order and rule of the state of our country". And in the next chapter he begins the consideration of this subject by saying "that our country has been governed and ruled these many years under the state of Princes which by their royal power and princely authority have judged all things pertaining to the State of our Realm to hang only upon their will and fantasy, insomuch that whatsoever they ever have conceived in their minds, they thought by-and-by to have it put in effect, without resistance to be made by any private man and subject; or else by-and-by they have said that men should diminish their princely authority. For what is a Prince (as it is commonly said) but he may do what he will. It is thought that all wholly hangs on his only arbitrament. This hath been thought, yea, and this is yet thought, to pertain to the Majesty of a Prince—to moderate and rule all things according to his will and pleasure; which is, without doubt, and ever hath been,

the greatest destruction to this Realm, yea, and to all others, that ever hath come thereto…
For Master Lupset this is sure, and a Gospel word, that country cannot be long well governed nor maintained with good policy where all is ruled by the will of one, not chosen by election, but cometh to it by natural succession; for seldom seen it is, that they which by succession come to kingdoms and realms, are worthy of such high authority".

Lupset is greatly alarmed, and warns Pole that many people will think that this sounds very like treason, for "it is commonly said (and, I think, truly) a king is above his laws, no law binds him".

The words attributed to Pole clearly express the opinion that the royal authority had tended to become absolute, and that a government of this kind was a great evil in England or any other country. It must be noticed, however, that Pole's words here suggest that this might be different if the prince were elected instead of hereditary, and he develops the criticism of succession by inheritance. Lupset replies that experience had shown that hereditary succession was necessary to prevent civil war, and Pole admits that it was better to have it in England.

Pole returns to the subject in the Second Part, and again expresses his preference for an elective monarchy, but he now adds that even the prince thus elected "should not rule and govern according to his own pleasure and liberty, but ever be subject to the order of his laws".

He turns, however, immediately to the question of the method of government if the prince succeeds by inheritance, "if we will that the heirs of the Prince shall ever succeed, whatsoever he be, then to him must be joined a Council by common authority; not such as he wills, but such as by the most part of the Parliament shall be judged to be wise and meet thereunto".

He assumes the existence of the "Great Parliament", as he calls it. It is not to meet continually, but to be called together for the election of the prince and for other matters "concerning the common state and policy", and is to appoint a Council which should sit continually in London and represent the authority of Parliament, and "should be ready to remedy all such causes, and repress seditions, and defend the liberty of the whole body of the people, at all such times as the king or his Council tended to anything hurtful and prejudicial to the same ". This Council is to be wholly distinct from the ordinary Council of the king, and it is to be composed of four nobles, two bishops, four judges, and four citizens of London, and they should have the authority of the whole Parliament when it was not meeting. The end and purpose of this Council is, "to see that the king and his proper Council should do nothing against the ordinance of his Laws and good Policy, and should also have power to call the Great Parliament whensoever to them it should seem necessary for the reformation of the whole State of the 'Commynalty'. By this Council, also, should pass all acts of Leagues, Confederations, Peace, and War. All the rest should be administered by the king and his Council".

In another place Pole is represented as dogmatically repudiating the conception that the authority of Government, whether it is evil or good, is derived from God. "Even as every particular man, when he followeth reason, is governed by God, and contrary, blinded with ignorance by his own vain opinion; so whole nations, when they live together in civil order, instituted and governed by reasonable policy, are then governed by the Providence of God and be under His tuition. As, contrary, when they are without good order and politic rule, they are ruled by the violence of tyranny; they are not governed by His Providence, nor celestial ordinance, but as a mass governed by 'affectis', so they be tormented infinite ways, by the reason of such tyrannical powers; so that of this you may see that it is not God that provideth tyrannies to rule over cities and towns, no more than it is He that ordaineth ill 'affectys' to overcome right reason".

He again insists that the law must be supreme even over the prince, "seeing also that Princes are commonly ruled by 'affectys' rather than by reason and order of justice, the laws which be sincere and pure reason must have chief authority. They must rule and govern the State, and not the Prince, after his own liberty and will". And he contends that, "For this cause the most wise men,

considering the nature of Princes, yea, and the nature of man, as it is indeed, affirm a mixed state to be of all other the best and most convenient to conserve the whole out of tyranny".

It would no doubt be impossible to attach very much importance to a work which was not published till three centuries after it was written, if it were not that its judgments coincide, in a large measure, with those of other important writers of the time. It is clear that Pole, as represented by-Starkey, absolutely refuses to acknowledge that the prince has any absolute authority derived from God ; he maintains emphatically that the prince is not above the Law but under it, and he conceives of the best government as being mixed or constitutional, and as representing the authority of the whole community.

We must finally consider, and carefully, what was the position of that great Frenchman, John Calvin, who exercised so immense an influence not only in France but throughout Europe. It appears to us that there has been some misunderstanding about this, and we must therefore examine it with some care.

Calvin has not, either in the 'Institutio' or elsewhere, sot out any complete system of political thought, but he states with care some important principles both of a general and a particular kind. His treatment of polities in the 'Institutio' was, at least in part, intended as a defence of the Reformers against the charge that they held doctrines which were subversive of all political and civil order. Indeed, he says this explicitly in the Preface to the 'Institutio' addressed to Francis I in 1536, and it seems to us that his treatment of political authority was largely determined by the need to repudiate those who did hold such subversive views, that is, especially, some Anabaptists. This is why Calvin so emphatically and repeatedly lays down the principle of the Divine source and nature of political authority, and the religious obligation of obedience to it. In one passage of the 'Institutio' he shows that the function of the magistrate is not only approved by God, but that the Scriptures speak of this authority in the strongest terms. The magistrates are even called "gods", and this not without significance, for they have received their authority from God, they are endowed with the authority of God, they bear the person of God, for they act in His place. This is what St Paul meant when he called the Power the Ordinance of God, and said that there was no Power which was not ordained by God.

We may compare this with a passage in one of his homilies on the First Book of Samuel, in which, like Gregory the Great, he treats the conduct of David in refusing to lift his hand against the Lord's Anointed as an example to Christian men, and argues, like Gregory, that we must obey the rulers, even when they abuse their authority, and that we must render honour to the king or prince, even when he unjustly imposes tributes and taxes upon his subjects, or otherwise gravely oppresses them.

This is not, however, all that Calvin said. In another place in the 'Institutio' he warns subjects that they must not meddle in public matters; but then he adds that while they must not interfere with the function of the magistrate, nor tumultuously raise their hands against him, if there is something in the public order which should be corrected, they should bring this to the knowledge of the magistrate whose hands are free to deal with the matter. Here, it is evident, is another mode of conceiving the position of the king or prince; private persons, indeed, may not resist, may not interfere in public matters, but there are others, public persons or officers, to whom this does not apply. The truth is that Calvin makes a sharp distinction between the position of private persons and that of those who held a public and constitutional office in the State. In an earlier passage in the 'Institutio' he had said that it would be idle for private persons to dispute about the best form of the State, for they have no right even to deliberate about any public matter, but it should be observed that it is "private" persons of whom he speaks. We must therefore bear this in mind when we turn to the well-known passage in which Calvin speaks of the possibility of a constitutional method by which the unjust ruler might be restrained. He had, in this passage, been saying that if men are cruelly treated, plundered, or

neglected by their prince, they must consider that God is no doubt visiting their sins with punishment, and that they can only look to God, in whose hand are the hearts of kings; while God has sometimes raised up deliverers for the oppressed, they must not imagine that they are entrusted with God's vengeance, they can but suffer and obey. There is then, however, a sudden turn; in saying this, he is speaking always of private persons. If there are magistrates of the people who have been created to restrain the arbitrary will of kings, such as were formerly the Ephors in Sparta, or the Tribunes of the People in Rome, or the Demarchs in Athens, or in modern times perhaps the three Estates in their Assemblies, these, he asserts, may legitimately intervene to restrain the license of kings; indeed, he maintains that if they should connive at the violence of the kings, they are guilty of treachery, for they betray the liberty of the people of whom they are, by God's ordinance, the guardians.

It is quite evident that while Calvin repudiates in the strongest terms all revolutionary and unconstitutional movements against the existing political authority, his words have no reference to the propriety of constitutional restraints on the ruler. We can, therefore, now take account of some observations which he makes upon the proper functions of government and its various forms.

He refuses to determine which is the absolutely best form of government; the monarchy is liable to turn into a tyranny, the aristocracy into a faction, the democracy to become seditious, but he admits that he would himself prefer either an aristocracy or a government combining the elements of aristocracy with those of the constitutional commonwealth (politia). Experience had shown that this was the best, and it was also the government which God Himself had instituted among the Israelites. That seemed to Calvin the happiest form of government, where liberty was moderated, and which tended to continuance. The magistrates of such a State ought to be diligent to see that its liberty was not violated or diminished.

From the discussion of the best form of Government he turns to the nature of the law of the State. He begins by laying down the general principle that without laws there can be no magistrates, as without magistrates there are no laws. He repudiates with great energy the notion that the political laws of Moses were binding upon the State; the moral law, however, which is the true and eternal law of justice, is binding upon men of all places and times who desire to order their life by the will of God, for it is His eternal and immutable will that men should worship Him and love each other. Subject to this, every nation is at liberty to establish laws for itself, as it finds best; they may vary in form, but they must have the same principle (ratio).

This, Calvin says, will be clear, if we will distinguish between law and equity (aequitas), upon which law depends. Equity, because it is natural, must be the same among all men; the constitutions (*i.e.*, positive laws), because they depend upon circumstances, may well differ, as long as they look to the same end of equity. The moral law of God is nothing else than the testimony of natural law, and the whole principle of equity, which is the rule and end of all law, is contained in it. Laws which are directed to this end are not to be condemned by us, even though they differ from the Jewish Law, and from each other.

It is clear that substantially Calvin was restating the principles of St Thomas Aquinas, and other great mediaeval political writers, both with regard to the nature of positive law, and its relation to reason, the moral law, and the natural law, and also with regard to the nature and limitations of the authority of the prince. It is evident that, like St Thomas, his own preference was for a mixed or constitutional government.

We may finally ask whether Calvin's opinions or advice on the actual events of his time throw any further light upon his conception of government. It would seem that so far as they go, they correspond very closely with the principles which we have just set out. Calvin lived through the period when the Protestant Princes of Germany, reluctantly in some cases, took up arms against the

authority of the Emperor, Charles V, and his letters show that he found no reason to criticise their action; indeed, in a letter to Farel of 1539, he seems formally to approve.

This contrasts with the tone of some letters of 1560, which seem to refer to the conspiracy of Amboise, in France. To Bullinger he says that he had acted rightly in repudiating the charge of responsibility for the tumults in France. He (Calvin) had known of the deliberations about this matter eight months before, and had interposed his authority to prevent them going any further. And to another correspondent he says that he had from the beginning anticipated what would happen, but he had been unable to restrain them (the conspirators). Formerly, they had allowed themselves to be governed by his advice, but when they saw that their design was displeasing to him they had deceived him. He never approved of the enterprise, for in his judgment they were attempting more than God permitted.

The difference between this and Calvin's judgment on the action of the German Princes serves to illustrate his theory. And our judgment is confirmed by that important letter to Coligny, of 1861, which Professor Allen has cited in his learned work, for, while Calvin condemns forcible resistance to persecution by the reformed party in France, he admits that such action would be lawful if it were taken by the Princes of the Blood and the Parliament.

We have then, we hope, said enough in this chapter to make it clear that by some of the most important writers of the earlier part of the sixteenth century, not in one country only, but in all the great countries of Western Europe, the mediaeval principle of the limitation of the authority of the ruler, Emperor, King, or Prince, was firmly and intelligently maintained.

We have also pointed out that this coincides both with the general evidence of constitutional practice and principles. In the last section of this chapter, however, in discussing the position of Calvin, we have referred to the question of the Divine authority of the ruler, and while we are clear that Calvin's own interpretation of this was not in any way inconsistent with the principle of the constitutional limitation of that authority, we must now turn to the consideration of the reappearance in the sixteenth century of the theory that the Divine authority of the ruler was unqualified and unlimited.

CHAPTER IV.
THE THEORY OF THE DIVINE RIGHT.

We have in the first volume of this work endeavoured to trace the appearance in Western thought of the conception that the Ruler was in such a sense representative of God that he could in no circumstances be resisted, however oppressive and tyrannical he might be. We have pointed out that while there may be some tendency towards this in earlier Christian writers, it was St Gregory the Great who first definitely formulated and enunciated this doctrine. Wo have ventured to suggest, and we still think it is true, that this conception was substantially alien to Western thought, and that it was an orientalism which was derived from an interpretation of some parts of the Old Testament. We have also pointed out that this must be quite clearly distinguished from the conception of St Paul, that political authority is derived from God, because it exists for the maintenance of justice.

We have also pointed out that while the conception of St Paul became the normal doctrine of medieval civilisation, the doctrine of St Gregory the Great had no real place in the political ideas of the Middle Ages, not only because, as the cynic might say, the recurrent conflicts between the ecclesiastical and secular powers made such a doctrine inconvenient, but much more because it was completely incompatible with the fundamental principle of the Middle Ages, that human society was governed by law, which was the expression of justice, and not by the arbitrary will of any ruler. There were indeed a few writers, such as especially Gregory of Catino in the twelfth century, who reaffirmed the view of St Gregory the Great, but they were insignificant in number and in authority. In the first and second parts of this volume we have cited the interesting but isolated restatements of St Gregory the Great, by Wycliffe in the fourteenth century and by the Cortes of Olmedo and by Aeneas Sylvius (Pope Pius II) in the fifteenth century.

It was not till the sixteenth century that, as far as wo can see, this conception came to have any importance. How far, indeed, it had any real importance even then we shall have to consider, but wo have first to endeavour to trace the appearance and development of the conception, and to discuss so far as possible what we are to understand by it.

As far as wo have been able to discover, the first writer of the sixteenth century of whom we can say that he, at one time, held and affirmed the conception that the temporal ruler was in such a sense representative of God that under no circumstances he could be resisted, was Luther. For there can be no doubt that this was his conviction till about 1530. We have, in spite of our best efforts, been quite unable to discover how Luther came to entertain so eccentric an opinion, whether directly from the tradition of Gregory the Great or from some other unknown influence. It is no doubt obvious that he endeavoured to find sufficient authority for it in the well-known words of St Paul in Romans XIII and of St Peter in his first Epistle (III. 13, 14), and like St Gregory the Great he was also clearly influenced by the conception of the king, the Lord's Anointed, as represented especially in the stories of the relation of David to Saul in 1 Samuel.

It is, however, difficult to imagine that these alone would have induced him to adopt an attitude so extreme, and which was so contrary, as we have seen, to the general tendency of thought in Germany and in Western Europe, not only in the Middle Ages, but in the fifteenth century.

We would begin by pointing out that it appears evident that Luther was not a systematic political thinker, that indeed he can hardly be described as a political thinker at all. There are, however, some general conceptions expressed in his writings which it may be well to notice, for they may serve at least to indicate some of the presuppositions with which he approached political questions.

In his treatise, 'Von Weltlicher Obrigkeit', after citing St Paul's words, "The powers that be are ordained of God" and the parallel words in the first Epistle of Peter, he discusses the apparent conflict between the Old Testament and the Sermon on the Mount, with regard to the use of force to maintain justice. He contends that the coercive authority of society is required because men are not all true Christians; if they were, there would be no need of kings and princes, of law or of the sword. If it is then asked why the Christian man should be obedient to the coercive authority, the answer is, that while the true Christian does not need this for himself, he must obey it for the sake of his neighbours.

The same conception is expressed in different terms in Luther's tract, written in July 1525, in defence of the harsh and violent terms which he had used against the peasants, in May of the same year. There are, he says, two kingdoms : the one is the kingdom of God; the other, the kingdom of the world. The kingdom of God is a kingdom of grace and mercy, the kingdom of the world is a kingdom of wrath, of punishment, and of judgment, to coerce the wicked and to defend the godly, and therefore it has the sword; the prince represents the wrath and the rod of God.

The same principles are again set out by Luther in a Treatise written in 1526, on the position of soldiers and their relation to the Christian religion. This, he says, is the conclusion of the whole matter : the office of the sword is lawful and a godly and useful ordinance. For God has established two governments in the world, the one is spiritual, the other is the worldly government of the sword, which has been set up, that those who will not live religiously and justly, and in obedience to the word of God, may be compelled to be religious and just in this world. God is the Founder and Lord of both forms of righteousness, both of the Spiritual and of the Temporal; they are not merely human ordinances, nor are they founded merely upon human power, but they are Divine.

It is the same conception of the two kingdoms which is expressed in the Tract which Luther wrote, apparently in April 1525, in answer to the demands of the Swabian peasants, when he deals with the question of serfdom. They wished, he says, to make all men equal, but this would be to try to convert the spiritual kingdom of Christ into a visible and earthly kingdom, which was impossible. For the earthly kingdom could not exist without inequality; some must be free, others in bondage, some, lords and some, subjects.

It seems to us clear that while Luther's words have a character of their own, he was, in principle, so far simply restating the Stoic and Patristic doctrine, that the coercive authority of the Political Society is a consequence of sin, that it is made necessary by the moral infirmity and defect of human nature. It is a consequence of sin, but also, as in the Patristic tradition, a Divine remedy for sin, created by God, and deriving its authority from Him. And we should conjecture that Luther's development of this, into the conception of the two kingdoms, is probably derived, ultimately, from St Augustine, and especially from the 'De Civitate Dei', although we have not actually observed any direct reference to this.

The Political Order, then, is the result of human sin, and is appropriate to the sinful nature of man, but it is a Divine institution, and its authority is a Divine Authority.

So far, we have nothing, or little more, than the traditional conceptions of the Middle Ages. We can now approach Luther's interpretation of the conception of the Divine origin of political authority as meaning that the Temporal Ruler must always be obeyed, except in spiritual matters, as holding the authority of God.

The first reference we have found to the subject of the necessity of implicit obedience to the Supreme Ruler, is in a letter written by Luther to the Elector Frederic of Saxony in 1522, after the decision of the Diet of Worms. Luther proposes to return to Wittenberg, but he urges upon the Elector that he must not resist any action taken by the Emperor, or attempt to defend Luther; the only thing he suggests that the Elector might do was to "leave the gates open", so that Luther might, if necessary, escape. The impression which this leaves is confirmed by the more formal "Bedenken" or

opinion, written by Luther in 1523, in which he very clearly condemns all forcible resistance to the Emperor.

It is the same principle which is expressed in a letter of 1525 to the Count of Mansfeld, in answer to a question, whether it would be lawful for the Reformed princes to form a league and defend themselves against the Emperor. Luther answers unequivocally that this would be absolutely wrong, for God requires men to honour the supreme authority, whether it is good or bad.

For the full development of this conception we must, however, turn to his pamphlets or tracts. We have already cited some important passages from the tract, 'Von Weltlicher Obrigkeit', and we should observe that this tract not only asserts the Divine origin of the Temporal Power, but also says very emphatically that no prince may fight against his king or emperor or his feudal lord, for the Supreme Lord must not be resisted by force but only by confession of the truth.

It was, however, in the tracts dealing with the Rising of the Peasants that Luther developed this theory most completely. In the first of these, written in April 1525, Luther said that the peasants in Swabia claimed to be defending their religion and to be Christian men, but he replied that they were taking God's name in vain. St Paul had bidden every man to be subject to the authority (Oberkeit), the man who resists God's Ordinance will be damned. They may say that the authority was wicked and intolerable, that it endeavoured to take the Gospel from them and oppressed them in body and soul, but this was no excuse, for to punish the wicked was not the right of any man but only of the Temporal Authority.

If every man took the law into his own hands, there would be no law or order in the world, but only slaughter and bloodshed, and Luther bids them remember that Christ taught men not to resist evil but to submit to injuries; the only right of the Christian is suffering and the Cross. Luther does not, indeed, deny that the Lords had behaved like tyrants, and would be judged by God, but the peasants had transgressed against God by their insurrection.

So far, Luther's theory was extreme, but his language was moderate; in two later tracts of the same year he seems to lose all sense of proportion and restraint and decency. In one of these, written in May 1525, he says that the peasants had broken their oath of obedience to the authorities; they had robbed and plundered, they had made the Gospel a cloke for their sin, and he calls upon the princes and lords to take the most violent and ruthless measures against them. And in another tract, written probably in July 1525, he attempted to defend the language and attitude of the first, especially by means of that distinction between the two kingdoms—God's kingdom of mercy and the earthly kingdom of wrath and punishment, which we have already discussed.

We come back to a more restrained tone of discussion in in the little work, 'Ob Kriegsleute auch im Seligen Stande sein können', written in 1526, to which we have already referred. Here he discusses the principles of political obedience with greater fulness, but with equal decision. He admits that in the ancient world men had not hesitated to depose and even to kill useless or wicked rulers. The Greeks set up monuments to the Tyrannicides, the Romans murdered many of their emperors ; but these, he says, were heathen who did not know God, and that the temporal authority was God's Ordinance. This was incompatible with the Christian Faith; even if the rulers do what is unjust it is not lawful to be disobedient to them, and to destroy the Ordinance of God; men must endure injustice. Luther was aware of the fact that the Swiss had emancipated themselves, and that, not long before, the Danes had deposed their king, but, he says, he is not speaking of what had been done, but of what ought to be done. Men must submit to the tyrant, they must not resist him, they must leave him to God's judgment, and he cites the example of David's conduct to Saul.

This is sufficiently clear, but it is not all. Luther was aware, even then, of what we may call constitutional tradition, but he sets this aside. It may be contended, he says, that a king or lord had sworn to his subjects to reign according to definite conditions, and that, if he violated these, he forfeited his authority, as it is said that the King of France must reign in accordance with the

judgment of his Parlement, and that the King of Denmark had sworn to observe certain constitutional articles. Luther answers that it is good and reasonable that the Supreme Ruler should reign according to law, and not merely according to his capricious will, and should swear to do this. But, if he did not do so, are his subjects to attack him and sit in judgment on him? Who, he says, has commanded this? This could only be done by some superior power who could hear both parties and condemn the guilty. He adds, in reply to those who might say that he was flattering the princes, that this was not true, for what he had said applied to all alike, peasants, burghers, nobles, lords, counts, and princes, for they all have a superior lord to whom they are subordinate.

Luther's conception is thus far perfectly clear and unambiguous. 'Die Obrigkeit' has an absolute authority, and God requires of men an unconditional obedience to it, for it is God Who has set it up. It would no doubt be well that the ruler should govern justly and according to law, but if he does not do so, his subjects must still submit and leave it to God to punish him. The principle is clear and unqualified, but we have made no progress in tracing the sources of Luther's opinion. It may be suggested that it was in the main a violent reaction against the danger of anarchy, as represented by the revolt of the Peasants, but this is not really consistent with the facts, for the statements of Luther, which we have cited from the years 1522, 1523, show clearly that he held the same opinions before the Peasants' Revolt.

We must now turn to the development of Luther's later views, for it is quite clear that these were not the same as his earlier views. As late as May and November 1529, we find him solemnly warning the Elector of Saxony against the formation of a League for the protection of the Reformers, and against any attempt to resist the Emperor if he endeavoured to seize Luther. But, as Professor Muller thinks, even in December 1529 there are some indications of a change, and in Mareh 1530 Luther and some others in a letter to the Elector of Saxony gave a formal opinion which has a very different character from Luther's earlier views. This letter was written in reply to one from the Elector, and Luther said that it might perhaps be true, that, according to the Imperial and Secular Law, it was in some cases lawful to defend oneself against the Emperor, especially as the Emperor had sworn to maintain his subjects in their ancient liberty. Scripture, however, Luther says, does not permit Christian men to set themselves against the Supreme Authority, but requires them to submit to injustice and violence from him. Secular and Papal Laws do not consider that the Supreme Authority is an Ordinance of God; but the Emperor remains Emperor, and the Prince remains Prince, even if he transgresses all God's commands—yes, even if he were a heathen. Then, however, Luther comes to the rather surprising conclusion that there is only one remedy, and that is that the Empire and the Electors should agree to depose him.

It is clear that in this formal statement of opinion we have something which is very different from Luther's earlier judgments. In the first place, we have an indication that Luther was beginning to take some account of the Constitutional Law of the Empire, and that he recognised that some jurists at least maintained that if the Emperor violated the obligations of the oath which he had sworn at his election, it was lawful to resist him. In the second place, he still maintained that the Holy Scriptures did not permit any such resistance, however unjust the Emperor's conduct might be. But in the third place, we come upon the surprising view that although, while the Emperor continued to be Emperor, he could not he resisted, it might be lawful for the Empire and the Electors to depose him. We have already observed a conception analogous to this in several earlier writers.

In October of the same year, 1530, the question of resistance to the Emperor was formally put before Luther and others of the Reformers at Torgau, and there was laid before them a statement on the subject drawn up by some jurists, showing in what circumstances it would be lawful to resist the Supreme Authority (Obrigkeit), and declaring that such circumstances were now present. Luther and his colleagues answered that they had not known that the Law itself recognised the right of resistance in certain cases; they had always thought that the Law must be obeyed, and that the Gospel does not

contradict the Secular Law; they could not therefore maintain that men might not defend themselves against the Emperor himself, or his representative; it was, therefore, also right that men should arm themselves, and thus be prepared to resist a sudden attack.

The judgments expressed in this letter represent a different position from the letter of March 1530. Luther was even then aware that some jurists admitted the lawfulness of resistance but he still maintained that Holy Scripture did not permit this. Now, Luther admitted that if, as the jurists said, the law of the Empire admitted the right of resistance, they could have nothing to say against it, for they had always taught that the law must be obeyed.

There are some letters written in the spring of 1531 which justified or explained this apparent change of position, but they do not add very much. In a letter addressed to Lazarus Spongier of Nüremberg, he says that he had heard that it was reported that he and the other Reformers had withdrawn their previous advice that the Emperor must not be resisted. The real truth was as follows : they were now informed that the Imperial Law permitted resistance in the case of obvious injustice. He himself had no opinion of his own on the law, but must leave that to the jurists to decide. If this was the Law of the Empire, they were no doubt bound to obey it. The other letters are in much the same terms.

That this change in Luther's position was permanent seems to be clear : in 1531 he wrote a pamphlet entitled, 'Warming an seine lieben Deutschen'. We are not concerned here with its general subject-matter, but with some passages in it which deal with the relations of those who accepted the Reformed opinions to the Emperor and the Roman Party. If, he says in one passage, it should come to war, he would not suffer those who defended themselves against the "murderous and blood-thirsty Papists" to be called rebels, but would refer them to the Law and the jurists; and in another place he says that his advice was that if the Emperor should summon them to fight against the Reforming Party no one should obey him.

We have dealt with Luther's position, not exhaustively, as has been done by Müller in his admirable monograph, but we hope, sufficiently to bring out his original opinions and the change after 1530. It seems clear that at first Luther maintained dogmatically that the king, whether he was good or bad, just or unjust, held his authority from God and could not be resisted, but must in all secular matters receive an unqualified submission. His judgment is clear, but we have not been able to find in his work any real light upon the source of his opinions, for his citations from St Paul and St Peter cannot be described as furnishing this adequately. No doubt his opinions were ultimately derived from those of St Gregory the Great, for these opinions had not completely disappeared in the Middle Ages, though they had been ignored or dismissed by all serious theological or political thinkers. We can only suggest conjecturally, that Luther may have come under the special influence of some abnormal teacher.

It is also clear that from about 1530 his opinions were completely altered, at least with regard to the Empire. Whether Luther fully understood the significance of the change in his conceptions may be doubted, but in fact the change was fundamental, for he was no longer maintaining the absolute authority of the Ruler, but the supreme authority of the Law; it is not necessary to explain the importance of this change.

It would seem that Melanchthon followed Luther, both in his earlier and later opinions. In a letter of 1530 to the Elector of Saxony, he speaks of resistance to the Emperor as being contrary to God's command, but in 1536 he joined Luther in signing the Declaration which we have just cited.

In a letter of 1539 he says plainly that the principle that subjects must not resist their superiors does not apply when the superior commits atrocious and notorious injuries. In 1546 Melanchthon, along with Bugenhagen and others, signed a declaration that, in their opinion, it was lawful for the "Stande" to defend themselves against the Emperor, if he attacked them on account of their religion. In a letter of the same year Melanchthon briefly, hut clearly, criticised the argument for non-

resistance, as drawn from St Paul's words in the Epistle to Romans XIII. 1. The Power, he says, is indeed an Ordinance of God, but only a just Power; unjust violence is not God's Ordinance; and he adds an important appeal to the principle that the relations of inferior authorities to the superior were determined by certain conditions and agreements, and refers to the mutual obligations of lord and vassal in Feudal Law. Thirteen years later Melanchthon set out the same judgment in terse and significant words. Resistance and necessary defense against the unjust and notorious violence of the superior is right, for the Gospel does not annul the political order, which is in accord with Law.

It is here that we may appropriately notice an important statement of the year 1550, made by the parish Clergy of Magdeburg, which sets out dogmatically the principle that the inferior public authorities might rightly defend their subjects against the unjust attacks of the Supreme Authority upon their religion; this means that in such eases the Imperial cities and the Princes could lawfully resist the Emperor. They refer to the doctrine that it was always unlawful to resist the Higher Powers, but they contemptuously reject it. It is admitted, they say, that the superior and the subjects are bound to each other by oaths, but princes and lords, some say, may deal as they like with their subjects, may forget their oaths and may do what they please, while the subjects may not protect or maintain their rights and liberties.

The 'Obrigkeit' is an Ordinance of God, whose function it is to honour the good and to punish the evil, and therefore, when it persecutes the good and sets forward the evil, it is no longer an Ordinance of God, but of the Devil, and to resist it is to resist, not the Ordinance of God, but of the Devil.

If the superior authority attempts to suppress the lower authority, which will not follow it in evil, its action is null and void before God, and the lower authority is still bound to carry out its duty. If the authority, prince, or emperor endeavours, against his oath, to destroy the lawful liberties of the lower authority, the latter may lawfully resist, though it may be wiser to submit; but if the higher authority endeavours to stamp out the true religion, the inferior authority must resist, and those who do this are not to be called rebels.

The first English writer of the sixteenth century, as far as we have seen, who sets out the conception of the Divine Right and Non-Resistance was William Tyndale. It is carefully and clearly set out in his work called 'The Obedience of Christian Men', published in 1528, and it is reaffirmed in his 'Exposition of Matthew V, VI, and VII', published in 1532.

We have already pointed out that the Reformers in France and Germany were anxious to show that they were in no way related to any movement of revolt or revolution, and that they had, still less, any sympathy with the Anabaptist movement. Tyndale's work, 'The Obedience of Christian Men', shows the same concern. In the Prologue to this work he says that the occasion of the Treatise was the charge that the doctrine of the Reformers, and especially the preaching of the Word of God, tended to make men disobey and revolt against their rulers, and to set up a system of community of goods. All this ho indignantly repudiates, and suggests that it was rather the Pope and his followers who had taught men to resist their rulers.

In setting out his own view, Tyndale begins by citing St Paul's words in Romans XIII, and concludes that it is God who has given laws to all nations, and who rules the world by means of the Kings and Rulers whom ho has appointed, and that no subject may resist his superior for any cause whatsoever, for if he does this, he takes upon himself the authority which belongs to God only. Again, rulers are ordained of God, whether they are good or evil, and what they do, whether good or bad, is done by God, for if they are evil, they are the ministers of God's punishment upon the sins of the people. A Christian man is in respect of God, but as a "passive thing, a thing that suffereth only and doth nought". This is sufficiently explicit, but he also says that the king in secular matters is outside of the Law, and whether he does right or wrong gives account to God only. How far this is a

reminiscence of the "legibus solutus" of the Roman Law, and how far it may be derived from other sources, wo cannot say.

It may be urged, indeed, that these are somewhat abstract phrases, and must not be pressed, but in a later work, an exposition of the Sermon on the Mount, he discusses the relation of the subject to the Euler in more concrete terms.

In commenting on the words of our Lord (Matt. V. 38, 42), Tyndale contends that these words do not mean that the Christian man is forbidden to go to law, but that, even if the law is administered by wicked and corrupt rulers, he must not take the law into his own hands, for to rail against his rulers is to rail against God, and to revolt against them is to revolt against God. This is sufficiently emphatic, but Tyndale was not satisfied till he had repudiated, what we may call, the traditional constitutional contention, that the king had on his accession sworn to maintain the laws, privileges, and liberties of his subjects, and that it was only upon this condition that his subjects had submitted to him, and that, therefore, if he misgoverned them, they were not bound to obey, but could resist and depose him. Tyndale answers contemptuously that this argument is of no force; a wife cannot compel her husband if he violates his oath to her, or a servant his master; this can only be done by some higher authority. Again, it may be contended that the subjects had chosen their ruler, and "Cujus est ligare, ejus est solvere"; but Tyndale answers that even though the people elect their ruler, it is God who has elected him through them, he is the Lord's anointed, and cannot be deposed without a special commandment from God; and he then cites the story of David and Saul, as Gregory the Great had done. He adds an ingenious parallel, that the citizens of London elected their Mayor, but could not depose him without the consent of the king, from whom they had received the power to elect, and concludes that if the highest authority does wrong, subjects can only complain to God.

It seems clear that Tyndale intended to repudiate all constitutional arguments for the restraint of the royal authority, and it is interesting to observe that in this same work he suggested that the evils which had befallen England in the fifteenth century were really the result of their action in slaying their rightful king, Richard II, whom God had set over them.

It would be difficult to find any stronger declaration of the conception that the king bolds by Divine Right an absolute and unqualified authority, that he is above law and not under it, that all appeal to constitutional tradition is empty and void, that all resistance to his authority, however reasonable the cause for this might be, is an offence against God, and the authority which he has given to the king.

It is obvious, of course, that this is a restatement of the conceptions of St Gregory the Great, but we are strongly inclined to think that it is from Luther's earlier statements that Tyndale's opinions are derived, and especially from the "Ermahnung zum Frieden" of 1525, and possibly from the tract 'Ob Kriegsleute auch im seligen Stande sein konnen' of 1526. He does not, indeed, refer to them explicitly, but a comparison of Tyndale's arguments with those contained in Luther's tracts seems to us to make this highly probable.

There is not much to be said about E. Barnes, another of the English Reformers, who seems to us clearly to be on this subject a disciple of Tyndale. In the tract entitled 'A supplication to Henry VIII' he is evidently concerned to show that, while the Reformers taught men that God commanded obedience to princes, it was the Pope who taught men to revolt. In another tract he sets out, in terms as strong as those of Tyndale, the duty of absolute submission to the king, however unjust and contrary to the law his action might be.

The only thing that he will allow is, that the oppressed man may fly (he is evidently thinking primarily of a man persecuted for his religion).

We have thus endeavoured to set out the first development in Germany and in England in the sixteenth century of the theory of the absolute Divine Right of the monarch, and of the principle of

non-resistance, but we shall return to this in another chapter, with regard to its development in the later part of the century.

CHAPTER V.
THE POLITICAL THEORY OF THE CIVILIANS IN THE SIXTEENTH CENTURY.

We have dealt with the conception of the source and nature of the authority of Law, as illustrated in the writers on Political Theory in the earlier part of the sixteenth century. In previous volumes and in the earlier parts of this volume we have found it necessary to distinguish sharply between the character of political theories in general and the conceptions of the Civilians, and it is necessary to continue this distinction, for, as we have said, the political conceptions which these jurists derived from their study of the Roman Law differed in many and important respects from the traditional conceptions and practice of mediaeval Europe.

We cannot, indeed, pretend that we have been able to examine the political theory of the sixteenth century Civilians in as much detail as we have done those of the earlier periods : we have no longer the invaluable guidance of Savigny's great work, which terminates at the end of the fifteenth century.

We begin with the famous French humanist and jurist, Guillaume Budé, whose work belongs to the earliest part of the sixteenth century. It is, indeed, not very easy to bring Budé's conceptions into complete harmony with each other; when dealing with general principles, he seems to assert the absolute power of monarchy, and especially in France; while in other places he attributes to the "Parlement" of Paris a very large authority, even in relation to the king.

The first position is developed by him in his discussion of the meaning of the phrase, "Princeps legibus solutus"; the second, in a passage in which he compares the Roman Senate with "Curia nostra suprema" (meaning clearly, the " Parlement" of Paris).

He begins the treatment of the meaning of "legibus solutus" by appealing to a famous passage of the 'Politics', in which Aristotle speaks of the natural monarchy of a man who is incomparably superior to all other men in the state. Such a man, Budé maintains, cannot be treated as the equal of others, but must rather be regarded as a god among men; it would be absurd to impose law upon such a man, as he is a law to himself. He goes on to assert that the Roman Emperors, at least at the time of Ulpian, and the Kings of France, had a pre-eminence of this kind; the Emperor ordered all things according to his will, and the Kings of France have all things in their power. They are like the Jove of Homer, and all things tremble at their nod: they are human Joves, but that, like other men, they die.

Budé is, indeed, not satisfied that the words "legibus solutus" are adequate to express the relation of the prince to the Law; he prefers the phrase "Principem . . . etiam legibus non teneri". Laws, he says, are made for men who are equal in every political "facultas", but they cannot constrain those who are greatly superior; kings have no equals in the antiquity and dignity of their birth, in excellence of soul and body, and in the majesty of their hearing; they are, or should he held to he, equal to the heroes; and laws which are made for the people cannot control such sacrosanct beings.

He suggests that there is no more reason why the laws should stand between the prince and the people than between a father and his children. He carries, however, his conception of the supreme place of the prince still further. The prince is the minister of God for the welfare of men, and it is for him to distribute the good things which are given by God to the human race : and he cites a saying that justice is the end of the law, and this is the function of the prince, for the prince is the image of God, who orders all things aright. This, Budé says, agrees with the words of the apostle, "Let every soul be subject to the Higher Powers". Plutarch had, indeed, said that the Law is the prince of princes, but he explained what he meant by the Law when he said that it is not that law which is written in books or on tables, but that living "reason" which is within the prince.

It is obvious that Budé was anxious, at least as a general principle, to maintain the view that the king stood outside of, and above, the legal order of society.

It is, however, also clear that in another place Budé represents the actual constitutional practice of France in very different terms. In discussing the position of the Senate in Rome he compares it with "curia nostra suprema", and maintains that this Court had all the powers which had been in the Senate. The "Maiestas" and powers of the Roman people had been transferred to the prince by the "Lex Regia", while the Senatorial Power had been granted to the Curia—*i.e.*, the "Parlement". It was this "Parlement" which declared the princes' "acta", "rata irritave", by it he willed that his Constitutions should be promulgated; and it was to the judgment of this Court alone that the princes, though "legibus soluti", submitted themselves ("a qua sibi jus dici, principes leges soluti civili animo ferant").

This is, indeed, a very different conception of the relation of the prince to the Law from that expressed in the passages already cited; it is possible that Budé looked upon this relation of king and Parlement as arising from and depending upon the king's will and pleasure, but the discrepancy remains, and we shall find something very like it in Bodin.

We may put beside the opinions of Bude some statements of Jean Ferrault, in a work on the laws and privileges of the kingdom of France, published in 1515. He contends that the Kings of France have the same power of legislation as the Roman Emperor, and he seems, curiously enough, to hold that the Salic Law was strictly analogous to the Lex Regia of Rome, and that by it all power had been transferred to the King of France, who possessed all the rights of the Emperor.

And, in another place, as we understand him, he seems to assert that the King of France while other kings and lords can impose "novum vectigal", while other kings and lords can only exact the Regalia.

We may also put beside Ferrault the opinions of Charles de Grassaille, in a work published in 1538.

When, however, we turn to other and more important Civilians of the sixteenth century, we find judgments of a very different kind. We begin with Alciatus of Milan and Bourges, whose earlier years were spent in Milan, but who later migrated to France and taught in the Law School of Bourges in the earlier part of the century.

Alciatus, as was natural, held that the authority of the Emperor was derived from the Roman people, but he developed this into the doctrine that all political authority was and could only be derived from the people. The "Jus imperii Romani" belonged to the people until they transferred it by law to Augustus. God gave men lordship over all animal, but not over other men; kings were created, not by the Divine command, but by the consent of the people. Charles the Great was elected by the Roman people, and this authority is now exercised by the seven German Electors. Thus, also in France, Chilperic was deposed and Pipin elected king, and so with Hugh Capet; and thus also, in lesser kingdoms. Alciatus concludes that "he is a just prince who reigns with the consent of the people, and he is a tyrant who reigns over unwilling subjects". St Augustine rightly described kingdoms created by violence, without the consent of the subjects, as "magna latrocinia."

This is an interesting expansion of the tradition of the Roman Law, that all authority in Rome was derived from the people, for Alciatus enlarges this into the general principle, that without the consent of the community there is no legitimate authority.

He is almost equally definite in his repudiation of the conception that the authority which the people had granted to the prince was absolutely unlimited. He refers contemptuously in one place to the "hallucinations" of the theologians and the "adulation" of the jurists who maintained that the power of the prince was supreme and free, and that he could do whatever he pleased. This, he says, is certainly not true in Italy; it is absurd to say that bishops, dukes, or marquises have an authority over Italians which the Emperor himself does not possess.

In another work he insists again upon the limited nature of the authority of princes. He has, he says, dealt at some length with this, in order that princes, whether they had reached the highest rank (he means the Empire) or are kings, dukes, or counts, might learn that they had not so great an authority as their flatterers tell them; and also in order that the doctrine of Martin (*i.e.*, that there was nothing that the Emperor could not do) should once again be refuted.

Alciatus did not, we think, doubt that the prince had the legislative power, which he had received from the people, but in one passage he indicates that he was of opinion that the prince should not make laws without the advice of the "Periti", the men of experience. It appears very possible that this is a reminiscence of the provisions of 'Code', I. 14, 8, though he is not here commenting on that passage. He is also clear that the prince is bound by his contracts, that he has no power to revoke or annul them. We have already observed the importance of this conception in the Civilians of the fourteenth and fifteenth centuries ; indeed, he refers directly to some of them, and he also refers to the important parallel principle of the Feudal Law, that the lord could not deprive the vassal of his fief without just cause.

He also discusses the question whether the prince can insert, in his briefs, clauses which derogate from the law; he says in one place that no one can do this except the prince, and such persons as have received authority from him. That is, he would seem to maintain the dispensing power of the prince. It should, however, be observed that in another place Alciatus allows this only under important reservations. The prince, he says, has power to remit all punishments for offences against himself, but he cannot deal in this way with "our" rights anymore than the people did who gave him this authority; there is, therefore, in 'jure nostro' no mention of "plenitudo potestatis", or of "non obstante" clauses. Much less can marquises, dukes, or counts take away another man's rights. Alciatus seems clearly to interpret the doctrine that the prince is "legibus solutus" as meaning little more than that he can remit penalties that he has himself imposed, and not as meaning that he can suspend any law at his pleasure.

The conception of political authority which we find in Alciatus is obviously very important, even if it stood alone, but its importance is greatly increased when we bring it into comparison with that of some other important Civilians of the sixteenth century.

How far it may be thought that some of the conceptions of other important French Civilians of the sixteenth century are due to the influence of Alciatus, and his teaching at Bourges, we cannot positively say, but it is certainly remarkable that several of them set out conceptions which are more nearly akin to his than to those of the Italian Civilians of the fifteenth century with which we have dealt in the second part of this volume.

François Connon, who died in 1551, is said to have studied law at Bourges under Alciatus, and his Commentaries on the Roman Law contain some very important observations on the nature of law and its relation to the king. The primitive world, he says in one place, was ruled by kings who were chosen for their capacity and virtue, and they ruled without any fixed system of law. When, however, they began to abuse their power, and men saw how dangerous it was to entrust the wellbeing of all to the goodwill of one, they either thrust out the kings and made laws, or retained the kings and imposed upon them the restraints of law. He goes on to cite a judgment which he attributes to Aristotle, that to obey the Law is to obey God and the Law, while to obey a man is to obey a wild beast, for the greed and anger which turns the magistrate from virtue is like that of a wild beast.

These are general conceptions, and when he turns to the actual conditions of his time, his statements are different but significant. In discussing the source of Law he first mentions with approval the saying of Demosthenes that law is the agreement of the whole "Civitas" and the similar doctrine of Papinian ('Digest,' I. 3, 1), but he admits that in France it is the authority of the king which binds men by laws. Even here, however, Connon maintains that it was from the consent of the

people that this authority was drawn, and thus no law is made without the will of the people, either by their own decree, or by that of the person to whom they have given authority to make it.

Connon is, however, clear that the legislative authority of the prince (at least, of the Roman Emperor) was unfettered by the necessity of taking counsel; he cites the opinion of Papinian that the Law is "consultum virorum prudentum", but adds that this does not imply that the prince must consult the jurists; it is customary to do so, and it is right and honourable, as the Code says "Humanum est", &c. ('Code', I. 14, 8), but as Bartolus says, this is a counsel of "Humanitas", not a legal necessity. Connon holds clearly and emphatically that the legislative power of the prince was as complete as that of the whole Roman people.

On the other hand, he contemptuously repudiates the notion that law is superior to custom; their authority is equal, and the later prevails over the earlier; and he is equally dogmatic in repudiating the doctrine that the prince is "legibus solutus". The prince is, indeed, over the people, but he is still one of the people, and he wishes that all princes should remember the "Digna Vox" ('Code', I. 121, 4), and should suffer their authority to be controlled by the law and by equity. A little later he lays down dogmatically the principle that an unjust law is not a law at all, and should be corrected or annulled; and that, if a king by hereditary right becomes a tyrant and violates the divine and human laws, he should be deposed. The law and the king are sacred, and not to be violated, but evil law is to be abrogated and the tyrant to be expelled. Until this has been done, they must be obeyed; but when it is done, men are free from them. We cannot say that these conceptions of Connon are derived from those of Alciatus, but there are obviously important parallels between them.

François Duaren was also a pupil of Alciatus and a contemporary of Connon, dying in 1559, and in his Commentaries on the 'Digest' we find some import ant observations on the sources of law and the authority of the prince.

There is no doubt, he says in one place, that the prince can make law, but he raises the question how far the people also have the right to do this, and he contends that they clearly possessed this right in the time of Julianus, that is, in the second century; he also cites Dion and Suetonius as showing that Augustus and Caligula were in the habit of submitting legislative proposals to the people, and in a later passage he suggests that it is at least possible that the people shared their power of legislation with the prince, and did not renounce it entirely, and he cites the words of Julianus as illustrating this.

His treatment of custom seems to ns to be related. He first asks whether custom can override the law when made by the prince, for "the event shows that the law did not correspond with the customs of the people"; and he cites as from Gratian the words of St Augustine that laws are confirmed when they are approved by the custom of those who are concerned. He also repudiates the interpretation of the famous rescript of Constantine as meaning that custom could not override law; Constantine only meant that custom had in itself no greater authority than law.

Duaren accepts the principle that the prince is "legibus solutus", though he adds that he does voluntarily submit to the law, and he cites "Digna Vox", but he very emphatically contradicts the conception that the rescripts of the prince are to be always obeyed. They have no authority against the law or the public interest, they cannot deprive a man of his legal rights, they cannot annul a judicial decision ("res judicata") when there is no legal right of appeal.

This means, as we understand it, that while the prince stands personally in some way outside of the law, he cannot interfere with the due process of law, or, by his brief, deprive a man of his legal rights. We are again reminded of Alciatus.

We turn to another French Civilian of a little later date, Nicolas Vigelius, whose work on the 'Digest' was first published in 1568.

His discussion of the sources of law does not seem to us to be much more than a collection of some of the passages in the 'Digest' and 'Code' which refer to it, except when he deals with the relation of custom to law. This he discusses in some detail, and he states his own conclusions dogmatically. He first refers to it in dealing with what he terms "Exceptions adversus leges". The seventeenth "exceptio" is "nisi lex alia lege vel consuetudine sit mutata", and he cites some words of that passage of Julianus, to which we have so often referred, in which he says that laws are abrogated not only by the will of the legislator, but also by the tacit consent of all, "per desuetudinem".

Vigelius returns to the subject a little later, and at some length. Custom, he says, has the force of law, and he confirms this by citing various passages from the 'Digest' and the 'Code'. He cites as an "exceptio" that important rescript of Constantine which seems to imply that custom had no force against law ('Code,' VIII. 52, 2) and some words of Ulpian (Digest, I. 32, 3); but he concludes dogmatically that if the custom were subsequent to the written law, it prevails against it. (We cite the last words of the passage.)

When he turns to the relations of the prince to the law, while he cannot directly repudiate the doctrine "Princeps legibus solutus", he argues that to act upon this is contrary to the "Digna Vox", and that in several cases the Emperor had said they would not act upon it, but that while they were "legibus soluti" they lived according to the laws ; and he quotes some lines of Claudian. Vigelius clearly does not like the principle that the prince is "legibus solutus". When we come to the authority of the prince's briefs, he states dogmatically the limits which are set upon it by the law. In spite of the reverence which is due to the briefs of the prince, no such brief is to be accepted in a Court of Law which is contrary to the general law or the public service, unless it is such that it inflicts no injury upon anyone.

A little later still, we come to another important French Civilian who lectured at Bourges from 1551 to 1572, H. Doneau, whose work, 'Commentariorum de Jure Civili', was first published in 1589-90.

Doneau is, in the first place, clear that law is established by the Roman people, for the prince only holds the legislative power because the people have conferred it upon him, and it is immaterial whether the people makes laws itself, or whether it does this by those to whom it gives the power to do so.

In another place Doneau seems to speak as though the consent of the citizens were still required to make law, and he cites the important passages which speak of the "communis resipublicae sponsio" as a necessary element in legislation; this is the more significant as he adds that the obligation of law is greater when it represents a man's own consent, than when it is imposed upon him by the will and authority of another.

It seems reasonable to relate this to Doneau's treatment of custom in relation to law. He interprets the rescript of Constantine ('Cod.', VIII. 52, 2) as referring not to a particular custom, but to custom in general, that is, as meaning that custom, as such, is not superior to law as such; and that if a particular custom and a particular law are in conflict, the later in time is superior.

When Doneau turns to the relation of the prince to the existing law, be assorts dogmatically that all men are under the law, even the prince. It is true that the prince is "legibus et solemnitatibus juris solutus" by the "Lex Regia" of the Roman people, but be is bound "communi principum lege et sua", for the prince wills to live according to the law.

He returns to the question in his Commentary on the 'Code', and contemptuously brushes aside the contention of those who favoured the prince, that it was derogatory to his dignity that he should not be able to do whatever he pleased, and he points out that the Empire rests upon good laws, which are established not only by the words of the prince but by his example.

The general principle that the prince is under the law is so firmly asserted by Doneau, that it is not surprising that he should lay it down dogmatically that Imperial Rescripts in particular cases,

which are contrary to law and the public interest, are to be ignored by the judges. He admits, indeed, that if they do not injure others, and in some other cases, they may be received, but with these exceptions they are to be treated as null and void; it is significant, he adds, that even if they contain a "non obstante" clause, they have no force.

It would seem clear, as we said before, that, whether we attribute this to the influence of Alciatus or not, these important Civilians of the sixteenth century represent very different conceptions from those of most Italian Civilians of the fifteenth century.

We can now turn to Cujas, the greatest French Civilian of the sixteenth century ; it is true that his work belongs to the later years of the century, but it appears to us that it is closely related in character to that of the Civilians with whom we have been dealing. Cujas' observations on politics are scattered over his various legal works, but when they are put together they seem to represent something like a systematic theory of the nature of the State and its authorities.

In commenting on the famous passage of Gains, "omnes populi" ('Digest', I. 1, 9), he sets out a far-reaching and significant judgment on the relation of the organised State to human life. There may be, he seems to mean, men who are not ruled by laws and customs, but these do not constitute a "Populus", for where there is no law there is no "Populus", and therefore no Commonwealth; and he cites Aristotle as saying that where there is Law, there is a Commonwealth. So far his words are reminiscent of Cicero as well as of Aristotle, and, indeed, they are also closely parallel to Bracton, and they represent the same profound and penetrating judgment, that without rational order the life of the community is impossible. Cujas does not, however, merely say that there can be no Commonwealth without Laws, but he also holds emphatically that while there may be races of men who live, like the beasts, without them, yet there is in all men a right Reason which makes them capable, like us, of the greatest things; for this Reason can be brought out like fire from ashes or from flint; and, though they may be "wild and outlaws", they are not, like the beasts, incapable of being ruled by custom and law. The natural Reason, which is the Law of Nature, may be asleep or buried in them, but the light of Reason may be easily stirred up.

These are very interesting words, closely parallel to a famous passage in Cicero's 'De Legibus'; but it is important especially as illustrating Cujas' judgment that the foundation of the Commonwealth is the Law, and the foundation of Law is Reason.

In another passage Cujas discusses the meaning of "Jus", and says that if we are to consider this properly we must begin with the Jus Gentium, which he identifies with that Natural Law which Reason teaches men, and which is present in all men.

He then discusses a phrase of Modestinus ('Digest' I. 3, 40). "Jus", he says, "is made by consent or necessity, or established by custom", and Cujas explains what he understands this to mean. "Jus", which is made by consent, is Lex, for it is established by the command of the "Populus" or the "Plebs". "Lex", that is, law in this sense, is binding upon us because we have consented to it, or because it has been established by that State in which we were born and brought up. Again, Cujas puts it in another way. What is "Lex"? he asks. It is an agreement of the Commonwealth or the common consent of all those who dwell together, or as Demosthenes and Aristotle say, the common agreement of the city.

Jus, which is made by necessity, is in the first place a "senatus consultum", and Cujas cites Pomponius, 'Digest', I. 2, 2. When it became difficult for the whole people to be gathered together on account of their number, it was necessity which compelled men to give the care of the Commonwealth to the Optimates. In the second place, it was necessity which created the form of "Jus" which is made by the prince; it was because the Senate was not equal to the charge of ruling the Provinces that the prince was created.

Jus, which is established by long custom, also rests upon consent, but it is a tacit and unwritten form of consent. Cujas adds that Jus, which is established by necessity, has indeed some form of

consent, but it is a forced, not a free consent, such as that which makes law (lex) or custom. The foundation of the Senatus consultum is necessity, that of law and custom is will.

We turn to his more developed theory of the nature of law as custom. In another work Cujas discusses this question with immediate reference to the famous passage in 'Code', VIII. 52, 2; he maintains that a custom which reason and public utility approve, and which has been confirmed by long unwritten consent, and by a judgment in the Courts, abrogates any law which has ceased to serve its purpose and is of little use to the Commonwealth. For no law is binding upon men unless it has been received by custom; or, as he puts it in another place, the force and power of approved custom is such that written laws do not bind men unless they have been accepted by the judgment of the people, that is, unless they have been approved by custom.

This is a very explicit statement of the importance and authority of custom as representing the reception of a law by the people. Cujas puts this principle, however, in still more general terms, in another work, when commenting on the famous definition by Papinian of Lex, in 'Digest' I. 3,1. We are bound, he says, by the Laws, for no other reason than that they have been received by the judgment of the people, and approved by custom, and he cites Aristotle as saying that the whole authority, which law has to compel men to obedience, comes from custom; and he cites a writer named Demetrius as saying that law is simply custom which has been written down, and that custom is unwritten law.

So far, then, Cujas conceives of law as representing the custom and consent of the community, but he also formally and explicitly accepts the principle that the people had transferred their legislative authority to the prince. In one work he puts this quite dogmatically and simply, that while the public and general ancient laws were made by the people, or the Plebs, they do not now make such laws, for they have transferred their authority to the prince. In another work he gives a summary of the various forms of Jus, which once belonged to the people, but had been transferred to the prince. It should, however, be noticed that in his 'Commentary on the Digest', Cujas' language about the nature of the authority of the prince does not seem quite the same. In commenting on the account given by Pomponius of the origin of the Imperial power, he describes how, by a slow process, Rome passed from the authority of a king to that of the people, from that of the people to that of the Senate, and from that of the Senate to that of one man, not a king, but a prince who should be first in the Commonwealth and the Senate, but should not take to himself all the right (jus) of the people or Senate, but rather should share it.

We turn to Cujas' conception of the relation of the prince to the law, when made, that is, to his discussion of the meaning of "legibus solutus". In treating the passage of Ulpian (Digest, I. 3, 31), which says, "Princeps legibus solutus est", he says that these words had been understood by the Greeks as referring to "penal" laws, for the prince has no judges; by the Latins as referring to all laws; but the truth is that they only apply to "Leges Caducariae", not to others; even if the prince has not sworn to observe the laws, much more, if he has. The people was bound by the laws which it had made, and therefore, also, the prince upon whom it had conferred its authority. The proper meaning of the phrase is that the prince has the power of making and unmaking laws, but he must only use this power for a just cause and for the good of the Commonwealth; he has also some power of rectifying things done without law. In another work, commenting on ' Code,' VI. 23, 3, he sets out the same judgment in much the same terms, and with special reference to his own time.

It is quite clear that Cujas refuses to admit that the Roman Emperor was above the law; he recognises, indeed, his legislative power, but maintains very confidently that he was normally bound to obey the law so long as it was law; and it must be observed that Cujas says in tbe passage last quoted that the princes of the modern world were bound by the oath, which they took on their accession, to obey the laws; that is, it is clear that besides what he conceived to be the rational and critical interpretation of the jurisprudence of the ancient world, he had no doubt about the

constitutional principle of his own time. It may also be observed that Cujas very emphatically asserts that it is a mere error to maintain that the prince has "property", in the strict sense of the word, in that which belongs to the private individual; he has rights over it "imperio", but not "dominio".

We think that it is plain that in France from Alciatus to Cujas, a number of the most important Civilians of the sixteenth century maintained a conception of Law and its relation to the prince very different from that of the Italian Civilians of the fifteenth century, and even from that of the Civilians of the fourteenth century.

We must also observe that one of the most important Civilians of the century in Germany, Zasius, a native of Zurich, but for many years Professor of Roman Law in the University of Freiburg in the Breisgau, during the first part of the sixteenth century, represented in some important points the same principles as Alciatus and the French Civilians with whom we have just been concerned.

We find some important judgments in his Commentaries on the 'Digest,' and we have, in one of his "Consilia", a detailed discussion of the question whether the Emperor could interfere with a judgment of the Reichs Kammer-Gericht by an Imperial writ or brief.

Zasius uses the strongest terms to describe the "Potestas immensa" of the Emperor; he is a living law, and what he decrees as law, or decides in judgment, is held to be law. He is "legibus solutus", and can make law "solus"; whether Zasius meant by this that he can issue laws by his own authority, or that he is the only person who can make law, is not clear.

We must not, however, be misled by these high-sounding phrases. Zasius goes on at once to say that the Roman prince, if he has made any contracts or agreements even with private persons, is bound by them; for, though God has placed the laws under the control of the prince, he has not done this with contracts; they belong to the "Jus Gentium" and are founded on natural reason. This, he maintains, is the common doctrine of the "Juris Periti", such as Cynus and Baldus, and he relates it to the tradition of feudal tenures.2 Zasius returns to this question of contractual obligations in his treatise, 'In usu feudorum'.

He also maintains that the prince's actions must be conformed to reason and equity, and he cites not only the well-known stories about Trajan and Agesilaus, but also the rescript of the Emperor Anastasius, which instructs the administrators of the Empire that they were not to pay any heed to rescripts or pragmatic sanctions which were contrary to the general law or to public utility.

Zasius considers this question further in a passage in which he discusses what is meant by the phrase "legibus solutus". Does this, he asks, mean that the prince can act contrary to the law and annul the Civil Law? The Canonists, he says, maintain that this was true of the Pope; it would thus be true also of the Emperor; but this assertion, he says, never pleased him, for various reasons, and especially because laws (jura) are given by God through the mouth of the prince. He considers that some laws may be suspended in particular cases, and that this is done by a "non obstante" clause. But again, he says, if the prince should annul a man's legal rights without due cause, his action is null and void, even though he does it in the form of a law or decree. This is the law of Germany, and he says that he had heard a judgment given against the prince in the prince's "consistory".

This reference to a definite case in the Courts is of great interest, and it seems probable that this is the case which, as we have said, is dealt with at length in one of Zasius' "Consilia", which has happily been preserved. The plaintiff had, many years before, brought a case against the defendant in the Reichs Kammer-Gericht, and the Court had ordered the defendant to pay a certain sum of money to the plaintiff. The defendant had then taken the matter to the Emperor Maximilian, who issued a mandate, "de plenitudine potestatis et ex certa scientia", annulling the judgment. After further negotiations, a compromise had been arrived at, by which the plaintiff was to receive 1000 florins, but this was never paid. On the death of Maximilian, the plaintiff applied for the execution of the original judgment.

Zasius begins by laying down two general principles, the first that the Emperor could not override the judgment of the Court, and the second, that the Emperor was bound by his contract.

He recognises that there had been much discussion about the effect of the use of such phrases as "ex plenitudine potestatis" and "ex certa scientia", when employed by the Emperor in his briefs or writs, but he is himself quite clear that the prince could not annul "Res Judicata" by the use of such phrases. He had always held, and still maintained, whatever other doctors might say, that the prince could not, by his "plenitudo potestatis" or his "certa scientia", or in any other way, annul the lawful right (jus) which a man might demand, except for some great public cause. The authority of the prince is of the largest kind, for the protection of his subjects, but an authority to injure them, belongs not to a prince, but to a tyrant. He dismisses rather contemptuously the contention that it must always be presumed that the prince had some just reason for his action, and contends that the use of such phrases as "plenitudo potestatis", &c., had become so much a matter of convention that no great foree could be attributed to them. He concludes, therefore, that the prince could not take away a man's lawful rights by the use of such phrases.

This is important, but it is not all that Zasius has to say; so far he has argued on general grounds that the Emperor could not override the judgment of a Court of Law, or violate the clear rights of any subject, by invoking some supposed absolute authority. He goes on to contend that in this particular case the Emperor Maximilian was bound by a Constitution of his own. He describes the Diet held at Worms in 1495, and says that Maximilian promulgated a Constitution that he would not obstruct the proceedings or judgments of the Reichs Kammer-Gericht, nor evoke its cases to himself, nor annul, nor suspend its decisions, and that he had confirmed this Constitution on several later occasions. This Constitution had received the force of a contract by the Emperor's oath to observe it, and the Emperor is bound by his contract.

He sums up, therefore, that the authority of the Roman prince does not extend to injustice; although he is free from merely positive law, he is subject to reason and the Divine Law, the right (jus) claimed by another which belonged to the Jus "Naturale" or "Gentium" could not be taken away by any words of the Emperor, such as "de plenitudine potestatis" or "ex certa scientia", except for some obvious public cause; the use of such phrases in the Imperial writs has therefore little significance. The Emperor, therefore, cannot annul the "res judicata" in the case under discussion, and more especially because he was bound by his own contract made with the Empire. He concludes, therefore, that the Court should order the judgment given before in favour of the plaintiff to he carried out.

We shall have occasion in later chapters to deal with some other important jurists of the sixteenth century, specially with Bodin, Peter Gregory of Toulouse, Barclay, and Althusius, hut primarily as political writers, not jurists, it seems to us better to treat them from that point of view.

In this chapter we have endeavoured to put together some observations on the political theory of some important Civilians of the sixteenth century, mainly in France, and we think that we have done enough to make it clear that they represent a position different in some respects from that of the Civilians of the fourteenth and fifteenth centuries, and analogous rather to that of some of the most important Civilians of the thirteenth century, like Azo and Hugolinus.

PART IV,
THE POLITICAL THEORY OF THE LATER SIXTEENTH CENTURY.

CHAPTER I.
THE SOURCE AND AUTHORITY OF LAW.

We have so far been dealing with the history of political theory and ideas in the first part of the sixteenth century, for it appears to us that it is wise to distinguish in our treatment between the earlier and the later part of the century. How far indeed there are any important; differences between the general character of the earlier and later conceptions we shall have to consider, but it is obvious that in the second half of the century there was a great deal more political writing. The fact is obvious, and some of the causes are obvious and apparent, for the last fifty years of the century were full of the clamour and noise of civil war and revolutionary movements. We may say at once that it seems clear to ourselves at least that these movements had no relation at all to what is called the "Renaissance", whatever that word may mean, and that the great revival of religion, the Reformation, or what is called the counter-reformation, was only, and only in part, the occasion and not the cause of these movements.

As von Ranke long ago pointed out, the great international conflicts of the sixteenth century were not caused by the religious movements, but only sometimes crossed and sometimes deflected by them; and the same thing is true of the political principles and theories. It is at first sight a curious thing to find a Scottish Protestant like George Buchanan expressing almost the same judgments in political theory as the Spanish Jesuit Mariana ; but the fact is that the difference of religious belief, as such, had little or no relation to political conceptions.

All this, however, wo shall have to consider; the fact is that, whatever the reason may have been, there was a great outburst of energetic political theory in the second part of the sixteenth century, and our business is to examine this, and to consider what were the relations of this to the traditional conceptions of the Middle Ages.

We thought it well to begin the preceding part of this volume by drawing attention to a work which seems to us to be in many ways very representative of the normal attitude of men in the sixteenth century to political authority—that is, de Seyssel's 'La Grant Monarchie de France', a work written apparently with no specially controversial intention, and we pointed out that, to him, the Government of France was a monarchy indeed, but limited by the various laws and organisations of the country.

In 1583 there was published in England (but it had been written apparently in 1562) the work entitled 'De Republica Anglorum', by Sir Thomas Smith, a man of large and varied experience of public office, an Ambassador, a Privy Councillor, and a Secretary of State. This work also appears to have been written without any special controversial intention, and we think that a consideration of the main principles set out in this work may serve to indicate some of the normal conceptions of Englishmen about politics, and especially their conception of the place and authority of law.

After describing the six forms of good and bad governments in the terms of the Aristotelian tradition, he goes on to deal in more detail with the contrast between the king and the tyrant. The king he describes as one who by inheritance or by election has received the Crown with the consent of the people, and who governs it by its laws, to the benefit both of the country and of himself. The tyrant, on the other hand, is one who rules without the consent of the people, who makes and unmakes laws at his pleasure, without the advice of the citizens, and who puts the advantage of himself and his kindred before the common good.

He goes on to say that this "tyrannical power" was given, as it was said, to the Roman emperor by a decree of the people, and some say that the same power belonged to the King of France and some of the Italian princes, that they possessed the power of making and unmaking laws, and of imposing taxes without the consent of the people; he adds that it was said that it was Louis XI who first changed the administration of the French kingdom into this absolute and tyrannical power. There are, he says, some who maintain that this was not a form of tyranny but the proper form of monarchy. Smith, however, regards such an unlimited authority as one which might be valuable in time of war, but is in time of peace dangerous to the people.

This is a very emphatic and important statement, that in normal political society, and in its normal circumstances, it is the Law and not the prince which is supreme. This is the conception of Bracton and of Fortescue, and, as in Fortescue, the statement receives a greater emphasis by the reference to France, while Smith, like Fortescue, thinks of the French conditions as being recent developments.

It is interesting to compare the conceptions of Sir Thomas Smith with those expressed in the contemporary work of Francis Victoria, who was a Dominican and Professor at Salamanca. Victoria has a high conception of the nature and place of the king and his legislative authority, but he also sets out in very dogmatic terms his judgment that the king is bound by the Law. Some, he says, contend that the king is above the whole commonwealth, and that no one can be bound except by a superior; but it is clear that the king is bound. The laws of the king have the same authority as those which are made by the whole commonwealth, but laws made by the whole commonwealth are binding upon all men. It is open to the king to make laws or not, but it is not open to him to be bound or not. As in contracts, a man may or may not enter into a contract, but when it is made it binds him.

The principles of government which are set out by Sir Thomas Smith may be conveniently compared with those which had been laid down a few years earlier, that is, in 1556, by Bishop Ponet in his work entitled 'A Short Treatise of Politike Power'. Ponet certainly shows no signs of the influence of that theory of the Divine Right of Kings with which we have dealt in a previous chapter, but sets out with singular clearness the same constitutional traditions as Sir Thomas Smith. Like him, he repeats the Aristotelian description of the three good governments—the Monarchy, Aristocracy, and Democracy; but adds, "And where all together, that is, a king, the nobility, and the Commons, a mixt state, which men by long continuance have judged to be the best of all; ... but yet every kind of these states tended to one end, that is, to the maintenance of justice, to the wealth and benefit of the hole multitude, and not of the superior and governors alone" (Ponet, Short Treatise, Part I.p.7). Ponet, however, also deals with the subject of the relation of political authority to God, and in Part II he asks the question whether kings, princes, and other governors have an absolute power and authority over their subjects. "Forasmuch as those that be the rulers in the world, and would be taken for Gods (that is, the ministers and images of God here in earth ...) claim and exercise an absolute power ... or prerogative to do what they lust, and none may gainsay them; to dispense with the laws as pleases them, and freely and without correction or offence doe contrary to the law of nature and other Gods laws, and the positive laws and customs of their countries, or break them : and use their subjects as men doe their beasts, and as lords doe their villains and bondsmen, getting their goods from them by hook and by crook, with 'sic volo sic jubeo', and spending it to the destruction of their subjects; the miscry of this time required to examine whether they do it rightfully or wrongfully" (Id. id., Part II. p. 17).

He answers the question first by pointing out that political authority was ordained by God Himself, to the end that justice should be maintained by men. "Before, ye have heard how for a long time, that is until after the general flood, there was no civil or politic power, and how it was first ordained by God Himself, and for what purpose He ordained it: that is (to comprehend all briefly) to

maintain justice: for everyone, doing his duty to God, and one to another, is but justice" (Id. id., Part. II. p. 18).

It is, however, his constitutional principles which are most fully and emphatically developed. He asks the question again, whether kings and princes have an absolute authority over their subjects, and answers confidently: "Ye have heard also, how States, Bodies politic, and Commonwealths, have authority to make laws for the maintenance of the Policy, so that they be not contrary to God's laws, and the laws of Nature, which if ye note well the question before propounded, whether kings and princes have an absolute power, shall appear not doubtful, or if any would affirm it, that he shall not be able to maintain it" (Id. id., Part II. p. 18).

And this leads him to make the same distinction, with which we are familiar in Fortescue, between those States which are governed by laws made by the prince, and those in which the community has retained the legislative power in its own hands. There are two kinds of princes, "the one, who alone may make positive laws, because the whole State and body of the country have given and resigned to them their authority so to do. Which nevertheless is rather to be computed a Tirant than a king. ... And thither be such unto whom the people have not given such an authority, but keep it themselves; as we have before say concerning the mixt State " (Id. id., Part. II. p. 21).

Ponet recognised that the Roman Empire had the first character, but this Empire had long ceased to exist, and ho exclaims impatiently, "I beseech thee, what certainty should there be in anything, when all should depend on one's will and affection?" (Id. id., Part II. p. 24).

He had already pointed out that it was just in order to prevent the oppression of the members by the head, that the various constitutional forms had been created in various states : Ephors in Sparta, the Tribunes in Rome, the Council or Diet in Germany; "in France and England, Parliaments, wherein there meet and assembled of all sorts of people, and nothing could be done without the knowledge and consent of all" (Id. id., Part I. p. 10).

In a later section of the treatise Ponet considers the question whether it is lawful to depose a wicked ruler and to kill a tyrant, and his answer is very explicit. He cites the deposition of Chilperic by the Pope, the depositions of Edward II and Richard II in England, and the recent deposition of the King of Denmark, and he urges that "the reasons, arguments and laws that serve for the deposing and displacing of an evil governor, will do as much for the proof that it is lawful to kill a tyrant " (Id. id., Part VI.).

With special reference to England, he says that it pertained to the authority of the High Constable, "not only to summon the king personally before the Parliament or other Courts of Judgment (to answer and receive according to justice), but also on just occasion to commit him unto ward" (Id. id., Part VI.); and in more general terms, "Kings, princes and governors have their authority of the people, as all laws, usages and policies declare and testify ... and, is any man so unreasonable to deny that the whole may do as much as they have permitted one member to do? or those that have appointed an office upon trust, have not authority upon just occasion (as the abuse of it) to take away that they gave?" (Id. id., Part VI.).

The only limitation he makes is that no private person may kill the tyrant except by public authority, except in the case that the public authority is utterly negligent; but the prince, committing crimes against any of his people, such as murder, theft, rape, &c., should be punished like any other criminal (Id. id. id.).

The theories of Ponet are, especially in this last part of his treatise, developed in terms far removed from Sir Thomas Smith's restrained and judicious manner, but the substance of his constitutional position is the same, and serves to indicate the importance in England of the political tradition of Bracton, Fortescue, and St Germans; and even some of Ponet's most drastic contentions were, after all, founded upon political traditions which were not unimportant.

So far we have been dealing with writings which are not related to the great political controversies of the latter part of the century. We must now turn to the literature which belongs to these. We turn to that great Humanist, George Buchanan, who vindicated the deposition of Mary, Queen of Scots. In his treatise, 'De Jure Regni apud Scotos', published in 1578, he deals first with the origin and nature of Law, for, as he evidently thought, until this had been made clear it was not possible to discuss properly the place and authority of the ruler.

The treatise is in the form of a dialogue between Buchanan and a person he calls Maetellanus (presumably Maitland). God, he says, is the author of human society, and He implanted in man the Law of Nature, of which the sum is that man should love God and his neighbour as himself; it is this Divine Law which is the source of human society. This society must have an authority to maintain peace and harmony, and this authority is that of the king. If the qualities required for a king were fully and properly developed in one man, we should recognise him as king by Mature, not by election, and give him an unrestrained power; even if these qualities are not perfect, we shall still call the ruler king, but we should give him as companion and restraint the Law. "Metellanus" asks whether, then, Buchanan does not think that the prince should have a complete authority, and Buchanan answers that he should by no means have this, for he is not only a king but a man, and liable to err through ignorance or sin, and therefore the wisest men have thought that the law should be added, to enlighten his ignorance, and to bring him back into the right way if he errs.

Buchanan expresses this again in more general terms, and says that kings were created to maintain "aequitas", and if they had done this they would have retained an authority free and "legibus solutus"; but, as is natural in human things, the authority which was intended for the public good changed into a "proud lordship". Laws therefore were made by the people, and the kings were compelled to obey the law which the people had created. They had found, by much experience, that it was better to entrust their liberty to the law than to the king.

The king is subject to the law, and Buchanan then discusses the question, who is the legislator? The people, he says, who have conferred authority upon the prince should have the power to impose a limit upon this authority. He explains that he did not mean that this power should be given to the whole mass of the people, but that, as "our" custom is, men chosen from all the "orders" should enter into counsel with the king, and only after this *council* should the final judgment be given by the people. Maitland objected that the people were rash and inconstant, and says that these advisers will be no better. Buchanan replies that he thinks differently. For the many not only know more, and are wiser than any one of them, but they are wiser and know more than any single person, even if he excel every one of them in prudence and intelligence; the multitude judges all questions better than any one man.

Buchanan also maintains that the interpretation of the Law must not be left to the judgment of the king.

We shall return to Buchanan later when we deal with the whole question of the position of the king, but in the meanwhile it is clear where he stands with regard to the source and the authority of the Law. He is, under his own terms, setting out the normal mediaeval conceptions.

We must turn to the treatment of law m the great and complex mass of the political tracts of the period of the civil wars in France. The immediate occasion of these civil wars was, no doubt, the question of religion; but it is also evident that the religious conflict was the occasion rather than the cause of the development of a very emphatic constitutionalism.

It was between the years 1573 and 1579 that there appeared several tracts or pamphlets, the 'Remonstrance aux Seigneurs Gentilshommes et autres', the 'Droit des Magistrata', the 'Franco Gallia', the 'Archon et Politie' (or 'la Politique'), and the 'Vindiciae contra tyrannos', and others which are related to each other in subject-matter and in principles. The general principle, which they seek to assert, is well expressed in the 'Remonstrance'. This work is addressed, primarily, to the

nobles and gentlemen of the Reformed Religion in France, but also to all those Frenchmen who sought the preservation of the kingdom, and it begins with the declaration that the name of Frenchman (Francs) was a proper description of men who desired to maintain an honourable liberty under the authority of their kings.

It goes on a little later to denounce the flatterers and parasites who tell the king that if he were under the rule and order of the Law he would be nothing but a 'valet' of the people, and to lament the fact that the Courts of Parlement, which were formerly over the kings and resisted their absolute power, were now basely servile to the commands of those from whom they expected rewards. The statement that the king was under and not over the Law, and that the Parliament was the organ of the supremacy of the Law, may seem somewhat extreme, but it should be remembered that it is practically what had been said in the early years of the sixteenth century by de Seyssel in the 'La Grant Monarchie de France.'

The same principle is restated in the 'Droit des Magistrate'. It is the part of a detestable flatterer, and not of a loyal subject, to tell the prince that sovereigns are not bound by the Laws. On the contrary, they are bound to govern by them, for they have sworn to maintain and to protect them. In a later passage of the same work we find a good illustration of the circumstances under which the Huguenots thus appealed to the supremacy of the Law. The author admits that subjects have not the right to force their lord to change the order of the State in matters of religion, but must submit to persecution, if the laws command it, for their religion. It is, however, wholly different if by public edicts, lawfully issued and confirmed by public authority, they have been permitted to exercise their religion. In that case the prince is bound to obey them, or by the same authority to revoke them. Otherwise he is exercising a manifest tyranny, and it is lawful, under proper conditions, to resist.

The same conceptions are restated and further developed in the treatise called 'La Politique, Dialogue de l'authorité des Princes, et de la liberté des peuples', generally cited as 'Archon et Politie'. Tyranny, Politie says, in an hereditary kingdom, is when a legitimate prince is not content with what he has lawfully acquired, but violates the ancient laws and customs of his country.

Archon protests that this is to put the king under the law, but there is a sentence in the Pandects which says that he is not under the law, though "par honnesteté" he should carry it out. For it is he who makes the law, and he does not submit to it except so far as he pleases, otherwise his power is not sovereign but bridled and restrained.

To this contention Politie replies by considering the real source of laws. He cites the definitions of law by Papinian, Demosthenes, and Chrysippus, and the opinion of Cicero that the deliberation and consent of the commonwealth are implied in the laws, and that the prince must therefore be subject to them.

When Archon contends that the Civil Law is composed of the ordinances of princes, and that in all its parts it is subject to their power, Politie replies that in general terms the Law includes all ordinances which are just; these have been formed by the people in their customs. If they are not suitable, the prince can adjust them to the needs of particular times and persons, but must not usurp the power to do this without the consent of those who are most concerned. Archon objects that this is very far indeed from the opinion of many kings, who consider that their subjects, their lives, and property are completely under their power. Politic agrees that they are under their jurisdiction, but only by process of law, and he adds a reminiscence of the Feudal Law, that the Lord owes the same faith and love to his vassal as the vassal to him, and loses his lordship for the same causes and crimes as the vassal loses his fief.

In another place the author of this treatise, like the author of the 'Droit des Magistrate', appeals to the supremacy of the Law as justifying the resistance of the Huguenots to persecution, when the exercise of their religion had been granted them by formal laws and edicts; and he extends this principle to the general legal rights of the people, for, as he says, there are few kingdoms or

principalities where the chief rulers are not restrained by many laws to which they have sworn, when they were accepted, and which they have promised to the sovereign power to obey—that is, to the estates which are formed by the whole body of the people. (We shall have much more to say later of the conception of the sovereign power which is represented in these words.)

The best known of these Huguenot works is the 'Vindiciae Contra Tyrannos', published in 1579. There has been much discussion of its authorship, but we are not here concerned with this but with the judgment of the author on the origin of law and its relation to the prince. His judgment is very clearly expressed. Men would have been satisfied to have received law from one good and just man, but the judgment of kings was too uncertain and variable. Laws were therefore made by the wise men and the magistrates. The principal function of the king is to keep and maintain the law. It is better to obey the law than the king; the law is the soul of the king, while the king is the instrument of the law. The law represents the combined reason and wisdom of the many, for the many see and understand more than the one. It has thus come about that while in the earliest times kings reigned absolutely and their will was law, this now only continues among barbarians, while the more polite and civilised people are bound by laws. We do not accept the saying of Caracalla that the emperor makes laws but does not receive them; rather in all well-ordered kingdoms the king receives the law from the people, and does not obtain the kingdom until he has promised to give every man his right (jus) according to the laws of the country. He can only amend or add to the laws when this has been approved by the people, or the chief men of the people, formally or informally, called together.

The author of the 'Vindiciae' adds some important observations on the actual or traditional practice of some of the more important countries of Western Europe. In the empire the emperor "rogat in concilio", and, if they approve, the princes, barons, and representatives of the cities sign the decree, and only then is the law valid; the emperor swears to observe the laws which have been thus made, and not to make other laws except with the common consent. In France, where the authority of the king is commonly thought to be higher than elsewhere, laws were formerly made in the Assembly of the three Orders, and all commands of the king were void, unless the Senate (*i.e.*, the Parlement) ratified them. In England, Spain, and Hungary the custom is the same as it always was. He concludes that if it is true that the laws are greater than the king, if kings must obey the law as the slave does his master, who would not prefer to obey the law rather than the king ? Who would obey the king if he violated the law, or would refuse to defend the law which had been violated ?

These writers are agreed in maintaining that the king was under the law and not over it, for his authority was derived from the law, and the law proceeds ultimately from the community. They admit that, in the earliest stages of human life, men may have submitted to the authority of rulers, uncontrolled by law; but they found long ago that it was impossible to submit to the arbitrary and capricious rule of one man, and this only now survives among barbarous and uncivilised people; and, as we have just seen, the author of the 'Vindiciae' asserts this principle of the supremacy of the Law of the community as representing the normal conception of the greater European countries.

It may be suggested that these writers were Protestants, though, as we have observed, there is nothing in these contentions which represents an appeal to distinctively Protestant opinions. We turn, therefore, to a group of writers who belonged to the Order of the Jesuits.

We begin with Molina, an important Spanish Jesuit, whose work, 'Do Justitia et Jure', was published in 1592. He maintains that the light of nature teaches that it is in the power of the commonwealth to entrust authority over itself to one or more persons, as it judges best. This authority is greater or less according to its judgment, and if the ruler endeavours to exercise more authority than is given to him, he acts tyrannically.

Having thus set out clearly the source and limits of the authority of the ruler, Molina approaches the subject with which we are here immediately concerned—that is, the conditions of the legislative authority.

One of the functions of the king is to make laws, but the question must be considered whether the people gave him the power to make laws only with their approval, or without it; and Molina thinks that if it is the custom that laws have no force unless they are approved by the people, it must be assumed that the commonwealth only granted to the king the legislative power, subject to this condition; for it is more probable that the king increased his power, the subjects not venturing to resist, than that they hail diminished the power which they had given him. If, as Castro suggested, the custom was that the commonwealth should obey all the laws of the prince which were not actually unjust, it would have to be concluded that it had granted all its authority to the king, but it could scarcely be believed that any commonwealth had done this. Molina's principle seems to be clear, that it is almost incredible that the commonwealth should have completely surrendered all that authority, which originally belonged to it, to the ruler.

It must not indeed be supposed that Molina was an enemy of monarchy; indeed, he clearly holds that it is the best form of government, for it tends more to internal peace than any other form, and he maintains that the authority of the monarch is greater, not merely than that of individuals in the commonwealth, but than that of the whole commonwealth —that is, within the limits of the authority which has been granted to him. But again, it must be observed that this authority is limited, and if the king attempts to take more than had been granted to him, the commonwealth is entitled to resist him as a tyrant.

Molina very emphatically maintains that the royal power, or any other supreme civil power which the commonwealth may create, is derived immediately from the commonwealth, and only "mediately" from God. For it is by the natural light and the authority which God has granted to the commonwealth that it should choose that form of civil power which it thinks most expedient. He adds that there always remain two powers : one in the king, the other in the commonwealth. The latter is indeed restrained in action, so long as the former continues, but restrained only as far as the commonwealth has granted power to the king. If this power is abolished, the commonwealth resumes its whole power; and even while it continues, the commonwealth can resist the king if he behaves unjustly or exceeds the power granted to him.

It is clear that Molina does not acknowledge any absolute "Divine Right", or indeed any form of absolutism. His language is grave and measured, but his conclusions are clear. He does not indeed refer directly to the constitutional traditions of Spain, as we shall presently see, that Mariana does, hut it is at least probable that he has them in mind. He believes in monarchy, but a monarchy of limited powers—limited by the conditions imposed by the commonwealth; and that these limitations can be enforced by the action of the commonwealth. The terms in which he states his arguments and conclusions are, no doubt, much more restrained than those of George Buchanan, or of the French Huguenot pamphlets, but the principles are the same. The community is the immediate source of all political and legislative authority, and the king has only a limited authority which is determined by the conditions under which the community has granted it.

From Molina we turn to Suarez, one of the most famous Jesuit writers of that time. The most important of his works for our purpose, 'De Legibus ac De Legislatore', was indeed only published in 1613, but it appears to us that it may reasonably be put alongside the work of Molina.

The authority to make law, he says, from its very nature, resides not in one man but in the community, for all men are by nature born free, and no man therefore has by nature jurisdiction or lordship over other men, and he repudiates the conception that political authority was bestowed immediately by God. He is careful indeed to point out that it is not any chance body of men without order or definite purpose which has this authority, but a community united by the common consent and special intention to form a political and mystical body and to pursue one political end.

This community has the power to transfer its jurisdiction to one person, but the nature and form of the authority thus created is created by human will. Suarez seems to prefer monarchy, but he

seems to think that this may often be combined with other forms of political authority; and he adds a little later that while a monarchy may be strictly hereditary, it also has first been derived from the community, and is subject to those conditions under which it was first created.

He had already said that political authority was not given by God to any one man directly; he corrects this by saying that God had only done this in rare cases, but that generally when the Scriptures say that God gave the kingdom to some definite person, this only meant that the Divine Providence had so ordered or permitted, and this did not exclude human action.

The first important aspect of Suarez' political theory is then clear. The community is the ultimate source of all political authority, and therefore of Law, and the conception that the authority of the prince was directly derived from God, while it may have been true in some exceptional cases, was not normally true; normally his authority was derived from the community, and was subject to such conditions as the community may have imposed.

We turn to another question when we consider the principles of Suarez with regard to the legislative power of the prince when he has been created by the community. It is, however, not at all easy to arrive at a quite clear conception of his position, and we give our opinion subject to correction. In one place he says that the power of making laws belongs to all supreme kings, but this is subject to the conditions under which the power was given him by the community. We must therefore ask whether the consent of the people is required when the king makes law. Suarez seems to us to answer that in principle, and normally this power belongs to the king alone, but custom may require the consent of the people.

In another place he says that in some countries the absolute power of making laws, as it was said, was not given to the king, but that he could only do this with the consent of the kingdom, expressed in public assemblies, and this was said to be the case in Aragon. But in other countries the power of the prince was not thus limited; and this was the case "in perfecta monarchia", for in this the people transferred its power absolutely. Suarez seems to mean that this was the ordinary character of monarchical authority.

Finally, we must ask what Suarez held about the relation of the prince to the law when made, but again it is difficult to feel confident that we understand his meaning. He is aware that some think that the prince or legislator, whether Ecclesiastical or Civil, is bound to obey his own laws; and he seems to mean that it is the will of God that the legislator should be bound by his own laws, but he refuses to accept the interpretation of the phrase that the prince is "legibus solutus" as applying only to some "leges caducarii" (as Cujas maintained), and explains it as meaning that the prince is exempt from the "vis legum coactiva".

It must, however, be observed that just as St Thomas must be understood as meaning that while there was no ordinary process of law against the king, the community has the right and power to restrain him or, if need be, to depose him if he becomes a tyrant, so Suarez had said in an earlier passage of this treatise that the king cannot be deprived of his power unless he becomes a tyrant, but that, if this happened, the kingdom could justly make war upon him.

Suarez clearly agrees with Molina in repudiating the theory of the "Divine Right" and recognising that the community is the immediate source of all political and legislative authority, and has the power to determine the form of this, according to its own judgment. But he is not so clear about the question whether the community normally retains a share in legislation. As we understand him, he inclines to the view that normally this belongs to the prince.

We turn to a more determined constitutional thinker in Mariana, also a member of the Society of Jesuits, whose work, 'De Rege', was brought out in 1598. He conceived of men as having originally been without any fixed order or society, but as having been driven into society by their own weakness, by their deplorable confusions, and by the crimes of men against each other.

The first government of the community was that of a king, appointed for his good qualities, and at first there were no laws. These were finally made because men doubted the justice and impartiality of the prince, while the law always speaks with the same voice. Mariana adds an important description of law: it is reason drawn from the mind of God, and free from all changeableness, which enjoins things honourable and useful, and forbids what is contrary to these.

It must not be thought that Mariana was an enemy of monarchy; on the contrary, he carefully discusses the advantages and disadvantages of monarchy, and concludes that it is the best form of government, provided that it is of a constitutional kind. We shall deal with the meaning of this in a later chapter. In the meanwhile we are concerned with the relation of the king to the Law, and on this point Mariana says very emphatically that when the monarchy is controlled by Law, nothing can be better; when it is free from that control, nothing can be worse.

The authority of the king is derived from the people; it is they who determine the laws of succession, and they have given him an authority restrained by the laws. And, in another place, Mariana says the prince must show an example of obedience to the laws: no one may disobey them, least of all the king. He may indeed, if circumstances require it, propose new laws, may interpret and mitigate old ones, and may provide for cases not determined by the law. To overturn laws at his pleasure, to show no reverence for the customs and ordinances of the country, is the peculiar vice of the tyrant; legitimate princes may not behave as though they had obtained an authority free from the laws. The prince should remember that most laws have not been made by the prince, but by the will of the whole commonwealth, whose authority in commanding and forbidding is greater than that of the prince, and as the prince must obey the laws, ho may not change these without the consent and decision of the whole body (“universitas’’).

In another chapter, which deals more generally with the relation of the authority of the king to that of the commonwealth, he not only contends that the authority of the king is limited by the laws, but refers to the constitution of Aragon as providing a special officer, the “justitia”, who had been created for the purpose of restraining the king by the authority of the law, and even as sanctioning the principle that the chief men could meet together without the knowledge of the king for the purpose of maintaining the laws and defending their liberty.

We turn to a greater, more massive, more restrained political thinker in Richard Hooker. It may indeed be doubted whether any political thinker of the sixteenth century is equal to him in breadth and justice of thought. It is true that his work was concerned primarily with law as related to the Church and Church order, but, like Gratian and Aquinas, he recognised that it was impossible to form an adequate conception of Church law without taking into account the principles of law in general. It is true also, as we shall point out in later chapters, that he said much which is of great importance with regard to the political order in general, but his conception of this is dominated by his conception of law.

Hooker was a great and independent thinker, but his independence consisted not in ignoring the past and the great political writers of the past, but in gathering together and putting into clear and intelligibly ordered form the principles and implications of the past, not as one who was bound and restricted by its authority, but as one who thought out again for himself the great principles and traditions of mediaeval society. Tor it is indeed perhaps the most interesting aspect of his work that he repeated, restated, and enlarged the normal conceptions of the political civilisation of mediaeval Europe and handed them down to the modern world.

It is, we think, clear that it is from St Thomas Aquinas that, directly or indirectly, Hooker took the analysis of the general nature of law, and he therefore accepted the division of law in the most general sense into the Eternal Law of God, the Natural Law, the Divine Law, and Human Law.

His definition of the Eternal Law is : “This law therefore we may name Eternal, being that order which God, before all ages, has set down with Himself to do all things by”. This law is not a

mere command of God's will, but the expression of His wisdom. "They err therefore who think of the will of God to do this or that, there is no reason besides His will ... That law Eternal which God Himself hath made to Himself ... that law in the admirable frame whereof shineth with most perfect beauty, the countenance of that wisdom which hath testified concerning herself. 'The Lord possessed me in the beginning of His way, even before His works of old I was set up'."

This is clearly in substance the same judgment as that of St Thomas Aquinas : "Et secundum hoc, lex eterna nihil aliud est, quam ratio divinae sapientiae, secundum quod est dircctiva omnium actuum, et motionum."

When Hooker turns to the Natural Law he follows the same tradition by saying that while all things were governed by the Eternal Law, the relation to this of the rational creature differed from that of the unrational. By the law of nature, therefore, Hooker means the law which man's reason recognises as binding upon him; and it might properly be called the law of reason. This is practically the same as Aquinas' "lex naturalis nihil aliud est quam participatio legis aeternae in rationali creatura."

We go on to the question of human law. This brings us to the conception of the nature and purpose of the Commonwealth or State. Hooker's conception of the origin of political society is expressed in a well-known passage: "The laws which have been hitherto mentioned (*i.e.*, the Natural Laws) do bind men absolutely even as they are men, although they have never any settled fellowship, nor any solemn agreement among themselves what to do or not to do. But, forasmuch as we are not by ourselves supplied with competent store of things needful for such a life as our nature doth desire, a life fit for the dignity of man, therefore, to supply the defects and imperfections which are in us, living single and solely by ourselves, we are naturally inclined to seek communion and fellowship with others. This was the cause of men's uniting themselves in politic societies, which societies could not be without government, nor government without a distinct kind of law from that which hath been already declared.

Two foundations there are which bear up public societies : the one, a mutual inclination, whereby all men desire sociable life and fellowship; the other, an order expressly or secretly agreed upon, touching the manner of this union in living together. The latter is that which we call the law of a common weal, the very soul of a politic body, the parts whereof are by law animated, held together, and set on work in such actions as the common good requireth.

Laws politic, ordained for external order and regiment amongst men, are never framed as they should be, unless presuming the will of man to be inwardly obstinate, rebellious, and averse from all obedience unto the sacred laws of his nature; in a word, unless presuming man to be, in regard of his depraved mind, little better than a wild beast, they do accordingly provide, notwithstanding, so to form his outward actions, that they be no hinderance unto the common good for which societies are instituted : unless they do this, they are not perfect.

If we add to this passage another which follows a little later, we have a fairly complete view of Hooker's conception of the origin and purpose of political society. "We all make complaint of the iniquity of our times; not unjustly, for the days are evil. But compare them with those times when there were no civil societies, with those times when there was as yet no manner of public regiment established, with those times wherein there were not above eight persons righteous living upon the face of the earth; and we have surely good cause to think that God hath blessed us exceedingly and hath made us behold most happy days."

Hooker's statement has a little of Cicero's conception of the naturally sociable disposition of men, something also of Aristotle, that the State is necessary for the good life, but also very clearly it represents the Stoic and Patristic tradition of the coercive State as the necessary remedy for the Fall; and it is interesting to observe that Hooker thinks of the period between the Fall and the Flood as illustrating the lamentable disorder which followed from the absence of this.

The character of human nature in Hooker's view requires government and law. How then were these created? He sets aside very emphatically the notion which was later developed in a somewhat absurd work of Sir Robert Filmer, that political authority was related to that of the father of a family. "To fathers within their private families nature has given a supreme power ... Howbeit over a whole grand multitude having no such dependence upon any one . . . impossible it is that any should have complete lawful power, but by consent of men, or immediate appointment of God; because, not having the natural superiority of fathers, this power must needs be either usurped and thus unlawful; or if lawful, then either granted or consented unto by those over whom they exercise the same, or else given extraordinarily from God, unto whom all the world is subject". And, equally emphatically, Hooker derives all political authority from an agreement among men to set up some "government public", to which they granted authority to rule and govern.

"To take away all such mutual grievances, injuries, and wrongs, there was no way but only by growing unto composition and agreement amongst themselves, by ordaining some kind of government public, and by yielding themselves subject thereunto; that, unto whom they granted authority to govern, by them the peace, tranquillity, and happy estate of the rest might be procured ... Without which consent there were no reason that one man should take upon him to be lord or judge over another; because, although there be, according to the opinion of some very great and judicious men, a kind of natural right in the noble, wise, and virtuous, to govern those which are of servile disposition; nevertheless, for manifestation of this, their right, and men's more peaceable contentment on both sides, the assent of those who are governed seemeth necessary."

Hooker here represents the normal conception of the Middle Ages, which had been only reinforced by the revived study of the Roman Law, that all political authority is in some sense derived from the community. He seems here also to suggest that behind this grant of authority by the community there lies some agreement or "contract" between men to form a political community, the conception with which we are familiar in Hobbes and Locke.

Hooker thinks that at first the government was left in the hands of one man, but men soon began to feel the inconvenience of this. "They saw that to live by one man's will becomes the cause of all men's misery. This constrained them to come unto laws, wherein all men might see their duties beforehand, and know the penalties of transgressing them". We have already seen this opinion as expressed by Buchanan and Mariana.

This leads Hooker to consider more fully the nature of law and its coercive authority, for "laws do not only teach what is good, but they enjoin it; they have in them a certain constraining force". He makes a distinction, a very important distinction, between those whose function it is to "devise" laws and those who give them coercive authority.

It is the wise men by whom laws should be "devised". Men of ordinary capacities are not competent to do this, but it is not the wisdom of these "devisors" which gives these laws coercive authority. This can only be given by the whole community, for, "by the natural law, to which God has made all men subject, the power to make laws belongs to the whole community, and therefore it is mere tyranny for any prince to take this upon himself, unless he has received this authority from the community, or immediately and personally from God Himself". "Laws they are not, therefore, which public approbation hath not made so."

He is indeed careful to add that the community may give its consent, not directly but by representation, "as in Parliaments, Councils, and the like Assemblies, although we be not personally ourselves present, notwithstanding our assent is by reason of other agents there in our behalf"; and he extends this even to the position of an absolute king, own the assumption that he had received his authority from the community; and this authority continues so long as it is not revoked by the same authority as that which gave it. "Laws, therefore, human, of what kind soever, are available by consent."

Hooker's words do not suggest a direct reference to any one political writer, but it seems to us reasonable to say that his very careful but dogmatic judgment is founded, first, upon the doctrine of the Homan Law that the legislative power is derived from the "populus" (*i.e.*, the community) ; while his conception of the place of the wise men in "devising" Law may be related to the terms of the famous definition of Papinian. In the second place, it is probably related to the saying of St Thomas Aquinas that the power of making laws belongs either to the whole multitude or to him who "gerit vicem" and has the care of the whole multitude.

Hooker's statement is drastic and far-reaching; if his principle that it is the community, and only the community, which can give the Law its coercive power, is derived from the Roman Law, ho is explicitly and dogmatically generalising this principle as applying naturally to all political societies, as in the famous phrase we have just quoted : "Laws they are not, which public approbation hath not made so."

In a later Book of the 'Ecclesialical Polity' he again deals with this subject, and in one place he cites the well-known words of Bracton : "Attribuat lex legi, quod lex attribuat ei, potestatem et dominium", and "Rex non debet esse sub homine, sed sub Deo et lege". Hooker admits, indeed, that there are different kinds of kingdoms, some by conquest, some by "agreement and composition"; and in this last case the authority depends upon the nature of the agreement; but he concludes : "Happier that people where Law is their king in the greatest things, than that whose king is himself the Law".

These are Hooker's general principles, but it is important to observe that he applies them specially to England. In a passage which follows immediately upon that just cited, he says : "In which respect, I cannot choose but commend highly their wisdom, by whom the foundations of this commonwealth have been laid; wherein, though no manner person or cause be un-subject to the king's power, yet so is the power of the king over all and in all, limited, that unto all its proceedings the Law itself is a rule. The axioms of our royal government are these: 'Lex facit regem', the king's grant of any favour made contrary to the law is void ; 'Rex nihil potest, nisi quod jure potest'. Our kings, therefore, when they take possession of the room they are called unto, have it painted out before their eyes, even by the very solemnities and rites of their inauguration, to what affairs by the said law their supreme authority and power reacheth".

And again, in a passage which is primarily related to Church Law in England, but has a general application : "The Parliament of England, together with the Convocation annexed thereunto, is that whereupon the very essence of all government within this kingdom doth depend ; it is even the body of the whole realm, it consisteth of the king and of all that within the land are subject to him, for they are all there present, either in person, or by such as they voluntarily have derived their power unto ... Touching the supremacy of power, which our Kings have in the case of making laws, it resteth principally in the strength of a negative voice; which, not to give them, were to deny them that without which they were but Kings by mere title, and not in exercise of dominion ... Which laws, being made amongst us, are not by any of us so taken or interpreted, as if they did receive their force from the power which the Prince doth communicate unto the Parliament, or to any other Court under him, but from power which the whole body of the Realm, being naturally possessed with, hath by free and deliberate assent derived unto him that ruleth over them, so far forth as hath been declared."

Finally, we must consider the treatment of the source and authority of Law as it is presented by that most important jurist of Lower Germany, Johannes Althusius, whose work, first published in 1603, was for a long time almost forgotten, but was recovered by Professor von Gierke, and which again serves to bring out very clearly the fact that the conception of an ordered or constitutional liberty was not asserted merely by controversial writers like George Buchanan or Mariana, or the pamphleteers of the Huguenot Party and the Catholic League in France, but by a writer learned, judicious, and measured in his thought and in his language, who also, like Hooker, sets out, not only philosophical principles, but also what he conceived to be the actual constitutional system of a great

country. For, as Hooker finds an embodiment of the principles of a free and ordered society in the English constitution, Althusius finds the same in the Government of the German Empire and of the States and cities which formed it.

In order to understand Althusius' conception of Law, we must observe his conception of the nature and origin of political society. He accepts the Aristotelian principle that a solitary man is not capable of a self-sufficing life, but also traces the origin of political society to an express or tacit contract between those who are to live together. He accepts the Ciceronian definition of the people as being a society of men living under a common system of law, and working for the common good. The object of the government of society is the common good, and its final end is a life in which men quietly and rightly serve God.

Althusius accepts the Aristotelian conception of the necessity of society, but he also clearly asserts that the formation of political society rested upon the contract or agreement between those who formed it. The statement of this conception is interesting and important in relation to the political theory of the seventeenth and eighteenth centuries, but it belongs rather to those times than to the history of mediaeval political theory, and we refer our readers to the discussion of this subject by von Gierke in his 'Althusius', especially Part II., Chap,II., 2.

We turn to what is here properly our subject when we consider Althusius' conception of law and its place in the State. The administration and government of the commonwealth, he says, is nothing else than the execution of the Law, and he illustrates this principle by citing Aristotle as saying that there is no commonwealth where the Laws are not supreme; and again, the supremacy of the Law is the supremacy of God, while that of a man is the supremacy of a beast. Cicero calls the magistrate the servant and interpreter of the law; we are all servants of the law that we may be free; Plato says that the Law is queen, and should control not only the other citizens hut kings themselves. In another place Althusius says that the magistrates are bound by the civil laws of the kingdom and of the "Majestas". The magistrate may be called a living law for he does nothing except by the Law's commands.

It is important to observe that from these principles Althusius draws the conclusion that it was right to say that the magistrate is not "legibus generalibus solutus"; he is not free from either the natural law or the civil laws. Althusius was, of course, aware that many thought differently, but he is only willing to concede that the prince was in such a sense exempt from the penal laws, that he was not to be punished unless he violated the fundamental laws, and his own agreement with the people; and Althusius refers to Cujas as holding this opinion. The prince cannot do anything against the law of the commonwealth, for the law is of the nature of a contract by which the prince is bound, and the authority which the people have conferred upon the prince is by its own nature limited to that which is for the good of the citizens. We shall return to the subject of the contract between the prince and people in the next chapter; in the meanwhile it is worth while to observe that Althusius conceives of the Law as having this character. We have seen this conception in writers of the fourteenth and fifteenth centuries. Althusius admits, indeed, that the prince is "legibus solutus", but only in the sense that the Law may in some cases give him the right of "dispensation".

In order, however, to appreciate fully Althusius' principle of the supremacy of law over the prince, wo must consider his conception of the "Majestas" or sovereign power in the commonwealth. It is probable that he takes this term from Bodin, and ho agrees with him in interpreting it as meaning that authority which recognises no other as equal or superior to itself. So far he does not differ from Bodin, but, having said this, he begins to develop a sharply marked contradiction of Bodin's theory. No single persons, he says, can receive this complete authority ("plenitudo potestatis"); they must recognise that it lies in the consent and agreement of the associated body.

We must turn to a long passage in which Althusius draws out his own conception in opposition to that of Bodin. Bodin, he says, contradicted the principle that the supreme power belonged to the

whole community. He begins by pointing out that even Bodin admits that the supreme power is subject to the Natural and Divine law; and he urges that a really absolute power would be a mere tyranny. He refuses dogmatically to attribute the supreme power to the king or the "optimates", and maintains that it can belong only to the whole body of the "universal" association—that is, to the commonwealth or kingdom, for it is from this body that, after God, all legitimate authority comes. The king, princes, or "optimates" recognise that the commonwealth by which they are set up or removed is superior to them, and that they are bound by a contract to obey it. The king, therefore, has no supreme and perpetual power which is free from the law, and does not hold the "Jura Majestatis", but only, and that by the grant of the society, the administration of these. The monarch therefore must render an account of his administration and may be deposed.

We have dealt with this aspect of political theory in the sixteenth century at some length, for, as it seems to us, the conception of the nature and authority of law was still, as in the Middle Ages, the most important element of political theory, and it will, we hope, he clear that the mediaeval principle of the supremacy of law was still asserted and understood.

We shall in a later chapter inquire how far there had also developed in the sixteenth century a conception that the king was absolute and above law.

CHAPTER II.
THE PRINCE UNDER THE LAW.

We have, in the last chapter, considered some aspects of the conceptions of the source and authority of law, that is, of those who were clear that the law was greater than the ruler. We shall, in a later chapter, discuss the position of those who took the opposite view. But, before we do this, we must deal with the conception of the source and nature of the authority of the prince.

We think it will be found to make for greater clearness if we treat this subject under the following heads : (1) The Source of the Authority of the Ruler; (2) The Conception of a Sovereign Power behind the Euler; (3) The Relation of the Euler to the Courts of Law; (4) The Theory of the Contract between the Ruler and the People; (5) The Right to resist, and even to depose the Ruler; (6) The Magistrates or Ephors.

(1) *The Source of the Authority of the Ruler*.—There is no need to discuss this at any great length, for while there were a few, with whom we shall deal in a later chapter, who trace the authority of the king to the direct appointment of God, these were quite exceptional. The great mass of opinion was clear, that is, that while God was the ultimate source of all authority, the immediate source was the Community itself, and it should be remembered that this judgment was confirmed by the whole tradition of the Roman Law and by the mediaeval and contemporary Civilians.

This was the current opinion, apart entirely from the political controversies of the time. We may begin by observing again the words of the Spanish Dominican, Soto, the Confessor of Charles V and Professor at Salamanca. The public civil authority is the ordinance of God, the commonwealth . creates the prince, but it was God who taught men to do this. We find the same principle stated by his Dominican contemporary and colleague in Salamanca, Franciscus Victoria, in the terms of a careful distinction between “Potestas” and “Authoritas”. The Royal “Potestas” is not derived from the commonwealth, but from God Himself, for though he is established by the commonwealth, for the commonwealth creates the king, it transfers not “Potestas” but its own “Authoritas” to him.

The same judgment is expressed by such a careful and experienced politician as Sir Thomas Smith. In a passage already cited, he contrasts the king and the tyrant, not only with reference to their relation to the law, but also to the source of his authority. The king is one who has attained the royal power by hereditary succession or by election, with the consent of the people, while the tyrant is one who has obtained power by force, and without the consent of the people.

We have cited these opinions, not as being in themselves very important, but merely as illustrations of what we think was the normal opinion, apart from the controversies of the later part of the century. When we pass to those who wrote under these later conditions, we naturally find all this much more sharply asserted. George Buchanan, for instance, in his work, ‘De Jure Regni apud Scotos’, which is in the form of a dialogue between himself and “Metellanus” (Maitland), in asserting the subordination of the King of Scotland to the laws, maintains that though the kings of Scotland received the throne by hereditary succession, they were created by the laws and the will of the people just as much as those kings who were elected.

The Huguenot writers of the period between 1573 and 1580 set out this conception in different ways. Hotman does this, with reference primarily to history, in his work ‘Franco Gallia’, originally published in Latin in 1573. We are not here concerned with the historical value of his contentions about the nature of the Merovingian and Carolingian monarchies, but only with the conclusions which he drew from his study of history. He contended that the supreme authority in the time of these monarchies belonged to the general assembly of the whole people, which he relates to the States General of later times, and that it was this assembly which elected and deposed kings. He

gives a number of examples of the authority of the States General, including a statement that it was the States General which decided between the claims to the French crown of Edward HI. and Philip of Valois. In one place he says roundly that the "Concile des Etats" (the States General) had the power to elect and to depose kings, and to entrust the administration of the kingdom during a minority to such a person as it thought best.

The treatise entitled 'La Politique, Dialogue d'Archon et de Politie', published in 1576, has a very high conception of monarchy, and speaks of the Prince as the Image and Vicar of God; but if he has this character, he must also represent the goodness and justice of God. Hereditary succession or election are both tolerable : the best is to combine the two, but even in the case of those who hold by hereditary succession the peoples who have the right to place magistrates over themselves have also the right to depose them. The best known of these works, the 'Vindiciae Contra Tyrannos', published in 1577, also speaks of kings as the Vicars of God, and says that it is God Who has "instituted" kings, but it is the people who constitute them, who bestow kingdoms and approve their election. Kings must remember that they reign "a Deo sed per populum et propter populum". Therefore if in some countries kingship has become hereditary, it is still the custom that the children do not succeed their fathers till they have been constituted anew by the people, and are only held to be kings when they have received the investiture of sceptre and crown from those who represent the "Majestas" of the people.

George Buchanan and the Huguenot writers express this judgment in strong and unqualified terms, but we find the same opinions expressed in as thorough-going a fashion by some of the Roman Catholic writers of the last years of the sixteenth century. Among the most important tracts written in defence of the deposition of Henry III of France is that of Boucher, 'Do justa Abdicatione Henrici Tertii' published in 1589. Boucher was a theologian of some eminence, and his work is largely concerned with the question of the power of the Pope to depose kings. We are not, however, here concerned with this question, but with his conception of the relation of the authority of the king to that of the community. With regard to this, he expressed himself as clearly and dogmatically as the Huguenot writers.

It is the people or commonwealth which establishes the king, but while it bestows this authority upon him, the final authority and "Majestas" remains with the people. It resided with them before there were any kings, and even kings must render their account for any offence against it. This "Majestas" is embodied in the Estates.

It is the people, then, from whom the king derives his authority, and not from God only, and he repudiates the interpretation of St Paul's words in Romans XIII as implying the latter. We recognise, he says, that kings, like all good things, come from God, but in accordance with the Jus Gentium, it is through the people.

It would be difficult to find a more explicit repudiation of what we call the "Divine Right", and a more thoroughgoing affirmation of the principle that the royal authority was inferior to the sovereign authority, or "Majestas", of the community; it was derived from it, and was answerable to it. Boucher adds, dogmatically, that no one is born a king; there is no Christian kingdom where hereditary succession has such a force that the right of establishing the king does not remain with the people.

Boucher does not, however, state these principles as merely abstract, but maintains that they were embodied in the actual constitutional systems of the European countries, and he refers specially to the Empire, to Aragon, and to the authority of Parliament in England, and he attributes the comparative absence in France of the constitutional forms of this supreme authority of the community to the recent tyrannical innovations of Louis XI. He cites the deposition of Merovingian and Carolingian kings in France, of Richard II in England, and the recent deposition of the King of Denmark.

With these writers we may place Mariana, the Spanish Jesuit of the late sixteenth century. He also considers the monarchy to be the best form of government, and he carefully discusses the advantages and disadvantages of succession by inheritance or by election. He finally concludes that hereditary succession is best, but the succession should be determined by law, not by the will of the king, for the commonwealth gave him an authority restrained by laws, and any change therefore must bo made with the consent of the "Ordines" (the Estates or Cortes). In another place, discussing the relation of the commonwealth to a king who becomes a tyrant, he argues that the commonwealth, from which the royal authority arises, may call the king to account, and may deprive him of his authority. When it transferred its authority to the prince, it reserved to itself a greater authority.

It may, no doubt, justly be said that these writers, especially the Huguenots and Mariana, express a highly controversial mood. But it should be observed that the same judgment is expressed by Hooker, substantially, but in characteristically measured terms. Hooker deals with the subject in the first book of the 'Ecclesiastical Polity', when he discusses the origins and first forms of political society. The first form of social authority was, he thinks, that of the father over his family, but that is not the nature of authority in a political society. "Howbeit over a whole general multitude, having no such dependency upon any one, and consisting of so many families as every political society doth, impossible is it that any should have complete lawful power, but by consent of man or immediate appointment of God; because, not having the natural authority of fathers, this power must needs be either usurped, and thus unlawful; or, if lawful, then, either granted or consented unto by those over whom they exercise the same, or else given extraordinarily from God, unto Whom all the world is subject."

He returns to the subject in the eighth book, where he is dealing with the relation of the king to the Church. "First, unto me it seemeth almost out of doubt and controversy, that every independent multitude, before any certain form of regiment established, hath, under God's supreme authority, full ' dominium ' over itself, even as a man, not tied with the bond of subjection as yet, unto any other, hath over himself the like power."

Hooker is indeed careful to defend the right of hereditary succession to kingship, but he is also clear in asserting that this hereditary right arises from the "original conveyance" by the community. "The case thus standing, although we judge it as being most true that kings, even inheritors, do hold their right to the power of dominion with dependency upon the whole body politic, over which they rule as kings; yet so it may not be understood, as if such dependency did grow, for that every supreme governor doth personally take from them his power by way of gift, bestowed of their own free accord upon him at the time of his entrance into the said place of government. But the cause of dependency is in that first original conveyance, when power was derived by the whole unto one; to pass from him unto them, whom out of him nature by lawful birth should produce, and no natural or legal inability make uncapable. Neither can any man with reason think but that the first institution of kings is a sufficient consideration wherefore their power should always depend on that from which it did then flow. Original influence of power from the body into the king is the cause of the king's dependency in power upon the body". Hooker denies that the individual king must be elected, but affirms that it was from the community that the right of hereditary succession was derived.

We have discussed the position of Althusius with regard to the supremacy of the law, in the last chapter, and need only here draw attention to an important passage in which he sets out the origin and nature of the authority of the administrator or prince. He recognises that while the commonwealth is formed by the free association of all its members, and establishes the laws necessary for this, it cannot itself administer them; and therefore it appoints ministers and rulers, and transfers to them the necessary authority and power; it gives them the power of the sword and commits itself to their care and rule. Althusius is clear that there must be rulers or princes in the commonwealth, but the rulers are appointed by the commonwealth, and their authority is always less

than that which the commonwealth reserves to itself. Their authority is only to rule according to the just laws of the commonwealth, and they are only God's ministers if they rule for the common good. The prince is not above the laws, but the laws above the prince. There neither is, nor can be, any such thing as that absolute power which, as it is sometimes said, is given to the prince.

Finally, wo may put beside Hooker and Althusius the judgment of the great Jesuit, Bellarmine. He is no doubt arguing, not for the direct, but for the indirect authority of the Papal See in temporal matters; but his judgment is clear that, while it is true that the royal or imperial power is from God, it must be understood that it does not normally come immediately from Him, but mediately through the consent of men, for as St Thomas Aquinas had said, lordship and principalities belong not to the Divine, but to the Human Law.

(2) *The Conception of the "Sovereignty" of the Community*.—We shall, in a later chapter, consider the theory of sovereignty as set out by Bodin, and we do not wish here to anticipate this. It is enough, for the moment, to say that in Bodin's view there must be in every political community some supreme power which makes all laws and magistrates, and which is subject to no law, except that of God and of nature, and to this power he gives the name of "Majestas". Bodin's work was published in French in 1576, but it is important to observe that some of the Huguenot pamphlets were published a little earlier, or about the same time, Hotman's 'Franco Gallia' in 1573, the 'Droit des Magistrats' in 1574, and the 'Archon et Politie' in 1576, and in some of these we find already developed a conception of a power belonging to the community or its representative authority, which is supreme over all other powers, even that of the king, and this supreme authority they call the "Souveraineté", while they speak of the king as "Souverain".

Hotman, in discussing the power of what he calls the "Concile des Estats", meaning the States General, maintains that it had power to elect and to depose kings, and he goes on to say that even after the election of the king, it reserved and retained in its own hands the "sovereign authority" of the government of the kingdom.

It is, however, in the 'Droit des Magistrats' of 1574 that the distinction between the "Souverain" and the "Souveraineté" is first carefully and completely drawn out. There are magistrates or officers, who are indeed inferior to the "Souverain", and are appointed by him, but do not properly hold from the "Souverain", but from the "Souveraineté". The distinction is clear, but is made even clearer when the author adds that the "Souverain" himself, before he is put in "real possession" of his sovereign administration, swears fidelity to the "Souveraineté". And again, empires and kingdoms are fiefs, which owe homage and fidelity to the "Souveraineté."

These are trenchant sayings, and the conception of the king as a vassal of the "Souveraineté" is unusual, to say the least, though not unintelligible ; but what we are here concerned with is the sharp distinction between the king who is "Souverain", and some greater authority behind him, which holds the "Souveraineté", for there are those who represent the "Souveraineté" and it is for them to provide for the tenure of the sovereign's fief, if he has lost it by his offences against his subjects. The king or "Souverain" is not above the laws, but is subject to them, for he has sworn to maintain and defend them. While it is not lawful for any private person to resist the tyrant, there are magistrates, inferior indeed to him, but whose function it is to act as bridles and restraints upon the sovereign magistrate. There are such officers in several Christian kingdoms, such as dukes, marquesses, counts, &c. ; they were formerly "estats et charges publiques", and wore appointed "par ordre legitime", and though these offices have become hereditary, the nature of their right and authority has not changed : such are also the elective officers of the cities, such as mayors, consuls, syndics, &o.

It is of these officers that the author of the treatise says, as we have seen, that they hold not from the "Souverain" but from the "Souveraineté", to which the "Souverain" himself has sworn fidelity; and he goes on to say that there is a mutual obligation between the king and these officers of

the kingdom, for the whole government is not in the hands of the king, but only the "souverain degré" of the government, while each of these inferior officers has his part in it according to his rank.

The pamphlet generally known as 'Archon et Politie', which was published in 1576, represents the same conception. In discussing the limitations on the arbitrary power of the prince it says that there are inferior authorities, "deputies" of the people; these create the prince and can depose him, and they would be traitors to their country if they suffered the "principauté" to become a tyranny. They, as "souverains magistrats", are above the prince (in their public capacity), while as private persons they are below him. And again, after discussing the right of subjects, who have by solemn edicts obtained from the prince the right to exercise their religion, to refuse obedience if the prince attempts tyrannically to violate these, and to defend their liberty by all lawful means; the author of the tract goes on to say that this applies also to the other rights of the people. There are, indeed, few kingdoms or principalities whose rulers are not bound and restrained by many laws, to which they have sworn at their "reception", and they have promised the "Souveraineté", that is, the "Estates" composed of the body of all the people, to keep these inviolably.

This conception, that behind the authority of the king or prince there is a greater authority still, and that this resides in the community, was also carefully set out by Mariana. After saying in general terms that the prince should understand that the authority of the whole commonwealth is greater than that of any one person, Mariana devotes a whole chapter to the consideration of this question in detail. He was aware that there were different opinions, that some learned men maintained that the king was greater not only than the individual citizen, but than all the citizens, and that the commonwealth could transfer the supreme power to the prince without any limitation. And, he continues, this seems to be the form of government among some peoples where there is no public "consensus", where the people or the chief men never assemble to deliberate about the affairs of the commonwealth, where men must obey whether the king's government is just or unjust. Such an authority, Mariana, however, says, is excessive, and tends to tyranny; Aristotle had indeed said that it existed among barbarous peoples, but "we" are not concerned with barbarians, but with the government of Spain and with the best form of government. He concedes that the king is supreme in those matters which by the law and custom of the nation are left to his judgment, such as making war and administering justice; in those matters the king has an authority greater not only than the individual citizen, but than all. On the other hand there are matters, such as legislation and taxation, in which the authority of the commonwealth is greater than that of the prince. Finally, and this is the most important part, the commonwealth has authority to coerce the prince if he is vicious and wicked, if he prefers to be feared rather than loved, and becomes a tyrant.

These writers may seem to represent somewhat extreme opinions, and it is therefore important to observe that Hooker and Althusius affirm the same principles. In one passage Hooker says : "Besides, when the law doth give him (the king) dominion, who doubteth but that the king who receiveth it must hold it of and under the law? According to that axiom, 'Attribuat rex legi, quod lex attribuât ei, potestatem et dominium'; and again, 'Rex non debet esse sub homine, sed sub Deo et lege'. Thirdly, whereas it is not altogether without reason that kings are judged to have by virtue of their dominion, although greater power than any, yet not than all the states of those societies conjointly wherein such sovereign rule is given them". And again, with special reference to England : "This is therefore the right whereby kings do hold their power; but yet in what sort the same doth rest and abide in them it somewhat behoveth to search. Wherein, that we be not enforced to make over-large discourses about the different conditions of sovereign or supreme power, that which we speak of kings shall be with respect unto the state and according to the nature of this kingdom, where the people are in no subjection, but such as willingly themselves have condescended unto, for their own most behoof and security. In kingdoms, therefore, of this quality the highest governor hath indeed universal dominion, but with dependence upon that whole entire body, over the several parts

whereof he hath dominion; so that it standeth for an axiom in this case. The king is "major singulis, universis minor".

We have already seen that Althusius is clear that the "Majestas" or sovereign authority which recognises no other as superior or equal to itself, belongs and can only belong to the whole political community, and we need only refer here to another passage, as expressing this judgment. The "Majestas" belongs to the people and it cannot transfer this to any other person. It cannot be divided or transferred, it is created by the whole body of the members of the kingdom, and without them it cannot stand. The king, therefore, however great his authority, can never deprive the members of his kingdom of the right to resist him if he acts unjustly. This "Jus", that is, the "Majestas", is the very soul and vital spirit of the commonwealth, and it can never grant it to anyone else without destroying itself.

(3) *The Relation of the King to the Courts of Law*.—We have seen in former volumes and in the earlier parts of this one that in constitutional theory and practice it was a generally accepted principle that the king could, in normal circumstances, take action against his subjects only by process of law. The famous clause of Magna Carta (39) represents the normal conception of feudal law, and the normal practice of mediaeval society. It is therefore important to inquire whether this principle continued to be recognised in the later sixteenth century.

George Buchanan deals with this question under two terms; and first, whether the king should have the power of interpreting the law. Maitland had urged that the king should have this power, but Buchanan replies that he was asking more than the most "imperious" of kings demanded. This power belonged to the judges; to give this power to the king would give him the opportunity to twist the law to his own convenience. If this were once permitted, it would be useless to have good laws; it would be better to have no laws at all than such a "liberum latrocinium", under colour of law. In the second place, Buchanan contends that any private person had the right to appeal to the courts of law in a dispute between himself and the king about his property; and that it makes no difference in principle whether it is the king himself or his "Procurator" whom he calls into court.

When we turn to the French Huguenot writers wo find some very important assertions of the same principles. The "Remonstrance" says that the Courts of "Parlement" were once above the kings, and opposed themselves to their absolute power, while "today" they submitted servilely to the commands of these from whom they hoped for advantage. The other Huguenot tracts are clear and emphatic in asserting the principle that the king could only take action against his subjects by process of law. In the tract 'Archon et Politie', "Archon" asks indignantly whether the king has not got the power of life and death over his subjects, and "Politie" answers that they have this power, hat only "avec conoissance de cause, et informations valables", that is, if one may venture a paraphrase, by legal process and on proper evidence. The author of the 'Vindiciae Contra Tyrannos' contends that even today the "Senatus Lutetiarum" (the Parlement of Paris) is set in a certain sense as a judge between the king and the people, even between the king and any private person; and he adds that, lest the Parlement should he afraid of the king, the judges could not formerly be appointed except with the nomination of the Parlement, or removed from their office except for a legitimate (legal) cause.

It may indeed again he suggested that Buchanan and the Huguenot pamphleteers represented an extreme and revolutionary position; and it is therefore very important to observe that Bodin, who certainly asserted the doctrine of the absolute authority of the king of France in the strongest terms (as we shall see in a later chapter), sets out a conception of the relation of the courts of law to the king, which is at least analogous to that of Buchanan and the Huguenots. In the first place, it should he observed that Bodin considers at some length the question whether the prince should himself act as a judge, and he is very clear that the prince should not do so. In the second place, Bodin discusses at length the question whether the judges should be perpetual or removable at the pleasure of the

prince. He admits that there had been different opinions about this, and even refers to Michel l'Hopital as having been in favour of their being removable. He admits that under a monarchy certain offices, such as those of the governor of the provinces, should be terminable; but, with regard to the judges, his opinion is very different: the judges, and especially those who have to decide on the life, the reputation, and the fortunes of the citizens, and from whom there is no appeal, should hold by a perpetual tenure. He gives an interesting account of the history of the actual practice in France, with reference especially to a law of Louis XI. He admits that the practice had varied, and that by long custom the document appointing judges contained a clause which said that they should hold their office at the king's pleasure; but this clause, he holds, was merely formal. Again, he admits that some maintained that it would be better that the tenure of magistrates should be terminable, but this ho says is false, and would be pernicious, for it is evident that princes are beset by flatterers and courtiers, and would make merchandise of the magistracies or take them away from the best men, who hate such courtiers and their vices. This custom of appointing terminable magistracies, Bodin says, savours of a tyranny or "domination", not of a monarchy, for a kingdom must, so far as possible, be governed by laws, not by the caprice or mere will of the prince.

(4) *The Conception of a Contract between the Ruler and the People*.—Wo can now approach the consideration of this subject, for we have considered its presuppositions; that is, first, that the authority of the ruler was derived from the community; second, the theory of the sovereignty of the community; third, the principle that the person and rights of the individual members of the community were protected even against the ruler by the courts of law.

It is even more necessary to remember that the conception of a contractual relation was the fundamental principle of all feudal society, and was therefore an important part of the normal political tradition of the Middle Ages. We have endeavoured to set this out in previous volumes. It will therefore be convenient to begin our consideration of the development of the theory of a contract between ruler and people in the later sixteenth century by observing the terms in which the resistance of the Low Countries to Philip II of Spain was justified by William of Orange. We are not here concerned with the great religious movements of that time, nor with the complex or economic conditions and national feeling which no doubt had their place in that resistance; we are. concerned with the constitutional principles which were set forward in justification of it; and, in the first place, in the 'Apologie' of William of Orange.

It should be clearly understood that to William, Philip was simply the Duke of Brabant, and lord of the other provinces of the Netherlands, that is, that he conceived of their relations to him as the relations of feudal vassals to their feudal lord, bound to each other by mutual obligations and mutual oaths.

William sets out this conception in one passage in specific and detailed terms. Does Philip, he says, not know the condition on which he holds his authority? Does he not remember the oath which he took before they swore allegiance to him, for he has no such power to do whatever he wishes, as he has in the Indies. He cannot violently constrain any one of his subjects, except so far as the customs of his "domicile" allow; he cannot change the "estat" of the country by his ordinance; he cannot impose taxation without the express consent of the country; he cannot bring soldiers into the country without the consent of the country; he cannot arrest any of his subjects without inquiry by the magistrate of the place; and when he has made him prisoner he cannot send him out of the country. William not only set out these and other conditions on which, as he maintained, Philip II held his authority in the Netherlands, but he also made it plain that these conditions were, if necessary, to be enforced. If the nobles do not fulfil their oath and compel the Duke to do right to the country, they should be condemned as guilty of perjury, faithlessness, and rebellion against the estates of the country. By his own oath Philip had admitted that, if he violated it, no service or

obedience should be rendered to him. Certainly between lords and vassals there is a mutual obligation, and among other rights the vassals have the right of the Ephors in Sparta, that is to maintain the royal authority of a good prince, and to bring to reason the prince who violates his oath.

It is clear that William of Orange looked upon the relation between Philip and the Netherlands in the terms of the traditions of feudal law, as founded upon contractual conditions; these were embodied in their mutual oaths, and the community had not only the right but the duty of enforcing these conditions.

We find the same conceptions expressed in the declaration of the Netherlands to the Diet of the Empire at Worms in 1578. Their representatives, suspecting the intentions of Don John of Austria, proposed to put the government of the Netherlands in the hands of the Archduke Matthias of Austria, and they maintained that they were within their legal rights, for it had been provided by the "Privileges de Brabant " that if the prince or his lieutenant violated the laws and rights of the country, it was lawful for the Estates, and also for those to whom the duty specially belonged, to refuse him homage and obedience until he had amended and conformed to that which was prescribed by the laws. They cited historical examples of such action, and added that these "Privileges", which had originally belonged particularly to Brabant, had been extended to all the Low Countries in the time of the Duchess Mary. We are not hero concerned with the historical validity of these contentions, but with the nature of the conception which they represented. It is obvious that while there is no direct reference to a contract, it was implied that the prince who violated the laws was liable to be suspended or deposed; that is, that there was an implicit contract.

It is significant that in the Articles of Agreement which were laid before the Duke of Anjou in the year 1581 by the envoys of the Estates sent to offer him the government, it is clearly stated that, if the Duke or his successors were at any time to violate the terms of the Agreement, the estates would be *ipso facto* released from their fidelity and would be at liberty to appoint another prince or to make such other arrangements as they might think suitable.

We think that it is with the impression of such a survival in the sixteenth century of the contractual conceptions of the feudal state in our minds that we shall best understand the treatment of the contract between ruler and people in other writers of the century.

George Buchanan asserts the conception of a contract in precise and dogmatic terms, in a discussion of the right to depose a king who becomes a tyrant. Maitland urged that subjects are bound by their oath of obedience to obey the king. Buchanan admits this, but replies that kings also promise to administer the law "ex aequo et bono", and that there is therefore a mutual contract between the king and the citizens. A contract is void if one of the parties violates its provisions, and therefore if the king breaks the bond which united him to the people, he loses whatever rights he had by the contract, and the people is free as it was before the agreement.

The Huguenot pamphlets assert the principles of the contract with equal emphasis. The 'Droit des Magistrats' contends that so far from its being true that the people had wholly surrendered their liberty to the king, it is rather true that they only accepted him on certain conditions, and thus it follows that, if these conditions were violated, those who had power to give this authority had the right also to withdraw it. And again, it was on certain promises and conditions that a king was accepted by his people, conditions founded on equity and natural reason, that he should conduct the government according to the laws, of which he is or ought to be the supreme protector. It is again worth observing that the 'Droit des Magistrats', in a passage to which we have already referred, in which it speaks of kingdoms and empires as fiefs of the "Souveraineté", refers to the feudal law as declaring that the lord loses his fief if he commits "felonie" against his vassals, and applies this to the case of an emperor or king in his relations to his subjects.

The 'Archon et Politie' speaks of the reciprocal pacts and conventions between the prince and the people which may not be violated by either party. The 'Vindiciae Contra Tyrannos' sets out the

principle of a "foedus" between king and people. It was the people who made the king, and the people imposed a condition which the king promised to observe. The condition was that the king should reign justly and according to the laws, and when he had promised to do this the people promised that they would faithfully obey him, but, if the king did not fulfil his promise, they would be free from all obligation to him. There are indeed two contracts, one between God and the king and people, the other between the king and the people. God is the avenger if the king does not keep the first pact, while the whole people and those persons who are responsible for the protection of the people have the same authority if the king does not fulfil his contract with them. It is, however, perhaps more important that the author of the 'Vindiciae' maintains that a contract of this kind was a part of the constitution of almost all contemporary states (imperia) which were worthy to be called states; and he illustrates this from the Empire and other elective monarchies, and then from hereditary monarchies like France, England, and Spain, and smaller states like Brabant. He finds the essential expression of this in the coronation ceremonies and especially in the coronation oaths, and concludes that no one can deny that there is a mutual and binding contract between kings and their subjects.

The author of the 'Vindiciae' sums up the whole matter by declaring emphatically that the king who violates the contract is perjured and unworthy of his office, and that the people who refuse obedience to him have violated no obligation, and he appeals to the principle of the feudal law that the vassal is free from the service if the lord has committed "felonie" against him. And finally he says that even if there were no ceremonies of coronation, if the king had taken no oaths, nature itself would teach men that kings were created by the people that they should rule justly, and that if they do not do this they are no longer kings and should not be acknowledged by the people.

We find a writer of the Catholic League like Boucher setting out the same conception of the contractual relation between the prince and the people; and again with relation to the tradition of the feudal law as to the mutual obligations of lord and vassal, and the doctrine of the feudal law books that the lord would lose his rights for the same offences as those for which the vassal would lose his fief. And, in justification of the deposition of Henry III, Boucher contended that the royal authority depended upon the mutual contract between king and people, in such a sense that, if the king were to violate it, he could not be recognised as king.

It may again be urged that the works which we have just cited were the outcome of violent and revolutionary movements and it is therefore very important to observe that Richard Hooker, in a passage of which we have already quoted part, affirms the same principle of the "compact" between the ruler and the community.

"The case thus standing", he says, "albeit we judge it a thing most true that kings, even inheritors, do hold the right to the power of dominion, with dependency upon the whole entire body politic over which they rule as kings, yet so it may not be understood, as if such dependency did grow, for that every supreme governor doth personally take from them his power by way of gift, bestowed upon him at his entrance into his said place of sovereign government. But the cause of this dependency is in that first original conveyance, when power was devised by the whole unto the one; to pass from him unto them, whom out of him nature by lawful birth should produce, and no natural or legal inability make uncapable. Neither can any man with reason think but that the first institution of kings is a sufficient consideration wherefore this power should always depend on that from which they flow. Original influence of power from the body into the king is the cause of the king's dependency in power upon the body.

By dependency we moan subordination and subjection... May then a body politic at all times withdraw in whole or in part that influence of dominion which passeth from it, if inconvenience doth grow thereby? It must be presumed that supreme governors will not in such case oppose themselves and be stiff in detaining that, the use whereof is with public detriment: but surely without their

consent I see not how this body should be able by any just means to help itself, saving when dominion doth escheat. Such things must, therefore, be thought upon beforehand, that power must be limited ere it be granted, which is the next thing we are to consider. In power of dominion all kings have not an equal latitude. Kings by conquest make their own charter ... Kings by God's own special appointment have also that largeness of power, which he doth assign or permit with approbation. Touching kings which were first instituted by agreement and composition made with them over whom they reign, how far this power may lawfully extend, the articles of compact between them must show, not the articles only of compact at the first beginning, which for the most part are either clean worn out of knowledge, or else known unto very few, but whatsoever hath been after in free and voluntary manner condescended unto, whether by express consent, whereof positive laws are witnesses, or else by silent allowance famously notified through custom reaching beyond the memory of man".

It will be observed how careful and how precise is the statement of the theory of "compact" between the ruler and the community. It rests ultimately upon the principle that normally the power of the king is derived from the community, not necessarily immediately in the case of the individual king, but by grant to a particular family ; this implies what Hooker calls "subordination and subjection" of the king. He does not admit that this implies the power to revoke the authority granted to the ruler, without his consent, but it does imply that his powers as such must be limited from the outset and throughout by the terms of the "compact." Further, and this is a notable conception, the "compact" does not mean merely some original or primitive agreement, but all the laws and customs of the constitution that has gradually grown up and been accepted. Hooker, in saying this, is not running counter to the conception of the contract, as embodied especially in the coronation oaths of king and people; but he is bringing this into closer relation to the principles of the supremacy of the law, that law which is the living expression of the custom and life of the community. The "compact" is on the king's part the promise to obey the law, and we therefore once again cite a passage in which his relation to the law is expressed.

"In which respect, I cannot choose but commend highly their wisdom by whom the foundations of this commonwealth have been laid ; wherein, though no manner of person or cause be unsubject to the king's power, yet so is the power of the king over all and in all limited, that unto all his proceedings the law itself is a rule. The axioms of our regal government are these : 'Lex facit regem', the king's grant of any favour made contrary to the law is void; 'Rex nihil potest, nisi quod jure potest'. Our kings, therefore, when they take possession of the room they are called unto, have it painted out before their eyes, oven by the very solemnities and rites of their inauguration, to what affairs by the said law their supreme authority and power rcacheth."

We turn again to Althusius; for he states the principles of a contract between the prince and the community from whom he draws his authority, very precisely and emphatically. By the establishment of the supreme magistrate the members of the kingdom bind themselves to obedience to him, for he receives from the community the rule (imperium) of the kingdom, but the people and the supreme magistrate enter into an agreement with each other with regard to certain laws and conditions to which they bind themselves by an oath; and this cannot be recalled or violated either by the magistrates or the subjects.

And again, in terms both general and emphatic, Althusius declares that no kingdom or commonwealth was over created without a contract between the subjects and the prince, which was to be kept religiously by both, and that if this wore violated, all the authority founded upon it would fall to the ground.

The supreme magistrate has only so much power as was expressly granted to him by the members of the community, while that which was not granted remains with the people. An absolute power, or what is called "plenitudo potestatis", cannot be granted to the supreme magistrate, for to

grant this would destroy that justice without which kingdoms are mere bands of robbers; an absolute power is not directed to the good of the subjects, but to a private satisfaction. The right (that is, jus) granted to the magistrate by the people is less than that of the people, and belongs to another (*i.e.*, the people), it is not his own.

Althusius does not, however, set out this principle of the contract merely as a theory. Like the author of the 'Vindiciae', he maintains that it could be found in almost all modern kingdoms, whether elective or hereditary, in France, England, Sweden, Spain, and the German Empire; and he relates it to the form of oath taken by the princes on their accession.

We venture to think that we have said enough to show that the conception of a contract between king and people was not merely archaeological nor unimportant in the sixteenth century. It was set out with force and clearness by the most sober and dispassionate writers like Hooker and Althusius, and it was clearly founded, first, on the relation of the king to the law, second, on the conception embodied in the coronation orders, and third, on the continuing influence of the feudal tradition of the Middle Ages,

(5) *The Right of Resistance and Deposition.*—In discussing the conception of the sovereignty of the community and of the contract between ruler and people, we have already touched upon this, but the subject is of so much importance that we must deal with it in more detail.

We need hardly repeat the emphatic terms in which William of Orange in his 'Apologie' and the other documents we have cited with regard to the revolt of the Netherlands, declare that Philip II had forfeited his authority, as he had violated the agreements upon which it rested.

The question of the right of resistance and deposition was raised in Scotland also, not merely as theory hut as a practical question, even earlier; and it was discussed by one of the best known writers and scholars of that time in Europe, that is, by George Buchanan. But behind George Buchanan there was a greater and more powerful figure, that is, John Knox, who not only defended the right of resistance and deposition in principle, but did much to carry it out in fact. We must therefore take account of some of the principles laid down, especially by Knox in the course of that triumphant revolt which Buchanan defends. We are not here concerned to discuss the merits of that conflict, or the character of those who took part in it, least of all of the Scottish nobles, the most unscrupulous and politically incompetent representatives of that class in Europe; but we are greatly concerned with the formulation and development of the principles of the revolt. And for this we must look, before George Buchanan's 'De Jure Regni' was published, mainly to the declarations of the Reformed preachers and of John Knox, as we find them in Knox's history of the Reformation in Scotland. (It is not necessary for our purpose to assume that John Knox's reports of these were always precisely accurate.)

The first statement which we should notice is that of the Reformed preachers to the "Congregation" in reply to the proclamation of the queen regent, Mary of Guise, in August 1557. "In open audience they (*i.e.*, the preachers) declare the authority of princes and magistrates to be of God... To bridal the fury and rage of princes in free kingdoms and realms..."

At the meeting of the "haile nobility, barouns and broughes in Edinburgh", in October of the same year, the preachers were required to give their judgment on the question whether the Regent "ought to be suffered so tyrannously to impinge above them", and John Willock and John Knox spoke for them. The declaration of Willock is reported as follows : "First, that, albeit magistrates be God's ordinance, having of him power and authority, yet is not their power so largely extended, but that it is bounded and limited by God and His Word. And secondarily, that as subjects are commanded to obey their magistrates, so are magistrate commanded to give some duty to the subjects; so that God, by His Word, has prescribed the office of the one and of the other. Thirdly, that albeit God hath appointed magistrates his lieutenancies on earth, and has honored them with His

a unique title, calling them Gods, … but that for just causes they might have been deprived. Fourthly: that in deposing of princes, and those that had bene in authority, God did not always use his immediate power ... And hereupon concluded he, That since the Queen Regent denied her chief duty to the subjects of the Realm, which was to minister justice unto them indifferently, to preserve their liberty from invasion of strangers, and to suffer them have Gods' Word openly preached among them; seeing, moreover, that the Queen Regent was an open and obstinate idolatress, a vehement maintainer of all superstition and idolatry; and finally that she utterly despised the counsel and requests of the Nobility, he could see no reason why they, the born *Counsalleris*, *Nobilitie*, and *Barouns* of the *Realme*, that they should not justly deprive her from all regiment and authority amongst them". Knox reports that he approved Willock's statement, but adds that all this referred to the Regent and not to Queen Mary, and that the deposition of the Regent should be conditional upon her refusing amendment.

It was not, however, long before the question of the authority of Queen Mary herself was raised. Knox gives an account of a conversation between himself and the Queen in 1561.
"Think ye, quod sche (*i.e.*, Mary), that subjects having power, may resist their Prince? If those princes exceed their bounds (quod he), madam, and do against that *whairfor* they should be obeyed, it is no doubt but that they may be resisted, even by power."

In 1564 the General Assembly of the Church appointed certain members to meet the Lords of the Council, and to confer upon complaints that John Knox had spoken lightly of the queen's authority. The proceedings are reported mainly in the form of a dialogue between Knox and Maitland of Lethington. The most important question raised was that of the interpretation of Romans XIII. Knox had distinguished between the ordinance of God and the persons placed in authority, and maintained that subjects were not bound to obey the prince in unlawful things, and might resist him. "And now, my Lord" (he goes on), "to answer to the place of the Apostle who affirms that such as resist the power, resists the ordinance of God, I say, that the power in that place is not to be understand of the unjust commandment of men; but of the just power wherewith God has arm his magistrates and lieutenants to punish sin and maintain virtue ...."

Maitland appealed to the judgment of the Reformers, Luther, Melancthon, and others, evidently knowing only their earlier opinions, and Knox answered, it is interesting to observe, by citing the Apology of Magdeburg, that is, presumably, the Declaration of the Magdeburg Clergy, to which we already referred.

These are important and unambiguous statements of the position of Knox; he refused to admit that the prince represented the authority of God in such a sense that it was never lawful to resist him, and maintained that it was well that he should be restrained by the wisdom of their godly subjects.

It was some years later that George Buchanan published his work entitled 'De Jure Regni apud Scotos', and we must observe the terms under which he vindicated the right of a community to depose the ruler who abuses his power; and in the first place, his careful criticism of the arguments for the necessary submission of Christian men to rulers, however unjust.

He represents Maitland as urging that St Paul had commanded Christian men to pray for princes, and among them were wicked emperors like Tiberius, Caligula, and Nero. Buchanan answers that what St Paul commands in 1 Timothy II is that we must pray for kings and other magistrates that we may live quiet lives in godliness and honesty, and he points out that in order to understand St Paul's meaning wo must observe the very careful terms which St Paul uses in the Epistle to the Romans to describe the function of the ruler. He is, St Paul says, a "minister" to whom God has given the sword that he may punish the wicked and protect the good ; and he quotes St Chrysostom as saying that St Paul is not speaking of the tyrant, but of the true and lawful magistrate, who represents the power of God on earth. It does not follow that because we are to pray for wicked princes wo are not to resist them, any more than because we are to pray for robbers we are not to

resist them.2 Buchanan follows this up by pointing out that St Paul's purpose in laying stress upon the Divine authority of the magistrate was to correct the anarchical tendencies of those Christian men who thought that because they were the free sons of God they ought not to be under any human authority, and that in the passage in Romans XIII. St Paul was referring not to any particular magistrate but to the function or office of the magistrate.

When he had thus disposed of the theological argument in favour of non-resistance, after mentioning some cases of the deposition of kings, he goes on to the more serious discussion of the meaning of the authority of the community over the king.

Maitland asks, how can the king who has become a tyrant be called "in jus"? Buchanan answers by asking which is the greater, the king or the law, and when Maitland admits that it is the law, Buchanan asks which is greater, the people or the law, and Maitland admits that it is the people, for it is the people which is the source and author of the law. Buchanan then concludes that, if the law is greater than the king and the people is greater than the law, there is no difficulty about the authority which can call the king to answer to the law. The people is greater than the king and thus when the king gives account to the people it is the lesser who is called to account by the greater. This brings him to the judgment to which we have already referred, that the king is answerable in private cases to the courts, and this must be much more true in greater matters.

When we turn to the Huguenot writers, we find they are equally clear about the right of resistance to and deposition of the unrighteous king. Hotman, the 'Droit des Magistrats', and the 'Vindiciae' all appeal to the precedents of the earlier periods of the French kingdom as showing that the national council or Estates had the right of deposing evil kings. They also cite more recent examples, the 'Droit des Magistrats' and the 'Vindiciae', the depositions of the Emperors Adolf and Wenceslas and the recent depositions of the King of Denmark and of Mary, Queen of Scots, and the 'Vindiciae' also refers to the depositions of Edward II of England and of Eric of Sweden. We have already pointed out that the 'Droit des Magistrats' compares the position of the king who holds of the sovereignty with that of a feudal lord, who will lose his fief if he commits "Felonie" against his vassals, that is, his subjects. The Catholics had held that the Church is above the Pope and can depose him for heresy, and the people has the same authority over the king who has manifestly become a tyrant, says the 'Droit des Magistrats'; while the 'Vindiciae' maintains that the people is absolved from its obedience to the king if he has violated his contract, the "people" is greater than the king, and can depose the tyrant.

We have already referred to Boucher, as a representative of the Catholic League in France, as maintaining the right of the community to depose the king who violates that contract with the people upon which his authority depends, and we need only here refer to his detailed discussion of the right to depose the tyrant. He cites St Thomas Aquinas as holding that it is lawful for a people to depose the unjust king if it belongs to them to appoint him, and this is followed by a detailed discussion of the question whether and under what circumstances it is lawful to kill the tyrant.

We have already dealt with some aspects of Mariana's theory of the state and government, and we need only recall that, while he is a strong supporter of monarchy, he thinks of laws as having been made to restrain the king, and that these laws have been made by the community from whom the king receives his authority.

He therefore maintains that inasmuch as the authority of the king is derived from the commonwealth, the king can be compelled to give account to the law, and, if he will not amend, he may be deposed; for the community, when it bestowed power on a king, kept the greater power in its own hands.

This is Mariana's general principle, and he goes on to consider how the authority of the community over the prince is to be exercised. He is in this chapter discussing and defending the revolt against Henry III of France and his assassination. He defends tyrannicide as lawful, but it

should be observed he makes a careful distinction between the tyrant who has usurped power and the lawful king who has become a tyrant by abusing his power. All philosophers and theologians, he says, are agreed that the usurper may be slain by anyone. It is different, however, in the case of a prince, who holds his power by the consent of the people, or by hereditary right. His private vices must be tolerated, but, if he injures the commonwealth, lays his hands upon public and private wealth, treats the public laws and religion with contempt, there must be no hesitation. At the same time the nature of the action against the prince must be carefully considered, lest evil should be added to evil. The best and safest course is that a public assembly should meet and consider what is to be done; the prince should first be admonished, and if he will correct his former faults, he should be re-established. If, however, he will not do this, the commonwealth may deprive him of his authority, may declare him a public enemy, may make war upon him and slay him; and it will be lawful for any private person to execute this sentence.

If, however, it is not possible to hold a public assembly, and the commonwealth is oppressed by the tyranny of the prince, and yet men desire to destroy the tyranny and to punish the manifest and intolerable crimes of the prince, the man who follows the public wishes and endeavours to destroy him is not, in Mariana's judgment, to be condemned. He does not think that there is much danger that many will follow this example; and he does not mean that the decision with regard to such action should be left to any single and private person; if the public voice cannot be expressed, learned and grave men should be consulted.

Mariana concludes the chapter with a critical discussion of the Decree of the Council of Constance, which condemned tyrannicide.

Cardinal Bellarmine is cautious and restrained in his discussion of this subject, but, as we have already pointed out, he is clear that the authority of the prince, while it is derived ultimately from God, is derived immediately from the consent of man. In another passage he says that although we are bound by the Divine Law to obey the king as long as he is king, the Divine Law does not say that there are no causes for which the king may be deprived of his kingdom; if this were not so, there would be scarcely any commonwealth, since they have been for the most part established after the expulsion of their kings. It is no doubt true that Bellarmine is really concerned to vindicate the right of the Pope to depose heretical kings, but his words leave little doubt that he recognised the right of the community to depose the king for just cause.

The only important writer among those with whom we have dealt in this chapter who is not willing to approve of the deposition of the king is Hooker. We have discussed his treatment of the "compact" or agreement between the community and its ruler, on which his authority rests, but as we have seen he does not admit that this implies that the community can withdraw its authority without the consent of the ruler. "It must be presumed that supreme governors will not in such case oppose themselves and be stiff in detaining that, the use whereof is with public detriment; but surely without this consent I see not how the body should be able by any just means to help itself, saving where dominion doth escheat". It must, however, be observed that Hooker adds that just on this account the authority which is bestowed upon the ruler must be carefully limited.

"Such things therefore must be thought upon beforehand, that power may be limited ere it be granted."

When we turn to Althusius we find that he deals with this question carefully but dogmatically, and mainly in that chapter in which he discusses the nature of tyranny and the remedies for it. He is concerned with tyranny, "exercitio", and describes it as that by which the foundations and bonds of the commonwealth are destroyed. For these foundations and bonds consist primarily in the mutual promises to observe and defend the fundamental laws, which were made by the community and the king. The violation of the contract between ruler and people, which wo have already discussed, is tyranny. Again, Althusius describes the exercise of an absolute power by the supreme magistrate as

tyranny. And again, he describes as tyranny the attempt to hinder the meeting of the assemblies of the kingdom and the free expression of opinion in them when they meet.

When he has thus described tyranny, he proceeds to discuss the remedies for it. Like Calvin, ho does not allow the private subject to resist or revolt. He is emphatic and unequivocal in maintaining that the tyrant is to be resisted and, if necessary, deposed by the properly constituted authority; the public officers who are responsible and competent to carry this out are the Optimates or Ephori; he sometimes speaks as though these public officers were to act alone, but in another place he seems clearly to mean that they are to call together the General Council of the Estates, and that it is to examine and judge the action of the tyrant. If there are no Ephors, the people should appoint "defensores" for this purpose.

It is interesting to observe that Althusius is aware of the contentions of Albericus Gentilis, which we discuss in a later chapter; but Althusius bluntly replies that the people and the Ephors are superior to the prince, who had received his authority from them.

He concludes the chapter by that assertion which we have already cited, that the indivisible and incommunicable "Majestas" belongs to the members of the whole kingdom, and cannot be transferred by them to the prince.

(6) *Magistrates, Nobles, or Ephors*.—There remains one development in the political theory of some of these writers which deserves a separate treatment, that is, the conception that while the supreme authority belongs to the community, and under it to the king, there are officers of the community whose function it is to protect its rights against all attempts on the part of the king to violate them.

We have referred in an earlier chapter to that very important passage in Calvin's Institutes, in which, after ho had used the strongest language against resistance by any private person to the public authority, he says that if there were magistrates of the people appointed to resist the licence of rulers, such as the Ephors in Sparta, or the Tribunes of the people in Rome, or the three Estates in modem kingdoms, they were bound to interfere and to protect the liberties of the people.

Whether Calvin derived this directly from some earlier writers we do not pretend to know; but what is clear is that the conception assumed considerable importance in some political writers of the later part of the sixteenth century.

We must also examine it, because though it may at first sight seem strange, it is related to certain experiments or developments in mediaeval society. We shall therefore do well to approach the consideration of this conception by again observing its appearance in the 'Apologie' of William of Orange.

Ho speaks of the nobles as being bound by their oath to compel the Duke of Brabant (Philip of Spain) to do justice to the country; and again, he says, that among the other rights of the vassals of Brabant is the privilege of exercising the same powers as the Ephors of Sparta, that is to maintain the power of a good prince, and to bring to reason the prince who violated his oath.

It is obvious that in this place the conception of the nobles or principal vassals of a state as having the responsibility to check and correct the arbitrary and illegal actions of the king or lord, is derived from the traditions of feudal law, especially as we have them in the Assizes of Jerusalem or in the Pseudo-Bracton; while the comparison of this with the position of the Ephors in Sparta may be derived from Calvin.

It is these conceptions which are developed in the Huguenot tracts. They are clear and emphatic, like Calvin, in maintaining that private persons cannot take action against the lawful prince. But the whole people can do so through its officers who have been appointed to act as a check and restraint upon the sovereign magistrate.

The author of the 'Vindiciae' distinguishes sharply between the officers of the king and those of the nation, such as the chancellor, the constable, the members of the "parlements", the peers of France, and others.

The 'Droit des Magistrats' says that the whole government is not placed in the hands of the king, but only the "Souverain degré" of the government : and each of the inferior officers has his share in this, for they have received their authority from the "Souveraineté" to maintain the laws, even by force if necessary, for the protection of those who were under their charge. They are below the "Souverain", but they do not depend properly on the "Souverain" but on the "Souveraineté".

These magistrates are, in case of necessity if the "Souverain" should become a tyrant, to resist him, and the Estates to whom such authority is given by the laws are to set things right and even to punish the tyrant, and must not be thought of as seditious or rebellious if they do this, but as carrying out their duty and the oath which they have taken to God and their country.

The whole conception is summed up by the author of the 'Vindiciae'. Princes are chosen by God, and are established by the people; as individuals they are inferior to the prince, but the whole body and those who represent the whole, the officers of the kingdom, are superior to him. The authority of the prince rests upon a contract between him and the people, tacit or expressed, natural or even civil, that the people must render obedience to the prince who rules well, that they will serve the prince who serves the commonwealth, that they will obey the prince who obeys the laws. Of this treatise or contract the officers of the kingdom are the guardians. The prince who violates the contract is a tyrant, "exercitio", and therefore the officers of the kingdom are bound to judge him according to the laws, and if he resists, to compel him by force.

No doubt these conceptions are expressed in violent and drastic terms, but it must be observed that they are related to the mediaeval traditions. In the first place, it is obvious that in the feudal system the king was thought of as controlled, if necessary, by the great vassals or tenants-in-chief. This is set out, not only in the Assizes of Jerusalem, but in the law books of the German Empire of the thirteenth century, like the 'Sachsenspiegel' and the 'Schwabenspiogel', and is illustrated by the constitutional forms of the deposition of the Emperors Adolf and Wenceslas. Even so careful a writer as Bracton admitted that at least some would say that the "Universitas Regni et Baronagium" could compel the king to do justice to an aggrieved person in his court, while the interpolator of Bracton and Fleta assert clearly that the king's "curia", that is, the earls and barons taken together, were superior to him. In the second place, we must remember those very interesting constitutional experiments, the appointment of a committee of the barons to secure the execution of the Great Charter, the demands of the barons in 1244, and the appointment of a committee of twenty-four to superintend the execution of the Provisions of Oxford in 1258 and 1264. In the third place, it should be observed that the conception of some of the great officers of the crown as being properly officers of the nation is implied in the Provisions of Oxford with respect to the appointment and tenure of office of the justiciar, the treasurer, and the chancellor.

The truth is, no doubt, that the Huguenot writers were influenced by the actual conditions of France, by the fact that some of the princes of the blood and many of the nobles were in violent and open opposition to the king, but behind the influence of these conditions we must recognise the continuing influence of traditional conceptions of the Middle Ages and of the feudal system.

It is therefore important to observe that Althusius also maintained the same conception, that there are officers of the commonwealth whom he also calls 'Ephori', whose office it is to defend the laws and constitutions of the commonwealth, even against the supreme magistrate.

The Ephors, he says, are entrusted by the consent of the people with authority, as representing them, to create the supreme magistrate, to help him with their counsel in the affairs of the commonwealth, and to restrain his licence in all matters which may be harmful to it, to see that the community is not injured by his private desires and by his action or inaction. It is important to

observe that in the conception of Althusius the powers of the Ephors are drawn from the community, like those of the prince or supreme magistrate, and that, while he thinks that there should be such officers in the commonwealth, if there are not, their functions will be discharged with the consent of the whole people. Althusius again, like the author of the 'Vindiciae', finds these officers of the commonwealth in almost all the countries of Western Europe: in France, the princes of the blood, the chancellor, the constable, the marshal, &c. ; in England, the peers and the representatives of the counties and cities; and so also in Poland, Belgium, Sweden, Denmark, Hungary, and Spain.

In the German Empire there are "general" Ephors, by whom he understands the Seven Electors, and he even refers to the Golden Bull of Charles IV as providing that proceedings could be taken against the emperor before the Count Palatine; but there are also "special" Ephors in Germany, by whom he means the dukes, princes, margraves, imperial cities, &c., but they only determined important business in the council of each province.

If we now attempt to sum up the general character of the theories of the source and nature of the authority of the prince, with which we have dealt in this chapter, we find that there is little which is essentially new, little of which we cannot find the sources in the Middle Ages.

That the authority of the prince was derived from God ultimately, but directly from the community, was in fact the normal principle of mediaeval political societies, and the influence of the revived study of the Roman jurisprudence had only confirmed this judgment.

When once the question was raised where the ultimate authority in the state was to he found, the normal answer was that it belonged to the community as a whole, for the word "populus" as in the Roman lawyers means the whole community, not any one part of it. It is no doubt true that in the Middle Ages the supreme authority in political society was the law, and not any one person or body of persons; and as long as the law was conceived of as being primarily custom, the question of an authority behind the law would have seemed meaningless. It was only in the later Middle Ages that the question of a law-making power began to be important, and it is with this that we see the first beginnings of the modem conception of sovereignty : no doubt, again, this development wa3 furthered by the revived study of the Roman law, with its clear-cut conception of legislative action. There is no doubt at all where, to the medieval mind, this supreme power which lay behind the law resided. It was the community, the universitas or populus, which made law. The conception that in the Middle Ages the prince was thought of as having individually and in his own authority the power of legislation is really nothing but an illusion.

When, therefore, the writers with whom wo have been dealing in this chapter speak of the "Souveraineté" which was behind and greater than the "Souverain", they were no doubt using sharper and more dogmatic terms than had boon used before, but they were not asserting a now principle.

It is hardly necessary to point out that the doctrine that the prince was controlled by the law and the courts of law in his relation to private persons and properties was a commonplace of mediaeval political theory and constitutional law.

The theory of the contract between the prince and the people was again in no sense now in principle, it rested upon the immemorial tradition of the mutual oaths which prince and people made to each other in the Coronation ceremonies, and it was obviously related to the whole character and principles of feudal society.

And finally, the right of the community to resist and even if necessary to depose the prince who persistently violated the laws of the community was founded upon important, precedents in various countries, and had been maintained not merely by violent and highly controversial writers like Mane-gold and John of Salisbury or Marsilius of Padua, but by such careful and judicious writers as St Thomas Aquinas.

CHAPTER III.
THE THEORY OF THE ABSOLUTE MONARCHY.

We have so far endeavoured to set out the continuance in the sixteenth century of the conception that the king is under the law; we must now consider how far, and in what terms, the conception that the king was above the law was developed in this period. It is, we think, clear that this was an innovation, that there is really scarcely any trace of such a conception in the earlier or later Middle Ages, except so far as it can be found in some of the Civilians, and even among them, as we have pointed out, there had been, and still was, much difference of opinion.

It will be well, we think, to begin by considering the theory of the absolute monarch as it was expressed by a prudent and moderate practical statesman and thinker—that is, by Michel L'Hôpital, who was Chancellor of France from 1560 to 1573. We are not here directly concerned with his relation to the Wars of Religion and his policy of compromise or toleration, nor are we for the moment concerned with his attitude to the States General, to which we shall return in a later chapter, but with his conception of the relation of the king to the law.

It is clear that while ho held that kings should govern, not only with moderation and goodwill towards his subjects, but also with justice and "légalité", he condemned all revolt against the monarch, however unjust he might be, and maintained that subjects can never have a just cause to renounce the obedience which they owe to their sovereign. He claimed indeed that France had lived for many years in tranquillity, because there were good laws under which the people rendered obedience to the prince, while the prince submitted himself voluntarily to the law; but it must be observed that L'Hôpital spoke of the obedience rendered by the King of France to the law as voluntary, not obligatory.

It seems clear to us that these phrases, though incidental, represent L'Hôpital's normal judgment. In the speech which, as chancellor, he addressed to the meeting of the States General at Orleans in 1559, we find him saying that no excuse could be made for those who took arms against the king, for no subject may defend himself against the prince or his magistrates, whether they are good or evil; the obedience which we owe to him is more binding, even, than that which we owe to our fathers. And, in another place, in the same speech, more explicitly still, while he expresses his wish that kings should recognise that the property of their subjects belongs to them "imperio, non dominio et proprietate", all are bound to obey his laws, except the king himself.

The position of L'Hôpital is interesting ; it certainly does not correspond with that of De Seyssel, nor with the opinion of some foreign observers of the French constitution like Machiavelli. It corresponds, however, with a declaration of the President of the Parliament of Paris in 1527, that the king was above the law, and with the judgment which Budé at least sometimes expressed. Whatever may be the origin of this conception in France, we have to observe L'Hôpital's opinion, for it is that of a prudent and responsible politician.

It is, however, in the famous work of J. Bodin, 'De Republica','published originally in French in 1576 and translated into Latin by himself, and republished in 1586, that we find, apart from some of the Civilians, the first important, and reasoned development of the theory that the king was absolute and above the law.

The work of Bodin, whatever may be thought of its intrinsic and permanent value, is indeed a large and comprehensive study of politics, and in order that we may understand his conception of the authority of the king, we must begin by considering, briefly, his general theory of the nature of political society.

He begins with a definition of the commonwealth (Respublica) which is noticeable, "Respublica est familiarum rerumqne inter ipsas communium summa potestate, ac ratione moderata multitudo". The commonwealth must indeed be governed by reason, but it must be controlled by a supreme force (or authority) ; for, as he goes on to say a little later, a commonwealth cannot hold together without a supreme power which compels all its members to form one body; or, as he puts it, in slightly different terms, the supreme authority is the "cardo" of the whole commonwealth : by it all magistrates and laws are created. It is by its strength and power that all lesser societies and all citizens are compelled to form one body. This supreme authority is "legibus soluta", whereas the magistrate is controlled by the laws; and it is this supreme authority to which Bodin gives the name of "Majestas".

In another place he again states the principle of the nature of this supreme power—that is, the "Majestas". Law is nothing but the command of the Supreme Power. The power of Law (Vis Legum) is placed in those who have the public "imperium", whether a prince or the people or a magistrate; for if anyone disobeys their commands, they have power to compel obedience. And again there are two forms of public authority : the supreme authority, which is free from laws, and from the authority of magistrates; the other, a legal authority, which is bound by the laws. The former belongs to "Majestas", which after God recognises no superior or equal.

This is the first and most fundamental principle of Bodin's political theory; to him there must be somewhere in the State a supreme and absolute authority. He is setting out what in later terms we should call the theory of the sovereignty of the State. We must, however, be very careful to observe that Bodin recognises that there is one immensely important limitation of this absolute power in the State. Supreme power is always subject to the authority of the divine law, of the natural law, and of the law of nations. It is only the positive civil laws which have their source from this supreme power in the State, and which are under its control.

There has been much discussion about the question whether this conception was new. As we have pointed out in previous volumes, the general mediaeval conception of law was not that of a command, but of custom—a custom enforced no doubt by the community, but which was not, properly speaking, made by the community, but was rather the expression of its life. Bodin thinks of it under the terms of a command, and his statement of this conception is sharp and dogmatic. We should venture to say that this is probably the result, especially, of the influence of the Roman law, which, though it attached much importance to custom, did, in the main, tend to describe positive law as the expression of the will and command of the Roman people, or of the emperor to whom it had given its legislative authority. This conception of law was not, however, peculiar to the Civilians; it is clear that, even as early as the ninth century, the conception of law, as representing the deliberate will of the community, was expressed in such famous words as those of the "Edictum Pistense", "Quoniam lex consensu populi et constitutione regis fit"; and by the end of the thirteenth century at least law was thought of, not only as customary but as being made. The theory of Bodin was, therefore, not, strictly speaking, new, but we think it may properly be said that it represents a much sharper and more dogmatic enunciation of the conception.

So far, then, we have in Bodin a dogmatic statement of the absolute power of the State, limited only by the divine law, the natural law, and the law of nations. But Bodin not only maintains that there is this absolute power in the State, but seems to assert that this authority rests upon force. Reason itself, he says, teaches us that the commonwealth is founded upon force, and he argues that Aristotle, Demosthenes, and Cicero were in error when they thought that in the beginning princes and kings were given their authority on account of their justice.

Bodin's discussion of this is somewhat meagre and inadequate ; it is incidental to his contention that in the State man has lost his natural liberty. He had in an earlier passage defined this natural liberty as that of a soul good and guided by nature, which, under God, rejects all authority but

that of itself and of true reason. He now defines the citizen as a freeman who is subject to the supreme authority of another, and says that liberty could not have been taken from man except by great force; the citizens, therefore, have lost something of their natural liberty when they were subjected to the authority of another.

We could wish that Bodin had developed in more detail what he meant by "the force" which created the commonwealth, and his conception of liberty, but he did not, as far as we have seen, do so. Indeed, it seems to us that his reference to the fact that man had lost his "natural" liberty in society is little more than a preliminary to the judgments upon actual political conditions.

There is another and more serious error, he says, and he attributes it to Aristotle—that is, the contention that a man is not a citizen (civis) who does not share in the public authority. And this leads to another and most important general principle—that is, that the people can transfer to one man, and without limit of time, its authority over the citizens, which includes the power of life and death, an authority which is not subject to any laws, and which he can hand on to any successor whom he wishes. The prince who has this power has "Majestas", while the prince who is bound by the laws, or holds authority only for a time, and has to render account to the people, does not hold this "Majestas". In another place Bodin asserts that the prince should not swear to the laws, for this is to destroy the "Majestas", and to confuse the government of one man with that of a few, or of the people.

Bodin has thus set out the principle that there must be in any political community some authority which is supreme and absolute, above the laws, because it makes the laws. It is not our function here to discuss the truth of this conception, how far it is a truism, and how far it is an illusion. It is not our part here to discuss the later history of this conception, but we think it well to point out to the student of political theory that, as this theory was profoundly different from that of the Middle Ages, it was also wholly different from that of Locke, to whom the State has no more of an absolute authority than the individual. It must also be remembered that this conception of Bodin is not the same as that of Hobbes, for this supreme or sovereign power is not free from all law, for it is not the source of all law. Above the positive law, which is made by the sovereign, there are, in the view of Bodin, as we have seen, the divine law, the natural law, and the law of nations (Jus Gentium).

This is not, however, the only limitation upon the supreme power. As we have already pointed out, Bodin maintains that the prince should not swear to maintain the laws; the prince has power by his own will to make laws and to amend them, if "Aequitas" demands it; but a "Conventio" or contract between the prince and the citizens binds them both, and cannot be changed without mutual consent; in this matter the prince is in no sense superior to his subjects. Bo din, unfortunately, does not, as far as we have seen, attempt to define or describe these contracts between the prince and his subjects. As we have seen in the earlier part of this volume, this question was much discussed by the Civilians of the fourteenth and fifteenth centuries, and we have the impression that their conception may have arisen especially from their familiarity with the contractual conceptions of feudalism, partly also from the question of the obligation of treaties made between the emperor and various Italian cities.

Custom, Bodin clearly refused to recognise as having any authority over the prince. Bartolus and Baldus give custom an important place in their treatment of law, as was also done by some Civilians and Canonists of the fifteenth century. Bodin, on the other hand, emphatically says that customs have little authority as comparted with law, and were entirely under the control of the prince.

There is, however, another limitation upon the authority of the prince. Bodin contemptuously rejects the vulgar opinion that all things belong to the prince. This is a mere confusion with the principle that all things are under his "Imperium" and "Dominatus". "Proprietas" and "Possessio"

belong to the individual; and he cites a judgment of the Parliament of Paris that the prince can bestow his own property on whom he will, but not that of another person; the prince cannot lay his hands upon other men's wealth "sine justa causa."

So far, then, we have seen that, with the limitations which we have just considered, Bodin is clear that there must be in every State a supreme and absolute power, not subject to the laws, but the source of the laws, which he calls Majestas, and that this power may be given by the community to one man as prince, who will be supreme and absolute.

Bodin maintains that this power is, properly speaking, "indivisible", and contends dogmatically that there can be no such thing as a mixed constitution. There are only three possible forms of government—monarchy, aristocracy, and democracy; the mixed government is simply a "popularis status". There are only three forms of commonwealth; the "Jura Majestatis" must belong either to the whole body of the citizens or to a minority of them or to one man. These forms cannot be combined with each other. The only "temperatio" of this which he allows, is that in the monarchy the honours and offices may be open to all; in the "popular" form they may be confined to the best and most noble, and in the aristocratic form they may be open to the poor as well as the rich.

This is not unimportant, but it does not modify Bodin's general principle that the supreme power ("Majestas") is absolute and above all positive laws, and this is brought out very clearly in a passage in which he deals with the relations of the magistrate to the supreme power. The magistrate, he says, must carry out the commands of the prince, so long as they are not contrary to the laws of God and of Nature; the prince ought indeed to maintain the laws and customs of the country, but the magistrate must not refuse to obey his commands even against them, for it is not his function to judge whether the prince's commands are just or not. lie is careful to explain that the well-known words of the rescript of the Emperor Anastasius, bidding the judges not to accept any imperial rescript which was contrary to the laws (Cod. I. xxii. 6), must be understood as only applying to cases where the rescript did not contain a " derogating " clause. The magistrate may indeed remonstrate, but if the prince repeats his command, he must obey.

We may sum up Bodin's theory of the supreme (sovereign) power in the State in the words of another passage. He begins indeed by repudiating the notion that the words in which Samuel set out the oppressive nature of kingship (1 Sam. VIII. 9-18) should be taken as a true description of the "iura maiestatis", but concludes by saying that the first and chief character of "Maiestas" is the power of giving laws to all and every citizen, without the consent of superiors or equals or inferiors.

So far, then, we have considered the general principles of Bodin; we must now turn to his discussion of the actual nature of the governments of the European States with which he was acquainted and their relation to law, and here he is compelled to admit that it was difficult to find a true monarchy. In the ancient world he found that the Spartan monarchy was only nominal; the government was really in the hands of the people. In Rome, after the expulsion of the kings, men attempted to divide the supreme authority, but in the end the Plebs obtained the power of making laws, and gradually possessed themselves of the other "iura maiestatis", in spite of the resistance of the optimates. In Spain and England he thinks that the laws were made "rogatione populi" and could not be annulled except in the assemblies of the people; and again, in England, he says that by ancient custom laws were made "consensu ordinum"; though he says in another place that while the English estates had a certain authority, the "iura maiestatis" belonged to the prince. Of the contemporary Empire he says that the emperor swore to observe the laws of the Empire, and was bound by the laws and decrees of the princes; and in another place the "Maiestas" of the Empire resided in the assembly of the princes and nobles, and the emperor could not make laws or appoint officials without their consent. In Bodin's judgment the Empire was not a monarchy but an aristocracy.

In France alone did Bodin find a government which had the nature of a supreme and sovereign monarchy. The estates could indeed humbly present their petitions to the prince, but he controlled all

things at his will, and whatever he commanded had the force of law. The notion that the prince should be controlled by the authority of the people vas dangerous and disturbing to the commonwealth; there was indeed no reasonable ground why the subjects should control their princes or why the assemblies of the people should have any authority, except to appoint a "procurator" for the prince if he were a minor, or insane, or a captive ; and he warned them that such a government would not be that of the people, but of the "optimates". Bodin also maintained that the coronation oath of the French kings was not an oath to keep the laws, and that in France laws had often been abrogated without the meeting or consent of the estates. France was a pure monarchy, while the estates had no power except to petition the king to do this or that.

We must, however, be careful to observe that in one place, as we have already seen, Bodin dealt at length with the question of the permanent tenure—that is, the independence of the judges—and contended that they should he irremovable except by process of law, for a precarious tenure of the judicial office was appropriate to a tyranny and not to a monarchy, which should he governed, as far as might he, by laws, not by the mere will of the prince. How far this conception is reconcilable with Bodin's general position we find it difficult to say; we have drawn attention to a similar apparent incoherence in the theory of Budé.

That Bodin thought that a monarchy of the absolute kind was the best form of government appears to us clear. In the last hook of his "De Republica" he compares the various forms of government with each other, and concludes : Monarchy has its inconveniences and dangers, hut those which belong to an aristocracy or democracy are much greater. The best form of government is that of one man, whose authority is not to be shared with the people or the "Patres"; all legislators, philosophers, historians, and theologians hold that this regal government is the best, not only for the convenience of the prince, but for the safety and happiness of the people. This supreme authority of the prince must not be shared with the assemblies of the people and nobles, or the "Maiestas imperii" will inevitably give place to anarchy. We must not give heed to the seditious clamour of those who maintain that the prince must be subject to such assemblies of the people, and that it is from them that the princes receive their authority to command and forbid. Any tyranny is better than the domination of the people. Tyrants will consider the danger of their actions, but the violence and fury of the peoples takes no rational account of their own or of other's interests.

Bodin's judgment seem to us clear and emphatic, as well as the audacity with which he appeals to the authority of legislators and philosophers—a somewhat strange appeal. He dogmatically asserts the absolute authority of the King of France, who was the source of law, and free from the law; in him it was that there resided that "Maiestas" or sovereignty which, as he contended, must always exist somewhere in a political society.

If we attempt to sum up the most important aspects of Bodin's political theory, we must observe first the singular significance of his suggestion that the State rests upon force, and that it was not, at least in its original form, related to justice, while it was to be directed by reason. Unhappily he did not, as far as we have seen, develop the conception, and it is therefore difficult to determine how far it was really important in his mind.

It is in his theory of the absolute and supreme authority, subject only to the natural and divine law, which resides in the State, that we find the most significant aspect of his work, but for our present purpose its importance lies specially in his judgment that this supreme and absolute power may be given by the commonwealth to one man; and that the king, in the proper sense of the word, is one who possesses this authority. There can be, in Bodin's judgment, no such thing as a mixed government, no combination of the monarchical and aristocratic and popular elements. It is here that Bodin breaks away most completely from the mediaeval tradition and the great mediaeval political thinkers, and even substantially, if not formally, from the principles of such men as De Seyssel.

It is true that Bodin, speaking not as a theorist but as an observer, evidently recognised that it was almost impossible to find any such monarchy in Western Europe, with the exception of France; while he maintained stoutly but without any great amount of historical evidence, that the King of France was in this sense supreme and absolute, the source of law, and not subject to law, and that it was in him that there resided that "Maiestas", that supreme or sovereign power, without which there can be no "Respublica".

It is in the work of Bodin that we find the most highly developed assertion of the absolute authority of the prince. There are, however, some other writers of the last part of the sixteenth century who, in varying terms, assert a theory of tin same kind, some of whom also restate the theory that the absolute authority of the prince is founded upon the divine law—that is, they restate that theory of the "Divine Right"—whose earlier appearance in the sixteenth century we have considered in Part III of this volume.

One of the most important of these was Thomas Bilson, Bishop Winchester, who in 1586 published a work entitled 'The true difference between Christian Subjection and Unnatural Rebellion'. This treatise is in the form of a dialogue between Philander, a Jesuit, and Theophilus, the Christian.

Bilson was indeed in a position of some difficulty. The primary purpose of his treatise was to prove the necessity of submission to the royal authority in England, but he finds himself compelled to defend, or at least to excuse, the revolt of the Protestants in various continental countries against their Catholic superiors.

We may begin by observing that Bilson cites St Paul and St Peter as teaching that kings are appointed by God, and must be obeyed; and the familiar Gregorian examples of David's submissive conduct to Saul, and asserts dogmatically that God expressly commanded the people to be subject to their king and not resist him. In another place he says : "Princes appoint penalties for others, not for themselves. They bear the sword over others, not others over them. Subjects must be punished by them and they by none, but by God whose place they supply ... No man may break the laws of princes without punishment, but the princes themselves, who may not be charged with the transgressions (of their own laws). For it was wisely spoken, he is wicked that saith to a king, thou art an offender. And if it be a monster in nature and policy to suffer the children to chasten the father, and the servants to punish their master, what a barbarous and impious a thing is this, to give the subjects power of life and death over the princes."

Again, more explicitly still: "The servant is not so surely bound to his master, as the subject is to the prince; power of life and death the master hath none, the prince hath; refuge against the master hath the servant to the common governor of them both, which is the magistrate, the subject hath no refuge against his sovereign, but only to God by prayer and patience, and therefore the prince may demise the servant, if the master be like to corrupt him; but no man can discharge the subject, though the prince go about to oppress him."

It would be difficult to find a more dogmatic and unqualified statement of the unlimited authority of the prince, or words which so directly and emphatically repudiate the tradition of medieval civilisation.

When, however, we turn to Bilson's treatment of the political conditions in continental countries, we seem to find ourselves in another world. The Jesuit brings up the conduct of the Protestants on the continent, and cites Beza's defence of the French nobles in taking up arms. Bilson defends them on the ground that the king had been in the hands of the Guises, and while he would not undertake to defend all that Protestant writers had said about resistance to kings, he urged that the constitutional system of different countries varied. He goes on : "The Romans, we know, could never abide the very name of a king. The Commonwealths of Venice, Milan, Florence, and Genoa are of the same mind. Many States have governors for life or for years, as they best liked that first created

their policies, and yet a sovereignty still remains somewhere in the people, somewhere in the senate, somewhere in the prelates and nobles that elect it: a magistrate, who hath his jurisdiction allotted and prefixed unto him, thus far and no further, and may be resisted and recalled from any tyrannous excesses by the general and public consent of the whole State whom he governs".

In Germany the emperor himself hath his bounds appointed unto him which he may not pass by the laws of the empire; and the princes, dukes, and cities that are under him have power to govern and use the sword as God's ministers, in their charge. And though, for the maintenance of the empire, they be subject to such orders as shall be decreed in the convent of all their States, and, according to that direction are to furnish the emperor with men and monies for his necessary wars and defence : yet, if he touch their policies, infringe their liberties, or violate the specialties which he by oath and order of the empire is bound to keep, they may lawfully resist him, and by force reduce him to the ancient and received form of government, or else repel him as a tyrant, and set another in his place by the right and freedom of their country. Therefore the Germans' doings or writings can help you little in this question. They speak according to the laws and rights of the empire, themselves being a very free State, and bearing the sword as lawful magistrates to defend and protect their liberties, and prohibit injuries against all oppressors, the emperor himself not excepted."

In another passage Bilson's contention is set out again in more general terms. The Romanist, Philander, brings forward the revolts in Scotland, France, and the Low Countries, as well as those in Germany. The Protestant, Theophilus, contends that the reformers had been barbarously slaughtered, but adds: "I must confess that except the laws of those realms do permit the people to stand on their right, if the princes should offer them wrong, I dare not allow their arms.... *Philander*: Think you their laws permit them to rebel? *Theophilus*: I busy not myself in other men's commonwealths as you do, neither will I rashly pronounce all that resist to be rebels; eases may fall out in Christian kingdoms when the people may plead their right against the prince, and not be charged with rebellion. *Philander*: As when, for example? *Theophilus*: If a prince should go about to subject his kingdom to a foreign realm, or change the form of the commonwealth from *imperio* to tyranny; or neglect the laws established by common consent of prince and people, to execute his own pleasure; in these and other eases which might be named, if the nobles and commons join together to defend their ancient and ancestral liberty, regiment, and laws, they may not well be counted rebels. *Philander:* You denied that even now, when I did urge it. *Theophilus*: I denied that bishops had authority to prescribe conditions to kings when they crowned them; but I never denied that the people might preserve the foundation, freedom, and form of their commonwealth, when they first consented to have a king. *Philander*: I remember you were resolute that subjects might not resist their princes for any respects, and now I see you slake. *Theophilus*: As I said, so I say now, the law of God gives no man leave to resist the prince; but I never said that kingdoms and commonwealths might not proportion their States as they thought best by their public laws, which afterwards the princes themselves may not violate. By superior powers ordained of God we understand not only princes, but all political States and regiments, somewhere the people, somewhere the nobles, having the same interest to the sword, that princes have in their kingdoms; and in kingdoms when princes bear rule, by the sword we do not mean the prince's private will against his laws, but his precept derived from his laws, and agreeing with his laws : which though it be wicked, yet may it not be resisted by any subject with armed violence. Marry, when princes offer their subjects not justice but force, and despise all laws to practise their lusts : not any private man may take the sword to redress the prince; but if the laws of the land appoint the nobles as next to the king to assist him in doing right, and withhold him from doing wrong, then they be licensed by man's law, and so not prohibited by God's, to interpose themselves for the safeguard of equity and innocence, and by all lawful and needful means to procure the prince to be reformed, but in no case deprived when the sceptre is inherited".

In these passages Bilson admits that the laws of some countries might contain provisions for restraining the prince's actions, and that in extreme cases the community might defend its ancient liberty and laws against him ; and he also makes it clear that, by the "superior power ordained of God," he did not mean only the prince, but all "political States and regiments". Like Calvin, he did not allow that any private person might by force resist the prince, but it was different with the constitutional authorities of the community. He even admitted that the community might depose an elected prince, like the emperor, though he emphatically asserted that this did not apply to the case of an hereditary prince. He suggested that such a constitutional limitation of the authority of the prince existed in the empire and possibly in other continental countries, but he did not suggest that they existed in England; and he at least seems to suggest that the monarchy in England was absolute, and that its "divine right" could not be questioned.

We turn next to a group of Scottish writers whose work was in some degree related to the deposition of Mary, Queen of Scots, and to George Buchanan's defence of this. In a treatise published in 1581 by a Scotsman, Cunerus, who was Bishop of Louvain, the "divine right", and the principle of non-resistance, are set out in very explicit terms. Ho cites Samuel's description of "the manner of the king" (1 Sam. VIII. 11, &c.) as being a statement of his rights—although he admits that it had been variously interpreted—for though the king, in doing such things as Samuel described, might be committing grave sins, the people must not resist. The king is the lord of the land, and the kingdom has been given him by God, and even his wicked actions must be endured by his subjects.

A more important work was published the same year by Adam Blackwood, entitled 'Pro Regibus Apologia', which is a formal reply to George Buchanan's 'De Jure Regni apud Scotos'.'Blackwood was a Scotsman, but had been educated in France, and was a counsellor or judge at Poitiers.

Blackwood was an uncompromising defender of the theory of the unlimited authority of the king. He admitted indeed that neither the ancient empire of Rome nor the contemporary empire had this character, but he maintained that the position of the Kings of Scotland was wholly different: the lives and fortunes of their subjects were in their power and they recognised no superior. This was also, he says, the character of the monarchy in the kingdoms of France, England, Spain, Portugal, and others, in that the people could not be admitted to any share in the supreme power; for this was the true nature of monarchy, that its authority could neither be divided nor shared.

This is a thoroughgoing statement, and the treatise is in the main an expansion of it. In the first place, Blackwood maintains that the monarchy in Scotland was founded upon force, the kingdom was created by Kenneth, and the people had therefore no legal rights; the king, he seems to mean, granted to certain great men the "dominium" of certain provinces, but retained in his own hands the "potestas et imperium". The royal authority, he again contends, was founded in many kingdoms not on election but on the force of arms, or on some other system of law, and by this he means the law of hereditary succession, which the people cannot abrogate.

Blackwood goes on to maintain that the authority of kings was analogous to that of the father over his family, or of the master over his slaves : they impose upon them whatever laws they please, they do not receive these from them, and they rule them according to their own judgment. He appeals to the history of Scotland and cites a passage from Hector Boece to show that the supreme power and authority of law had lain with the king. He admits indeed that in Rome the authority which had at first belonged to the kings was transferred to the law, but maintains that this was not the case elsewhere; for, he says, nowhere was such a bridle (fraenum) imposed upon kings, and their authority subjected to that of the multitude, nowhere was a law imposed upon kings which should restrain their supreme authority. The prince is a living law in the world, and his power and

jurisdiction cannot be controlled by any other law than his own will. A little further on he asks what can be more absurd than to say that the king declares the law, while the people makes it.

Blackwood's statements are curiously inconsistent with the political conceptions of De Seyssel. His notion of an absolutely unrestrained monarchy goes indeed much further than even Bodin; for in another place he maintains dogmatically that not only the persons but the property of all the people are in the power of the king. It is only the use of this which belongs to private persons.

It is no wonder that Blackwood, in another place, should seem to be indignant that Aristotle should have described the Persians and other Asiatic monarchies as being really barbarous.

The treatise of Blackwood is somewhat crude, and shows little acquaintance with contemporary conditions and theories, but it may be one source of the opinions of a work which was important by reason of its authorship, that is, 'The True Law of Free Monarchies', written by James VI of Scotland and published first in 1598 before he became King of England, and republished in London in 1603.

In this work James unites the secular theory of the absolute king and the theological theory of his absolute authority as being by divine right. He opens the work with a general statement of the proper functions of a monarchy. The office of a king is to maintain justice and judgment, to establish good laws for the people, and to procure peace for them. In his coronation oath he swears, first, to maintain the religion "presently professed" in the country; secondly, to maintain all the good laws made by his predecessor ; and thirdly, to maintain the whole country and every estate therein in all their ancient privileges and liberties.

This has a very constitutional sound, and seems to restrain the authority of the king. James was describing, so far, the office or duty of the king, but when he turns to the duty of the subjects we find quite another mode of thought. He cites the speech of Samuel (1 Sam. VIII) on the nature of kingship, and explains what this implied. "First, he (Samuel) declares unto them, what points of justice and equity their king will break in his behaviour unto them. And next, he puts them out of hope that wearie as they will, they shall not have leave to shake off that yoke, which God, through their importunities, hath laid upon them."

Again, James cites the example of David's conduct to Saul, as Gregory the Great had done, and concludes : "Shortly, then, to take up in two or three sentences, grounded upon all these arguments out of the law of God, the duty and alleageance of the people to their lawful king, that obedience, I say, ought to be to him, as to God's lieutenant in earth, obeying his commands in all things, except directly against God, as the commands of God's minister, acknowledging him a Judge, set by God over them, having power to judge them, but to be judged only by God, whom to only he must give count of his judgment ... following and obeying his lawful commands, eschewing and flying his fury in his unlawful, without resistance, but by sobs and tears, to God."

This is indeed the theory of the divine right of the king and of passive obedience in a most extreme form. James does not cite directly any authority for this doctrine except the Scriptures, but we may conjecture that he derived it from writers like Tyndale.

He goes on to show that this absolute power of the king was also founded upon the "Fundamental and Civil Law, especially of this country". He admits that in the first ages it may be true that various commonwealths chose a ruler for themselves, but this, he says, has nothing to do with Scotland, for Scotland was conquered by King Fergus, who came from Ireland, and he and his successors imposed their laws upon the country, "and, so it follows, of necessity, that the kings were the Authors and Makers of the laws, and not the laws of the kings". He does not ignore the existence of the Parliament, but in it "the laws are but craved by his subjects and only made by him at their rogation and with their advice. For albeit the king make daily statutes and ordinances, enjoining such pains thereto, as he thinks meet, without any advice of Parliament or Estates, yet it lies in the power

of no Parliament to make any kind of laws or statute, without his sceptre be put to it, for giving it the force of a Law."

So much for Scotland, but James also maintains that "the same ground of the king's right over all the land, and subjects thereof, remaines alike in all other free monarchies, as well as in this"; and, with special reference to England, he contends that William the Conqueror made himself King of England by force, and made his own laws.

The king then is the source of all law, and he is over all law; he is "master over every person that inhabit the same, having power over the life and death of every one of them. For although a just prince will not take the life of any one of his subjects without a clear law: yet the same laws, whereby he takes this, are made by himself, or his predecessors. And so the power flows always from himself."

The king should, indeed, govern according to his law, "For albeit it be true that I have at length proved, that the king is above law, as both the author and giver of strength thereto; yet a good king will not only delight to rule his subjects by the law, but even will conform himself, in his own actions thereunto, always keeping that ground, that the health of the commonwealth be his chief law."

The king may mitigate or suspend a general law, but "a good king although he be above the Law, will subject and frame his actions thereto, for example's sake to his subjects", but he does this "of his own free will, but not as subject thereto."

Having thus set out his conception of the absolute authority of the king as founded upon divine law, and the principle that the king is the source of law and above law, he considers some arguments against this. James had evidently heard of the theory of a contract between king and people, and he is at pains to show that this conception had no value, "For, say they, there is a mutuall paction, and contract bound up, and sworne betwixt the king and the people, whereupon it followeth, that if the one part of the Contract or the Indent bee broken upon the king's side, the people are no longer bound to keep their part of it, but are thereby freed of their oath. For (say they) a contract betwixt two parties of all lawe frees the one partie if the other breake unto him.

As to this contract alledged, made at the coronation of a King, although I deny any such contract to be made then, especially containing such a clause irritant, as they alledge : yet I confesse that a King at his coronation, or at the entry to his kingdome, willingly promiseth to his people, to discharge honourably and truly the office given him by God over them. But presuming that thereafter he breake his promise unto them, never so inexcusable, the question is, who should be judge of this breake, giving unto them this contract were made to them never so sicker, according to their alleageance."

We return to France and may observe the contentions of Pierre de Belloy in a short treatise entitled 'Apologie Catholique', published in 1585 and directed against the Catholic League and its refusal to admit that Henry of Navarre could be recognised as the legitimate heir to the French crown. He admitted that there were laws of the emperor (*i.e.*, of the Roman law) which declared a heretic to be incapable of inheritance, but these, he maintained, applied only to private persons and not to kingdoms or empires, for these could not be taken from their true lords for heresy or for any other cause, for they are held immediately from God Himself, and not from men; subjects are bound to obey and serve their princes, and cannot question their justice.

And again, the people have no right to control the actions of the king, but may only lift their eyes to heaven and remember that it is by the divine will that the sceptre has passed into the hands of him who bears the crown, whether he is good or bad. This is specially the case where the king comes to the throne, as in France, by legitimate succession, and where, by the law of the monarchy, the people have not only placed all their power in the hands of the king, but have tied themselves to the succession of the Blood Royal.

A more important work, which also sets out the theory of the absolute monarchy, was published in 1596; this was the 'De Republica' of Peter Gregory of Toulouse.

He cites the Aristotelian classification of the three good forms of government—good because they are directed to the wellbeing of the whole community. He refuses to admit that there are strictly any mixed governments : the supreme power must lie either with the king, or the "Optimates", or the people. He indeed admits the three forms, but pays no further attention to the aristocracy and the popular government, and assumes that the people had transferred all their authority to the prince.

It is, however, with the nature of the French monarchy that he is really concerned. The king holds supreme authority, he does indeed protect the people from oppression by the nobles, he admits plebeians to the magistracy and the public offices, he governs the country through various councils or courts, ho gives the cities municipal laws and officers; but all this is under the royal authority and can be changed by him at his discretion. All, however, is to be done justly and for the welfare of the people, or the monarchy would degenerate into tyranny.

He maintains indeed that the famous passage in 1 Samuel VIII describes the abuse of the royal authority, not its legitimate use, unless indeed such actions should be required for the public good; but the absolute power of the prince has been given him by God, he is God's vicar, and we must recognise in him the majesty and image of god.

Gregory repudiated emphatically the opinion, which he attributes to Aristotle, that the man who rules over an unwilling people is a tyrant, for, as he maintains, if this were true, there neither has been, nor could be, a State which deserves the name of a monarchy ; for a State which depends upon the will of the people cannot be called a monarchy, but a democracy; the supreme power in such a State resides in the people and not in the prince. The king who violates the laws of nature and the laws of God is indeed a tyrant, but not the king who disregards the "political" and civil laws. He develops the last principle in the next part of his treatise, and while he admits that the prince must obey the supreme law of God and of nature, he maintains that he is not bound by his own laws or those of his predecessors, except for some fundamental laws, such as that of the hereditary succession, which the king cannot violate. The prince has power to make, to interpret, and to abrogate all general laws, and the right to issue "privilegia", and thus to "derogate" from the law ; he even has the right to use a "non-obstante" clause in such "privilegia".

On the other hand, like Bodin and many of the Civilians, he admits that if the law of the prince had passed into a contract, he could not annul it, for the obligation of a contract belongs to the natural law, to which, as a political and rational being, the prince is subject. As in the Civilians, this conception is brought into relation with the feudal law.

It is also true that Gregory urges upon the prince that it is well to take counsel; and he gives a short account of the Councils in Greece and in the Carolingian times, and he finds the traces of these in the meetings of the three Estates, which are called together by the king that he may learn from them the grievances of the people, and sometimes that he might inform them of the necessity of going to war, or of other public affairs, for which the assistance of the subjects was required. He mentions three causes for which especially they might be called : first, the appointment of a regent, in the case of a minority, or when the king was insane, or a prisoner, and he mentions as examples the captivity of King John, the insanity of Charles VI, and the minority of Charles VIII. Second, to deal with conspiracies, the reform of the Commonwealth, or the oppression of the people by the nobles. Third, when it was necessary to impose new "tributes" and aids upon the people, to lay before them the urgent affairs of the kingdom and the king, which justly required the help of the subjects.

Gregory was, however, careful to add that the people must not imagine that this was done by the kings because the King of France was dependent on these assemblies, for he could impose and exact taxes without their consent. It must be understood that the King of France was not dependent

on the assemblies, as in Poland and elsewhere, but the assemblies were dependent upon the king, who summoned them at his pleasure, for the kingdom was an hereditary monarchy, otherwise the kingdom would not be a monarchy but a democracy.

Finally, he also discusses the question of the deposition of the prince. He admits that the depositions of the Emperor Henry IV by Pope Gregory VII, and of Frederick II by Innocent IV, were justifiable; and that even the deposition of the Emperor Wenceslas by the electors may have been lawful, as the empire was elective; but he denies that hereditary monarchs could be deposed. The monarch is dependent on God only; it is to God only that he will give account for the souls of his subjects. All his jurisdiction and the power of the sword in the monarchy is from God only; his subjects have no authority to deal with him judicially. In an earlier passage he had indeed asserted that while the authority of the prince was absolute, his function was to maintain justice and to be the defender and father of his subjects, and that, if he did not fulfil the function, he was a tyrant; but a little further on he condemns in the strongest language those who dared to conspire against an unjust prince.

The most important defender in this period, after Bodin, of the absolute authority of the king was William Barclay, a Scotsman indeed by birth and early education at Aberdeen University, but he studied law at Bourges and became a Professor of Civil Law, first at Pont-Mousson and later at Angers. His most important work, 'De Regno et Regali Potestate', was published in 1600, and while it is in large measure a reply to George Buchanan, it surveys the whole question of the source and nature of the royal authority.

If we make the attempt to set out Barclay's opinions in some reasoned order, we may begin by observing that he discusses the conception set out by Buchanan (and Hooker, as we may remember) that man had first created kings to remedy the disorders incident to life without a controlling authority, and then made laws for the purpose of restraining the arbitrary actions of the king. He maintains that laws are made not to bind the king, but to take the place of his personal authority when he was absent. He thinks indeed that princes should take advice, and speaks of the evil effects of neglecting this, but he is also clear that, finally, it is the king who decides what is to be law. He repudiates indignantly Buchanan's assertion that the Scottish constitution required that laws should be made with the consent of the "Proceres" and the approval of the people, and asserts dogmatically that, both in Scotland and in France, the king made laws without the consent of such a body as the "Senate". This is important, but more important is his emphatic statement that no one is a king who is bound by the laws.

Barclay's main principles will become clearer if we examine his conception of the source and character of the royal authority.

He maintains that the royal authority is Divine. He is careful indeed to explain that this does not necessarily mean that the man whom God destined for the government was king before the consent of the people was given. Saul, he says, was chosen by God, but was made king "populi suffragio", and it was the same with David. What Barclay means is that when the king has been, by the Divine permission, lawfully constituted by men, God gives him an authority which is superior to that of the whole people, for, when it is said that God has established the king, it is meant that God has confirmed his authority in such a sense that it cannot be violated or controlled by the people.

This, he maintains, is true also of the king who succeeds by hereditary right, unless the lawful heir is by nature incapable, or there is some grave doubt about the right order of the succession; and he refers to the succession in Scotland in the time of Robert Bruce and the dispute about the succession in France between Philip of Valois and Edward III, which was determined by the "Ordinum et Optimatum conventus."

The authority of the king is thus derived from God, and Barclay illustrates this by a reference to Samuel's description of the "Jura Regis" (1 Samuel VIII). Such royal conduct as Samuel

describes, Barclay says, would be unjust, but cannot be judged by men. Kings and princes who acknowledge no superior are reserved to the judgment of God; others must answer to the king for their actions, but the king only to God. Those, therefore, who claim authority to judge the king, who is the vicar of God, are guilty of a great offence against God.

It is interesting to observe that Barclay finds himself compelled to repudiate or explain away St Thomas Aquinas. Boucher had cited St Thomas ('De Regimine Principum', I. 6) as saying that if the people had the right to appoint the king, it was also within their right to depose him if he became a tyrant. Barclay endeavours to meet this by suggesting a doubt whether the 'De Regimine Principum' was a genuine work of St Thomas, and then argues that, even if it were genuine, the principle only applied when the king was elective.

Barclay thus maintains that the authority of the king is in such a sense Divine that revolt against him is revolt against God.

We turn from his theological arguments for the contention that the prince had an absolute authority to the legal. He maintains that this was the judgment of such eminent Jurists as the Speculator (*i.e.*, Durandus the elder), Bartolus, Baldus, Paulus de Castro, Ludovicus Romanus, Alexander, Jason, Albericus, and others. He sums up their opinion as being that the Pope and the prince, when acting "ex certa scientia", can do anything "supra ius, contra ius, et extra ius", for the prince has "plenitudo potestatis", and when he wills anything "ex certa scientia", no one can question his authority. It is sacrilegious to dispute about the authority of the prince. The prince can establish laws by his sole authority, though it is "humanum" that he should consult the "Proceres"; the prince can annul all "positive" laws, for he is not subject to them, hut they to him, for God has subjected all laws to him. The commands of the prince have the force of laws, the prince is in truth "legibus solutus".

It should be observed that with regard to this last point Barclay recognised that there was an interpretation very different from his own; that was the interpretation of Cujas, who, as we have seen, had maintained that the words "legibus solutus" only applied to certain laws. Barclay mentions the opinion, but only to repudiate it.

The nature of Barclay's conception of the absolute and Divine authority of the prince seems then to be clearly as well as emphatically expressed; but we must observe that he makes two exceptions to his principle of non-resistance and implicit obedience. If the prince behaves with intolerable cruelty and tyranny, not to private individuals but to the whole commonwealth of which he is the head, or to some important part of it, the people has the right to resist, while it must not withdraw its proper reverence, or take vengeance for the wrongs done. This is an important concession; but in another place Barclay goes still further. He repudiates indeed Boucher's contention that any private person may punish the tyrant when the public authority had deprived him of his kingdom; but he admits that the community may slay the prince who endeavours to destroy it, not indeed because the community is superior to the prince, but because, if he endeavours to overthrow the commonwealth and kingdom, he has deprived himself of all lordship, and has in law and in fact ceased to be king. In another place he gives as examples of the conditions under which a country may take arms against the king, the conduct of Nero, and of John Baliol, who promised to acknowledge the overlordship of Edward I in Scotland.

It is also very important to observe that while Barclay sets out the principles of the absolute authority of the prince in general terms, though with special reference to France and Scotland, he was aware that these were not recognised in all countries, and he seems to be perplexed about the German Empire and Poland.

That Barclay's judgment with regard to the absolute authority of the prince continued to be held by him is evident from another treatise, published in 1609, a year after his death. This was the work entitled 'Do Potestate Papae', which was concerned mainly with the refutation of the

contention of those Roman Catholic writers who maintained that the Pope could, for sufficient reasons, depose kings. We are not here concerned with this question, but it is worth while to observe that Barclay repeated his judgment that the king was subject to God only, to no human or temporal punishment, and that, as the Jurists had said, he was "legibus solutus". He admits indeed that the form of government in any commonwealth was a matter to be determined by human law, and oven the decision who was to be prince; but when this had once been settled, obedience to him, in all things not contrary to the commands of God, was required by natural and Divine ordinance.

Finally, there were two writers m England, by profession Civilians and Professors of Roman Law, whoso work we might have discussed in Part III of this volume; but although they were Civilians, their work was primarily related to constitutional conditions in England. The first of these,Albericus Gentilis, is justly famous for his work on the Law of War, in which he, at least in some measure, anticipated the great work of Grotius. He had been Professor of Civil Law in Perugia, but, adopting the Reformed opinions, he fled from Italy and finally found a refuge in England, and was made Professor of Civil Law in Oxford. In 1605 he published a short work, 'Regales Disputationes Tres,' in which he discussed the source and nature of the authority of the king, with special reference to England.

Supreme princes, Albericus says in the first of these 'Disputationes', have no superior, but are above all men; they are absolutely supreme, for they recognise no authority over them except God, neither man nor law. The prince is "legibus solutus", and "quodcunque placet principi" is law. This is not a barbarous rule, but that of the Roman Law, the most excellent of all the system of law of men. Again, a little later, the prince is God on earth, and his authority is greater than that which formerly belonged to the father over his son, or to the master over his slave; and in another place he even seems to suggest that the authority of the law of the prince is simply that of his will, without any reference to reason.

Albericus admits indeed that this was not true of all forms of monarchy. There were some in which authority rested upon certain agreements, and the subjects had reserved to themselves their own laws and privileges; he refers to Alciatus, and cites as examples of such conditions the imperial cities of Germany, some of the papal states in Italy, the provinces of "Lower Germany" (meaning, no doubt, the Netherlands), which had for so many years been defending their liberties, and the long and successful resistance of the Swiss to the Austrians."

Albericus, however, contends that the English monarchy had not this character, but that in England the king had an absolute authority subject to no control by the public law. He refers to the important distinction made by Baldus between the ordinary and the extraordinary powers of the prince, and he identifies the latter with that which was meant in England by the Prerogative. The first is bound by the laws; the second is so absolute that the prince could take away a man's lawful right without any cause.

It is true that in another place he seems to admit that he might concede that the prince could not, even in his "plenitudo potestatis", take away his subjects' property without just cause; but he seems to mean that this was not of much importance, for the absolute prince himself determines what is a just cause.

He was indeed aware that it had been argued that no people could be found so senseless as to confer such an absolute authority upon the prince; but this contention was, he says, false, and he appeals to Aristotle, and also to Bodin, who had shown that such absolute kingdoms existed even today in Asia, Africa, and Europe, and he refers to that learned prince (meaning presumably James I) who had maintained that the Hebrew monarchy had been of this kind.

Albericus admits, however, like Bodin and the Civilians, that all princes were subject to the Divine Law, the Law of Nature, and the Law of Nations, and, like Bodin and many Civilians, that he was bound by his contracts.

In the third of these 'Regales Disputationes', "De Vi Civium in Regem semper iniusta", he does not add much of importance; he condemns all violence offered to the prince by his subjects; but he again makes the important reservation that this does not apply to the cases when the prince was subject to a judge or a guardian, as was alleged to be the case in France and the Netherlands. It is worth noticing that Albericus was aware of the arguments which had been drawn from the feudal laws in favour of the right to resistance, but he repudiated this on the ground that the nature of feudal authority was wholly different from that of a king : it was of the nature of a contract.

The authority of the prince is greater than that even of a father : and it belongs to the Divine law, the natural law of nations, and was not established by men alone.

Albericus does not add much to the general theory of the absolute monarchy and its Divine authority, but he is of some interest as asserting that whatever might be the case in other countries, the English monarchy possessed in its Prerogative an extraordinary authority subject to no laws or limitations except those of the Divine and natural law, and of contract.

The other work of this same time is that of James Cowell, Professor of Civil Law in Cambridge, 'The Interpreter', published in 1607.

He had indeed in an earlier work, 'Institutions Juris Anglicani', published in 1605, set out constitutional conceptions similar to those of St Germans and Sir Thomas Smith. He distinguished in this work two elements in the laws of England, the 'Consuetndines Veteres' and the 'Statuta'; the first are approved "commnni sponsione", and by the oath of the king; while the second were sanctioned by the common counsel of the kingdom. They do not arise from the will of the king alone, but are established by the consent of the whole kingdom called together for the purpose by the king; but the king's approval is also necessary. The king is indeed superior to the laws in this respect, that he can grant "privilegia" to individuals, or municipal bodies, or societies (collegiis), but only so far as they do not injure any third person.

Two years later, however, in 1607, Cavell set out in 'The Interpreter' political principles which certainly seem to be very different. This work is in form a dictionary of legal terms in alphabetical order; and we may conveniently begin by noticing the article on the king. "Thirdly", he says, the king is above law by his absolute power (Bracton, lib. pri. 8); and though for the better and equal course of making laws, he does admit the Estates, that is, Lords Spiritual, Lords Temporal, and the Commons into counsel, yet this, in divers learned men's opinions is not of constraint, but of his own benignity, or by reason of his promise made upon oath at the time of his coronation. For otherwise were he a subject, after a sort, and subordinate, which may not be thought without breach of duty and loyalty. For then must we deny him to be above the law, and so have no power of dispensing with any positive law, or of granting especial privileges and charters unto any, which is his only and clear right, as Sir Thomas Smith well express (lib. 2. cap. 3, 'De Kepub. Anglorum'), and Bracton (lib. 2. cap. 36, 3), and Britton (cap. 39). ... And though, at his coronation he take an oath not to alter the laws of the land : yet, the oath notwithstanding, he may alter or suspend any particular law that seems hurtful to the public estate (Blackwood, 'Apologia Begum,' 11)."

There are clearly two conceptions expressed in the passage. First, the King of England does normally consult Parliament in making laws, but Cowell will not say that this is necessary; and second, that there is in the king an absolute power, which is above law; but Cowell may not here mean much more than the power of dispensing with the law or of granting "privileges" in special cases.

We go on to the article on "Parliament". "In England we use it for the assembly of the king and the three Estates of the realm, *videlicet*, the Lords Spiritual!, the Lords Temporal, and Commons, for the debating of matters touching the commonwealth, and especially the making and correcting of laws. Which assembly or court is of all other the highest and of greatest authority, as you may recall in Sir Thomas Smith, 'De Rep. Ang.'. And of these two one must be true, that either the king is

above the Parliament, that is the positive laws of the kingdom, or else that he is not an absolute king (Arist, Politic, cap. 11). And, though it be a merciful policy, and also a politic mercy (not alterable without great peril) to make laws by the consent of the whole Realm, because so no one part shall have cause to complain of a partiality : yet simply to bind the prince to or by those laws were repugnant to the nature of an absolute monarchy. See Bracton, lib. 5, Tract. 3, ca. 3 nu. 3. . . . That learned Hotoman in his 'Franco Gallia' doth vehemently oppugn this ground ... but he is clean overborne by reason."

This does not add much to the contentions of the last passage, but there is perhaps a slightly different emphasis; for though Cowell uses the highest terms of the authority of Parliament, he maintains that an absolute king must be above Parliament and the positive laws of the kingdom.

In the article on Prerogative he declares very emphatically that the King of England is an absolute king. He explains that by the Prerogative he understands " that especial power, preeminence or privilege that the king hath in any kind, over and above the ordinary course of the common law, in the right of the crown. . . . Now for these regalities which are of the higher nature (all being within the compass of his prerogative, and justly to be comprised under that title), there is not one that belonged to the most absolute prince in the world which will not also belong to our king, except the custom of the nations so differ (as indeed they do) that one thing be in the one accounted a regality, that in another is none. Only by the custom of the kingdom, he makes no laws without the consent of the estates, though he may quash any laws concluded of by them. And whether his power of making laws be restrained (de necessitate) or of a godly and commendable policy, not to be altered without great peril, I leave to the judgment of wiser men. But I hold it incontrovertible that the King of England is an absolute king."

It is clear that Cowell conceives of the "Prerogative" as being some ultimate and reserved authority possessed by the King of England over and above his ordinary powers, which was comparable with the "absolute" power of other kings this suggests a comparison with Albericus Gentilis; and, while he admits that by the custom of the country he made no laws without the consent of Parliament, ho will not say whether this was necessary or merely good policy.

In the article on Subsidies he makes a somewhat curious suggestion. He defines a "Subsidie" as "a tax or tribute assessed by Parliament and granted by the Commons to be levied of every subject"; and adds : Some hold the opinion, that the subsidy is granted by the subjects to the prince in recompense or consideration, that whereas the prince, of his absolute power, might make laws of himself, ho doth of favour admit the consent of his subjects thereto, that all things in their own confession may be done with the greatest indifference."

If we now endeavour to sum up the development of the theory of the absolute prince in the sixteenth century, it seems to us clear that there were two elements in this, one theological, the other legal; but neither of these has any real relation either to the Renaissance or to that great religious movement which we call the Reformation and Counter-Reformation.

If we begin with the conception that the authority of the prince is absolute because he is the representative of God, and because his authority is therefore equivalent to that of God, it is obvious that it rested upon little except the tradition of the unfortunate phrases of Gregory the Great, and a superficial interpretation of some passages in the Old and New Testaments. Writers like Tyndale and Bilson among those who followed the Reformed movement, and Barclay among those who adhered to Rome, had evidently no serious or critical foundation for the view; while Luther once held it but later abandoned it; and Calvin and Hooker among the Reformed, and the great Jesuits like Suarez and Bellarmine among the Romanists, repudiated it. It is quite impossible to relate this in the sixteenth century to any one of the theological movements of the time in particular.

The nature of the legal conception of the absolute king is more complex. We recognise here the effects of the revived study of the Roman Jurisprudence in the Corpus Juris Civilis. The great Jurists

were indeed perfectly clear that all political authority in the Roman State was derived from the people; but they wrote at a time when practically the legislative power belonged to the emperor; their conception of law and its source was for practical purposes represented in the words of Ulpian, "quod principi placuit, legis habet vigorem: utpote cum lege regia, quae de imperio eiuis lata est, populus ei et in eum omm suum imperium et potestatem conferat". The normal medieval conception of the nature and source of positive law was much more complex; it rested upon the principle that positive law was primarily custom; and this was expressed in the words of Gratian, founded indeed upon St Isidore : "Humanum genus duobus regitur, naturali videlicet rare et moribus". When the conception of deliberate legislation gradually took shape the law was thought of as representing the action of the whole community, of the king doubtless, but also of the great and wise men, and as requiring the consent of the whole community. The words of the 'Edictum Pistense' of 864, "quoniam lex consensu populi et constitutione regis fit" are not, as some careless observers have sometimes seemed to think, mere empty phrases, however incidental in their original context they may have been; rather they represent the normal conception of men in the Middle Ages.

The revived study of the Roman law therefore brought into the political thought of the Middle Ages a new and revolutionary conception; and while there is little trace of this even in the fourteenth and fifteenth centuries outside of the technical work of the Civilians, we can hardly doubt that it did gradually exercise considerable influence, and that the development of the theory of the absolute authority of the king or prince in the sixteenth century may, at least in part, be traced to this.

Again, it was from the revived study of the Roman law that there came the conception that the emperor was "legibus solutus", was not only the source of law, but was above it, or, if we may put it so, outside of it. What the original meaning of the phrase may have been, we do not feel competent to discuss. It is difficult to reconcile the view that it meant that the emperor could do or command whatever ho pleased with the terms of the rescript of Theodosius and Valentinian of 426 A.D. "Rescripta contra ius olicita ab omnibus iudicibus praecipimus refutari". What is quite certain is that the conception that the prince could normally ignore and override the law was contrary to the whole tradition of medieval society from Hncmar of Rheims in the ninth century to John of Salisbury in the twelfth, Bracton in the thirteenth, Fortescue in the fifteenth, and Hooker in the sixteenth; and, as we have seen, the principles of the political theorists correspond with the constitutional traditions in Spain as well as in England. It is true that the mediaeval Civilians were by no means certain or clear in their interpretation of the words "legibus solutus"; such a statement as that which Jason de Mayno attributes to Baldus, that the Pope and the prince could do anything "supra ius et contra ius et extra ius", may have corresponded with Jason's own opinion, but it can scarcely be said to have been asserted by the Civilians generally. As we have seen, in the sixteenth century Alciatus and the most important French Civilians from Connon to Cujas frankly criticised or repudiated the whole conception. And even Budd and Bodin seem clearly to confirm the judgment that the "Parlement" could protect private rights against the king.

At the same time, the conception that the king was not only the source of law, but above it, was apparently present in the Roman law, and we see the reflection of it even in such a prudent and judicious official of the French Court as Michel L'Hôpital.

Bodin clearly held the principle that the king was above the law, when he maintains that in spite of the rescript of Emperor Anastasius the magistrates must obey the command of the prince even when he knew it to be contrary to the law; and Barclay sums up the opinion of the Civilians as he understood them as being that the Pope and the prince, who have "plenitudo potestatis", could do anything "supra ius, contra ius et extra ius", for he was "legibus solutus".

This conception was even more revolutionary than the first, and more completely contrary to the whole character of the political civilisation of the Middle Ages, for, as we have so often said, the foundation of this was the principle that the law was the supreme power in the commonwealth. We

do not, we think, go too far if we say that it is surely the foundation of any rational system of society that the authority of the law is greater than that of any individual member of the community.

It is no doubt true and important that we can see in the work, especially of the Huguenot pamphleteers and of Bodin, the development of a conception that there must be in every community an authority behind the positive law, and greater than that law; and we may ask how far this was related to the theory of an absolute monarchy. It is obvious that, properly speaking, it has nothing to do with it. The "Maiestas" might in theory belong either to the whole community, or a few, or to one ; there is no necessary relation between the conception of an ultimate supreme power and that of an absolute monarch, nor indeed does Bodin pretend that there is ; but that there may have been in some men's minds a confused impression that there was such a relation, is possible.

CHAPTER IV.
REPRESENTATIVE INSTITUTIONS IN PRACTICE.

We have dealt with these in the fourteenth and fifteenth centuries, and have seen their importance as illustrating the general conceptions of men in Central and Western Europe about political authority ; we must now inquire what place they occupied in the sixteenth century, in fact and in political theory. In this chapter we shall consider briefly what we know about the meetings of these representative bodies, especially in Castile and in France, and the part they played in public affairs, while in the next chapter we shall put together some of the contemporary theories of their powers and importance.

When we examine the proceedings of the Cortes of Castile we find that they were meeting frequently, and that they were occupied not only with questions of taxation, but with a variety of important public affairs. The first and most important of these, however, was legislation, and we have a very important statement with regard to this in the prologue to the proceedings of the Cortes at Toledo in 1480. In this year Ferdinand and Isabella, in calling together the representatives of the town, said that they did this because the conditions of the time required the provision of new laws, and they describe the process of legislation, as being carried out with the consent of their Council, but on the petition of the Cortes. It is deserving of notice, too, that Ferdinand and Isabella declared that all royal "mercedes e facultades" contrary to "desta ley" were to be treated as null and void, and that it was provided that royal Briefs using the phrases "proprio motu e certa sciencia" or containing a "non-obstante clause" were to be treated in the same way.

We may compare the terms in which the Cortes at Valladolid in 1506 promised obedience and fealty to the Queen Joanna, and her husband Philip; that is according to the laws and "fueros" and the ancient custom of the country. In another clause they declared that the kings (*i.e.*, the former kings) had laid it down that when it was necessary to make laws, the Cortes should be summoned, and that it was established that no laws should be made or revoked except in Corte ; they petitioned that from henceforth this procedure should be followed.

Again at Valladolid in 1518 and in 1523 the Cortes petitioned Charles (the Emperor Charles V) that the "Cartas e Cedulas de suspensyones" which had been given by him and his predecessors should be revoked, and Charles assented. At the Cortes in Madrid in 1534, in response to a petition to the same effect, Charles said he did not intend to issue any such Briefs.

In the proceedings of the Cortes at Valladolid in 1523 we have a formal declaration by the king, that the answers given by him to their petitions and "capitulos" wore to be enrolled and carried out as laws and pragmatic sanctions made and promulgated by him in Cortes. The Cortes at Madrid in 1534 petitioned the king that all the "capitulos proveydos" in past and present Cortes should be recorded in one volume, with the laws of the "Ordinamiento" as amended and corrected, and that every city and "villa" should have a copy of the book; the king replied that he was providing for this.

Towards the end of the century we find in the proceedings of the Cortes of Madrid of 1579-82 an important petition and reply with respect to the laws of the kingdom. The Cortes petitioned Philip II that no law or pragmatic was henceforth to be made or published until it had been before them. The king replied that it was just that the kingdom should receive satisfaction on this point.

It appears to us that it is perfectly clear that the Cortes throughout maintained that the only normal method of legislation was by the king in the Cortes, and that they vigorously protested against any attempt on the part of the crown to override this legislation by any royal Brief, as they had done in earlier centuries.

It is no doubt true that if the control of legislation was, at any rate during the first half of the century, among the most important of the functions of the Cortes, the control of taxation was of equal significance, as it had been in the fourteenth and fifteenth centuries. There can be no doubt that the constitutional rule in Spain was that the king could not, except for his ordinary revenues, impose taxation without the consent of the Cortes, and that this principle was recognised throughout the century.

In 1515 the Cortes met at Burgos, and the crown laid before it a statement on the War of the Holy League, and intimated that the King of France was about to make war on Spain, and asked for assistance. The Cortes thanked the crown for its communication, and in view of the situation granted the same aid as it done at Burgos in 1512. In 1518 the Cortes in Valladolid petitioned Charles V to abolish all the new impositions which had been laid upon the kingdom, against the law, and Charles replied that if they would give him the details he would see that the matter should be dealt with according to justice. At the Cortes held at Santiago and Corunna in 1520, the Bishop of Badajos reported the election of Charles to the empire, represented the great expenses which his coronation would involve, and asked the Cortes to continue the "servicio", which had been granted at Valladolid in 1518, for three years more. This gave rise to a protracted discussion of the question whether the king's request for a grant, or the petitions and other business of the procurators should be considered first. The Cortes by a large majority agreed that the general business should be considered first, but the crown steadily refused to sanction this, as contrary to precedent. The majority still persisted, but gradually became smaller, and when at last the procurators of Valladolid went over to the minority, the grant to the crown was made.

The conflict was, however, renewed at Valladolid in 1523 Charles V again asked for the "servicio", and promised that if it was granted within twenty days, he would reply to the petitions of the Cities. The Cortes had demanded that these should be heard first, and that the "servicio" should be considered afterwards, and Charles again refused, saying that this was contrary to the traditional usage, while the Cortes contended that they had received written instructions from their Cities, that they were not to grant the "servicio" until their petitions had been considered, and suggested that they should be sent to lay the matter before them. The dispute about the precedence of petitions and grievances was continued at Toledo in 1525, and Charles promised that the petitions should be answered before the Cortes separated.

It should be observed that among the petitions presented at Valladolid in 1523 was one that the king should not ask for such grants, for the country was poor, and the royal revenue had increased greatly since the time of the Catholic kings (Ferdinand and Isabella), and the king replied that he would not ask for a "servicio", except for a just cause, and in Cortes, and according to the laws of the kingdom. It is clear that Charles recognised that the power of imposing such taxation did not belong to the crown, except in and with the Cortes.

When we come to the later part of the century it is clear that the authority to grant a subsidy (servicio) still belonged to the Cortes; the king (Philip II) asked for it, and the Cortes granted it. We find also that the dispute about the precedence of subsidies and petitions was again renewed in 1563 and 1566, and that the king again promised that he would answer the petitioners before the Cortes terminated.

But we also find a new and protracted dispute about certain other forms of the royal revenue. At the Cortes of Madrid in 1566 the king asked for a subsidy, and the Cortes granted it, but complained of certain new "rentas, &c.," which had been imposed by the crown, and presented a formal petition in which they urged that the former kings had ordained by laws made in the Cortes that no new "rentas, pechos, derechos, monedas" nor other forms of tribute should be created or collected without a meeting of the kingdom in Cortes, and the authorisation of the procurators, as was established by the law of the Ordinance of King Alfonso. The king replied apologetically, urging

the great wars in which he had been involved, and his great need of money; ho said that he would rejoice if he could relieve the country of these burdens, but did not give any promise. The Cortes by a majority voted that they did not authorise any now "rentas" without the assent of the Cortes. The question was raised again in the Cortes at Cordova in 1570 and at Madrid in 1576, and the king argued in much the same terms.

It should be observed that the king, while contending that the conditions of the time compelled him to levy them, did not deny their illegality, and that he made no attempt to levy the "servicio" without obtaining the consent of the Cortes.

Legislation and taxation were not, however, the only public affairs which came before the Cortes. In 1476 the Cortes complained of the administration of justice, and asked that for two years they should be allowed to appoint certain persons who should reside in the royal Court, and the crown assented.

In 1525 Charles V agreed that the Cortes should appoint two of their number to reside at Court as long as was necessary to see that what had just been authorised by the Cortes was carried out. Among other public matters with which the Cortes dealt, one of the most interesting was the union of the kingdom of Navarre. At the Cortes of Burgos in 1515 Ferdinand announced his intention of carrying this out, and the Cortes, in the name of the kingdom of Castile and Leon, accepted this. Other matters brought before tho Cortes included the alienation of the royal patrimony, 1470 and 1480; the naturalisation of foreigners, 1476,1523; affairs concerning the relations of Church and State, 1512, 1525, including the interference of the Inquisition in matters which did not concern religion, 1579; and the royal marriage, 1525.

The conception of the nature of legislative authority in France does not appear to us to have been so clear in France in the sixteenth century as in Spain; and it is not always easy to distinguish between administrative and legislative action. In spite of this, however, it seems to us that from the beginning to the end of the century, the principle of an absolute power in the king to override ancient law, or to create new law, would have been recognised only by a few.

We find a commission appointed by Charles VIII in 1497 to collect and publish the customs of different parts of the kingdom, hut it must he carefully observed that Charles authorised this only on the condition that the collection and record had the approval of the Three Estates of each district, or at least the larger and wiser part of them. It would appear that the work had not been completed, and in 1506 Louis XII. appointed another commission to carry it out, subject to the same conditions. This recognition of the place of customary law, and of the principle that it rested primarily upon the recognition of the country, is obviously of great importance.

The authority of the Provincial Estates in constitutional matters and in legislation, so far as these concerned particular provinces, is sometimes very emphatically stated. It was on the representations and requests of the Three Estates of Provence that Louis XII in 1498 united this province to the French crown, with the promise to maintain all its liberties, customs, and laws. On the occasion of the marriage of Louis XII to Anne of Brittany in 1499 it was provided in the Letters Patent, issued on the occasion by the king, that no new laws or constitutions should be made, which might change the rights and customs of Brittany, except in the manner which had been observed in the Duchy; that is, that if occasion should arise for some change, it was to be done by the Parlement and Assembly of the Estates of the province.

It was with the advice of the Three Estates of Normandy that in 1499 Louis XII transformed the "Exchequer Court" of Normandy into a "Parlement". We find in 1532 another example of the importance of the Provincial Estates in constitutional matters, in the provision for the perpetual union of Brittany to the French crown. The Estates petitioned Francis I. that the Dauphin should be recognised as their duke, and that various things done contrary to their customs should be revoked and annulled, as having been done without the knowledge and consent of the Estates; and they also

petitioned that Brittany should be in perpetuity united to the kingdom of France. The king accepted their request, and declared his eldest son to be the Duke of Brittany, according to the custom that the eldest should succeed to the Duchy, notwithstanding anything that might have been done before to the contrary, without the knowledge and consent of the Three Estates.

It is true, however, that in one important case we find that Louis XII overrode the Estates of Provence. In 1501 he issued an Ordinance establishing a Parlement in Provence, and he did this after consultation with some notable persons of his Great Council, of the "Parlement" and of Provence; but there is no direct reference to the Estates. An Ordinance of 1502 seems to indicate that some representation had been made by the Three Estates of Provence, presumably against the creation of the "Parlement", and the king had appointed a commission to inquire into the matter, and had in the meanwhile suspended the operation of the Ordinance of 1501. Louis XII, having heard the report of the commission and the representations of the Estates, now "de nostre plein science, pleine puissance et authorité royal et provençalle" confirms the creation of the Parlement.

In 1535 we find an Ordinance of Francis I which appears to us as though it were intended to impose certain limitations upon the meetings and proceedings of the Three Estates of Provence. They are not to meet more than once in the year, and then under Letters Patent from the king; they were to be presided over by deputies of the king, and were only to deal with matters mentioned in the Letters Patent, but they might make representations to these deputies, who might deal with them according to the powers which they had received, or report them to the king. The royal governor is forbidden to call together the Estates, except on matters of great urgency or danger. The king forbids the Estates to make Statutes or Ordinances, or any act of administration of justice, and declares these null and void if they should do so.

Wo shall return to the position of the Provincial Estates, especially with regard to taxation, but in the meanwhile we may say that it is evident that they continued to have a very considerable constitutional importance.

When, however, we endeavour to determine what was the constitutional position and importance of the States General in France in the first half of the sixteenth century, we have found it difficult to form a precise opinion. It is not correct to say that they were wholly forgotten or ignored; the assembly, which seems to have the character of a meeting of the Slates General, held at Tours in 1506, dealt with the marriage of Francis, Count of Angouleme (afterwards Francis I), and the daughter of Louis XII. It was provided by the Treaty of 1514 between Louis XII and Henry VIII of England, that the Treaty should be ratified not only by the Parliament in England, but by the Three Estates to be called together for the purpose in France. Francis I commanded his mother in 1525 to assemble "aucun nombre" of good and notable persons of all the provinces and cities of France, that they might give their consent to the Edict which he made in Madrid transferring the kingdom to his son (to be resumed by himself when he should be set at liberty). In the Treaty of Madrid of the same year between Francis and Charles V, it was provided that the hostages given to Charles should remain with him until the Treaty had been approved and ratified by the States General, as well as "registered" by the Parlements of Paris and the provinces.

It is true that the "Ordonnances" by which Francis I entrusted the government of France in 1515, and again in 1523, to his mother, gave her what may be taken as meaning a complete authority to make "Ordonnances", Statutes, and Edicts, with the advice of the Council, but they also specifically include the power to call together the Estates of the kingdom, or any part of it, to report to them the affairs of the kingdom, and to ask for aids and money, and other things, which might be needed.

As we have often said before, we are not in this work writing a Constitutional History, nor are we concerned to disentangle the highly complex conditions, political and religious, which brought about the civil wars of France in the latter part of the sixteenth century; our task is only to endeavour

to observe and understand the nature and history of the political ideas and theories of Western Europe. It is therefore not our part to explain why it was that with the death of Henry II in 1559 the political conditions of France seem to have changed so suddenly; it is enough for us to observe that they did thus change.

In the year after Henry's death, his successor, Francis II, summoned the States General to meet at Orleans in December. Francis II died on 5th December, but notwithstanding the Estates were opened on 13th December, with a speech by Michel L'Hôpital, the chancellor. How far the speech as reported and printed in his works corresponds exactly with what he said on the occasion we cannot pretend to say; but it contains some very important observations, both on the history of the States General and on their functions as conceived by a great royal official.

It was certain, he said, that the ancient kings were wont to hold the Estates frequently, though they had been disused for some eighty years. The Estates wore an assembly of all the subjects or their deputies, and the purpose of holding them was that the king should communicate with his subjects on the most important matters and receive their opinions and counsels, that he should hear their complaints and grievances, and provide for these as might be reasonable. The Estates had therefore been called together for various causes, as circumstances required, to ask for help in men and money, or to set in order " la justice," or to provide for the government of the country, or for other business. (By the words " the government of the country" he seems to mean, specially, the determination of the succession, for he refers to the Estates as having decided that the succession to Charles IV. belonged to Philip of Valois and not to Edward III of England.) The king, he said, is not bound to take counsel with his people, but it is good and honourable he should do so. The former Estates had been most useful to the kings, and Louis XII had discontinued the meetings, not because he feared to give the people authority, but because he did not wish to impose this burden upon them. The purpose for which the Estates had now been summoned was to find means to appease the seditions in the kingdom, caused by religion.

This speech of L'Hôpital appears to us to be of very considerable importance in relation to the development of political conceptions in the years which followed, and it is also specially important not only because he was a great officer of the crown, but because, as we have pointed out in the last chapter, he held very strongly that the authority of the king was not, in the strict sense, subject to the law, and that resistance to him was never lawful. It is therefore the more important that he should, like Commines, look upon the States General as a normal and reasonable form of the representation of the whole community, disused as he says (not quite correctly) for some eighty years, but traditional and useful. And it is also important to observe that he looks upon the function of the Estates when they met, as being, not merely to supply money, hut also to give their opinion and counsel upon the highest and most important affairs of the country.

When we turn from L'Hôpital's opinion as to the nature and functions of the States General to the actual proceedings of their meeting at Orleans, apart from the question of taxation, to which we shall return later, we find that the Three Estates presented separately their "cahiers" with their complaints and requests, and in January 1561 the king issued a general "Ordonnance" "sur les plaintes, doléances et remonstrances des députez des trois estats". The Estates were also concerned with the question of the Regency during the minority of Charles IX, and in his "will and testament" L'Hôpital says that the question was brought before the Estates, and that they entrusted the "tutela" of the young king to his mother, and appointed the King of Navarre to help and advise her.

We do not pretend to deal with the history of the disastrous years that followed, the outbreak of the civil wars, the attempts at a settlement of the religious difficulties, and the massacre of St Bartholomew in 1572. The Edict of pacification of May 1576 was followed in August by the meeting of the Three Estates at Blois; and it is at least evident that they were clear about their own importance, and asserted their constitutional authority. This is illustrated in the terms of the address

to the king by the nobles, the composition of which is attributed to M. de Beaufremont. They thanked God that the king had been pleased to call together the General Council of the kingdom, that is the Estates, to which his ancestors had always turned when it was necessary to set things in order. More important, however, is that the Third Estate demanded, first, that the States General should meet again after five years, and after that every ten years; and secondly, that the Ordinances made by the king should have a legislative character, and should not be revoked except in another meeting of the Estates.

It was, however, twelve years before the Estates met again, in 1588, and again at Blois; and this time the Estates were largely under the control of the Catholic League ; but it would appear that they were now even more determined to assert their constitutional position. The meeting of the Estates was opened by a speech of the king (Henry III), and in this he declared on his oath that he would bind himself to observe all that he had decreed as sacred laws, and would not reserve to himself any liberty for the future to depart from them for any cause or under any pretext. It is true that Henry went on to say that in doing this he might seem to be submitting to laws of which he was himself the source, and which themselves exempted him from their authority, and that he was thus imposing upon the royal authority more limits than his predecessors, but, he says, it was a token of the generosity of a good prince to submit to the laws and to bind himself to maintain them.

It is no doubt true that Henry III was at this time in the power of the Catholic League, and it is probably to the engagements of the "Edict of Union" that these words primarily refer; but they suggest the temper of the Estates. We may put beside these some statements made by the Third Estate and the clergy, urging upon the nobles to join with them in persuading the king himself to swear, and to compel the Princes and the Three Estates to swear, to the Catholic Union. This, they said, could only be made irrevocable if it were sanctioned by the States General. The Edicts of the king had no other foundation than his will, and could be revoked by him at his pleasure, only Edicts approved and sanctioned by the States General were firm and inviolable. The kings were not bound by the civil laws (whatever this may mean), but they were bound by the Laws of God and the Natural Laws, and by those to which they had sworn when they were consecrated and anointed.

In the "Cahier" of the Third Estate it was demanded that the "Parlements" should not publish and register any Edict until this had been communicated to the "Procureurs-Syndics" of the Estates of the provinces.

It was also demanded by the Third Estate that the decisions of the Estates should not go to the king's council, but should be published at once, as in some other countries; but this was opposed by the nobles and clergy. And again, Henry III, in commanding the Estates to take the oath to the "Edict of Union", added that they should swear to observe the other fundamental laws of France about the authority of the king and the obedience due to him. The Three Estates were apparently greatly troubled about this, and to reassure them the king, as it is reported, declared "quil n' entendoit faire lois fundamentales en son royanme que par l'advis de ses Etats."

These meetings of the Estates did not contribute much to the restoration of peace, and it was the political genius of Henry IV, supported by the "Politiques", which saved the country. At the same time it must be observed that the conception of the determination of great national problems by a constitutional representation of the whole nation had become so important that for some years Henry IV continued to profess his intention of calling together the States General. In the Declaration which Henry IV issued after the assassination of Henry III, in August 1589, he promised to maintain the regulations about religion which had been agreed upon by him and Henry III in April, until the conclusion of a general peace, or the determination of the States General, which he proposed to call within six months. A summons was actually issued in November 1589 for a meeting of the States General at Tours in March 1590, but the meeting did not take place; and indeed it was scarcely

possible that it should, for it was in March 1590 that the battle of Ivry was fought, and the war with the Catholic League continued, till 1594, and. with Spain till the peace of Vervins in 1598.

The importance of the States General as representing the public mind, is also attested by the fact that the leaders of the Catholic League called them together in 1593, while in 1596 Henry IV called, together, not the Estates, but an assembly of notables. D'Aubignd in his History gives an account of the deliberations of Henry IV, whether he should summon the States General, and tells us that he decided not to do so, as the condition of the country was too unsettled, but that he endeavoured to make the assembly in some measure representative both of the various provinces and of the various orders of society, and he tells us that in his letters of summons Henry directed those whom he called "de s'informer exactement de l'estat de la ville ou de la province", and " de prendre l'advis de ses subjects de ce a quoy il est bon d'y pourveoir pour y establir un bon et asscuré repos, et aussy de ce dont nous pouvons estre secourus". And perhaps more important are the terms of his opening speech, in which Henry assured the notables that he had called them together, not as his predecessor had done, to make them assent to his wishes, but to receive their counsels and to follow them. No doubt we must not take these diplomatic and tactful phrases too seriously, but they serve at any rate to illustrate what Henry and his advisers recognised to be the tendency of public opinion.

It is quite true again that when Henry IV issued the Edict of Nantes in 1598, he did not call together the Estates or even the notables, but published it with the advice of the Princes of the Blood, other princes and officers of the crown, and other great and notable persons of his Council of Stat ; but he was careful to say that ho did this after he had examined the "Cahiers dos plaintes" of his Catholic subjects, and after ho had permitted his subjects of the Reformed religion to assemble and prepare their statements; and that it was only when these had been carefully considered that the Edict was issued.

We must turn to the financial authority of the Estates Provincial and General in the sixteenth century. We must bear in mind that the position of the Provincial Estates was of great importance, and that even though the States General only met occasionally, it must not be assumed that it was admitted that the French crown had the right to impose taxation at its own discretion. We give a few examples of the recognition of the place of the Provincial Estates in this matter.

On the occasion of the marriage of Louis XII to Anne the Duchess of Brittany in 1499, it was specially provided in the Letters Patent confirming the liberties of the Duchy, that when subsidies were to be levied, the Estates were to be called together in the accustomed manner,2 and we find that in 1501 the Royal Commissioners, who were sent to hold a meeting of the Estates of Brittany, were instructed to report to them the great expenses of the war in Italy, and to ask them to grant special taxation to meet these. In 1551 Henry II forbade the Parlement of Grenoble to interfere in the levy of taxes which the Estates of Dauphiné imposed at their annual meeting. In 1571 it would appear that Charles IX asked the Estates of Brittany to grant a subsidy of 300,000 livres, but they would only give 120,000. In 1578 the Estates of Normandy demanded the reduction of taxation to the level of the time of Louis XII, and granted the taille for one year only.

When we turn to the national authority we find that there are some important references, even in the first part of the sixteenth century. Louis XII in 1508 speaks of the grants of money in the form of aids, tailles, and gabelles, as having been imposed by his ancestors after great deliberations with the princes, prelates, nobles, burgesses, and other inhabitants of the country, to resist the invasions of its enemies. It is true that the words do not refer directly to the States General, but they seem to imply the national consent to taxation. Francis I, in giving his mother charge of the kingdom in 1515 and 1523 during his absence at the wars in Italy, specifically mentions that he has given her authority to call together the Estates of the kingdom, or of particular provinces, to report to them the condition of his affairs, and to ask them for aids. In 1549 Henry II issued an Ordinance raising the wages of the "Gendarmerie", and substituting this for the contributions in kind which the inhabitants of the places

where they wore quartered had been obliged to make to them; but he adds that he had first caused the matter to be laid before the people of the various provinces, and had received their approval. In 1555 Henry repeated the Ordinance, and again added that he had imposed the necessary taxation with the consent of his subjects.

We have already dealt with the important constitutional conceptions of the history and nature of the States General which the Chancellor, Michel L'Hôpital, set out in the speech with which he opened the States General at Orleans in December 1560. For our present purpose it is important to consider the speech he made to them on 31st January 1561.

He first put before them the lamentable financial position of the king, whose debts now amounted to 43 million livres. He proposed that the clergy should undertake to redeem the royal domain and the aids and "gabelles" which had been alienated, and he proposed to the Third Estate that the "gabelle" in salt, the "tailles", and the tax on wine should be greatly increased; but he also assured them the king asked this only for a period of six years, after which all the taxes should be restored to the level at which they stood in the time of Louis XII. It is important also to observe that L'Hôpital added, that as the members of the Estates said that they had not received authority to make any grant, they should return to their provinces, and consult them, and return in May.

When the States General met at Blois in 3576, several of the deputies of the Third Estate represented that the crown was levying money by various new impositions, contrary to the ancient constitution, and it was agreed to request the king to cause inquiries to he made about this in each province. The nobles joined in this request, and again, when the Third Estate was asked to grant an aid of two million "livres", it replied that they had received no power from their constituencies to make such a grant.

At the Estates of Blois in 1588, one of the Burgundian deputies complained that they had been compelled to pay extraordinary impositions "contre la liberté et le privilège du pays", and the Third Estate joined in the demand that the taille should be reduced to the level of 1576.

As we have already pointed out, no States General met during the reign of Henry IV, but it must be noticed that it was with the advice and consent of the Assembly of Notables which he called together in 1596 that the new tax of the "pancarte" was imposed in 1597; and it was provided that while one-half of the proceeds of the tax was to be under the direct control of the king, the other half was to be administered by a commission appointed by the notables. This arrangement did not, however, continue long. After a few months the commission transferred their part to the king, and in 1602 Henry IV abolished the tax, on the ground that it had been found peculiarly onerous, and substituted other forms of taxation for it.

It would thus appear that in the sixteenth century, as before, apart from the ordinary revenues of the crown, which now included the taille at a more or less definite amount, it was generally hold that it was proper, if not absolutely necessary, that the crown should obtain the consent of the community, either formally or informally, through the Provincial Estates, the States General, or some less formal assembly, before it could impose taxation. It is no doubt probably true that in the sixteenth century, as in the fourteenth and fifteenth centuries, the crown from time to time raised money without any constitutional formality, but it seems clear that this was irregular.

CHAPTER V.
THE THEORY OF REPRESENTATIVE INSTITUTIONS IN THE POLITICAL LITERATURE OF THE SIXTEENTH CENTURY.

We have so far considered the importance of the representative institutions as we find them illustrated in the actual proceedings of the Cortes and the Estates, Provincial and General, of Spain and France, but we must now take account of the discussion of the subject in the political treatises and pamphlets of the sixteenth century. We have said enough to show that these representative institutions continued in the sixteenth century to have some real importance in the structure of political society.

This, however, is not a sufficient account of the significance of the conception of the organised representation of the community. We think that it is clear that the importance of this was almost universally recognised in theory, and was accepted even by those who insisted most strongly upon the authority of the monarchy.

Wo may begin by reminding ourselves of the terms in which Commino8, in the last years of the fifteenth century (or the first years of the sixteenth century), refers to the States General. Commines' own opinion was that the royal power vas greatly increased when the king acted with the advice or counsel of his subjects, that is of the Estates; ho speaks with disdainful contempt of those who opposed their meetings as tending to diminish the royal authority ; and lie is equally dogmatic in maintaining that the king had no authority to impose taxation on his subjects without their consent. It is quite clear that to Commines the meetings of the Estates were a normal, useful, and even, for financial purposes, a necessary part of any intelligent system of government; and this is the more important because he was a great servant and officer of the French crown.

It is, again, true that while de Seyssel's principle of the limitation of the authority of the French monarchy rested primarily upon a legal foundation, and that he was little interested in representative institutions, he was clear in maintaining that when there were great matters to consider, such as war or legislation, the king should call together, not his Ordinary Council, but a great council of princes, prelates, nobles, jurists, and (though he seems to admit it grudgingly) some citizens of the great towns. De Seyssel had been, like Commines, for many years in the service of the French crown.

Again, as we have seen in the last chapter, Michel L'Hôpital as Chancellor of France, at the opening of the States General of Blois in 1559, spoke of the ancient Kings of France as having held meetings of the Estates frequently, and said that they had consulted them on matters of grave importance for the country. He says indeed that the king was not bound to take counsel with his people, but it was good and useful that he should do so.3 It is clear that in L'Hôpital's opinion the States General, as representing the French people, were a normal and valuable part of the political organisation of the country.

It is also very important to observe that even Bodin, with all his insistence upon the "Maiestas" (sovereignty) of the King of France, maintains the great importance of the meetings of the representative assemblies, and indeed states this as a general principle which applied not only to France, but to the other important countries of Western Europe. He urges the great advantages of such assemblies for dealing with the evils which might arise in the commonwealth, for making laws, or for raising money. He praises the Spanish and English rule that their "Curiae" or "Parlamenta" met every three years, and while he admits that the King of France did not call together the "Comitia" (the States General) so frequently, he points out that six of the French provinces had their particular assemblies. He mentions with approval Commines, vigorous criticism of those who had

opposed the meeting of the States General, on the accession of Charles VIII (Tours, 1484); and finally he describes with admiration the system of representative assemblies, local and general, which were highly developed in Switzerland and Germany.

Bodin returns to the subject in a later book of the 'De Republica' and deals specially with the principle that no taxation could be imposed without the consent of the Estates. He says that in an assembly held by Philip of Valois in 1338 it was declared that no taxation could be imposed without the consent of the Estates; and that though Louis XI imposed a tax (without their consent) in the last years of his reign, this was abolished by the States General of Tours on the accession of Charles VIII. He adds that Commines maintained that princes could only impose taxes with the consent of their subjects, as was still the rule in Spain, Britain, and Germany.

We have already referred to the very interesting and important statements of James Almain and John Major, in the early years of the century, that the community is superior to the king, and can depose him; and John Major says that in difficult matters the Three Estates of the kingdom are to direct him. In another place we have pointed out that Calvin, with all his emphatic condemnation of the disobedience of private persons to the divine authority of the ruler, was also clear that if the king should abuse his authority and misgovern his subjects, the magistrates of the people, or perhaps the Three Estates, should restrain him. Wo have also, in an earlier chapter, dealt with the conception of the nature and source of law in St Germans (1539), and especially his treatment of English law as being primarily founded upon custom; and we are here only concerned to observe that when this was not adequate, the laws which he calls statutes could be made by the king, the lords spiritual and temporal, and the community of the whole kingdom in Parliament.

We have also referred to that important work of Sir Thomas Smith, 'De Republica Anglorum', which sharply contrasts the prince who governs with the consent of the people and according to the laws of the commonwealth, with the tyrant who makes and breaks the law at his pleasure. We must now consider his treatment of the nature and power of Parliament. He defines a *respublica* or commonwealth as being a multitude of free men united into one, and holding together by mutual wills and contracts, for their protection in peace and war. The fundamental character of the government of the commonwealth of England ho describes in sweeping and emphatic words. It belongs to three kinds of men; the king or queen by whose will and authority all things are ruled, the greater and lesser nobles, and the yeomanry, and each of these classes has its part in judgments, in election of officers, in imposing taxation, and in making laws. The meaning of this far-reaching statement is explained when, in a later chapter, he goes on to describe the Parliament and its powers. It is in the Parliament that the whole absolute power resides, for there are present the king, the nobles, the commons, and the clergy are represented by the bishops. It is they who take counsel for the wellbeing of the kingdom and commonwealth, and when, after long deliberation, a Bill is read three times, discussed in both Houses, approved, and confirmed by the assent of the king, no question can be raised as to what has been decided, for it has the force of law. There was indeed little or nothing that was new in this, but it is interesting to compare the statement of the "absolute" authority which resides in Parliament with the conception of Bodin.

Sir Thomas Smith goes on to enumerate the powers of Parliament, and in a later chapter, those of the king. Parliament among other things makes laws, declares the rights and properties of private persons, establishes the forms of religion, determines the succession to the kingdom, imposes taxation.

The king, on the other hand, has the right of making war and peace, of appointing the Council, he has absolute power, not restricted by any laws, in time of war; he has control over the currency, the right of moderating the severity of law, when mercy and equity require it; he appoints the chief officers of the kingdom, and no jurisdiction great or little belongs to anyone except the king.

We have set out these statements of political writers, mostly of the earlier part of the century, because, as it seems to us, it is only when we have made clear to ourselves what was the normal judgment of the time that we can properly understand and appreciate the significance of the often highly controversial literature of the later part of the century.

We have already cited George Buchanan's emphatic statement that the legislative authority belonged to the whole people of a commonwealth, but that as in Scotland this power should he entrusted to persons chosen from all the orders (Estates) who should deliberate with the king, and that only after this should the final judgment be given by the people.

In the Huguenot pamphlets the demand for the recognition of a regular representative authority was founded in the first place upon historical contentions, which may have been in some respects overstated and even fantastic, but that does not moan they had no value. Hotman in the 'Franco Gallia' (1573) maintained that the supreme government in the Merovingian period belonged to the assembly of the representatives of the whole people, which met every year, and was composed of the king, the nobles, and the deputies of the provinces, and he held that this continued in the Carolingian period, and under the house of Capet. He was on firmer ground when he came to the later Middle Ages, and put together a number of examples of the importance and actions of the States General in France, from the time of the first great meeting, to deal with the conflict between Philip the Fair and Boniface YIII. in 1302, down to the States General of Tours in 1484.3 He cites that important passage in Corn-mines' 'Mémoires', to which we have already referred, and concludes that it was only the flatterers of the king who resisted the freedom of the Estates.

Much of this may seem a little fanciful, but it is not so fantastic as the notion that in the Middle Ages the government of the Empire or the French kingdom had been that of an absolute monarch. We are, however, not here concerned with the accuracy of Hotman's appeal to history, but with the importance of its appearance at this time. For it recurs in the other important political tracts of the time.

The 'Remonstrance' demanded the restoration of the ancient laws and the assembling of the Estates, as had been the custom till the French kings desired to rule absolutely and uncontrolled. The writer cites various examples of such meetings in Merovingian and Carolingian times, and contends that it was by these means that the proper relations between the king, the nobles, and the people had been maintained, and should now be restored. He urges the excellent results of the meeting of the States General at Tours in 1484, and the good work begun by the Estates which met at Orleans in 1560, which had been unhappily frustrated by evil machinations. What is better, he exclaims, than that the Ordinance of God should be graved on the heart of the king, and that the king should govern with the goodwill and consent of his people; and what is more detestable than that he should lord it over them by constraint; how can the State be now maintained but by the ancient and sacred rule of calling together the Estates, by means of which some remedy might be found for the corruption of religion and justice.

The 'Droit des Magistrats' points out the excellent results of the recognition of the authority of Parliament in England,5 and asserts that the French people had from the first so ordered the monarchy that the kings did not reign by hereditary succession alone, but were elected by the Estates of the kingdom, who had also exercised the right of deposition. The ancient and authentic histories showed that the same Estates had possessed the authority to appoint and remove the principal officers of the crown, or at least to observe what the kings did in this matter, and to control taxation and the other more important affairs of the kingdom in war and peace. The writer recognised indeed that this was no longer the case in France, but he maintains that this was contrary to the methods of the 'Anciens' and "directement repugnant aux loix posées avec le fondement de la Monarchie Française", and he appeals to all good jurists to say whether any prescription was valid against these.

The 'Vindiciae Contra Tyrannos' sets out the same conception in emphatic terms. In ancient times the assembly of the Three Estates met every year, in later periods from time to time, to determine matters concerning the commonwealth, and the authority of this assembly was such that its decisions were held as sacred. It was in its power to determine such matters as war and peace, as the imposition of taxation, and when the corruption or tyranny of the king required, it could even change the succession. Hereditary succession had been accepted to avoid the inconveniences of election, but when it caused greater evils and the kingdom became a tyranny, the lawful assembly of the people retained authority to depose the tyrant and to appoint a good king in his place.

Like the 'Droit des Magistrats', the ' Vindiciae' cites the example of the regular meetings of the Parliament in England and Scotland, and in another place maintains that in the empire, as well as in Poland, Hungary, Denmark, and England, taxes could only be imposed by the authority of the public assembly, and asserts that this had been the rule also in France, and refers to the law of Philip of Valois.

We turn to Spain and the Jesuit Mariana. In an early chapter he declares that the decision about the law of succession must be made "ordinum consensu"; but his position is more completely developed in a later chapter in which he discusses the question whether the authority of the community or the king is the greater. (We have already cited some passages from this chapter.) He begins by referring to the constitutional order of Aragon, but, feeling apparently that this was somewhat unusual, he turns to other countries where the authority of the people was less. Almost all recognise the king as ruler and head of the commonwealth, and that his authority is greater than that of any one of the citizens, but they deny that his authority is equal to that of the whole commonwealth or to that of the representatives and principal men elected from all the orders (Estates) in their assembly; as we see in Spain, where the king cannot impose taxes against the will of the people. It is the same with laws, they are set up when they are promulgated, but are established by the custom of those who live by them. The commonwealth has the right to depose and even to slay the king who becomes a tyrant, for it has retained in its own hands an authority greater than that which it has delegated.

Mariana recognised indeed that there were some learned men who denied this, and maintained that the king was greater than the whole body of the citizens. He answered that this was true only in nations where there was no public assembly, where the people or the chief men never met to deliberate on the affairs of the commonwealth, where men were compelled to obey, whether the rule of the king was just or unjust. He adds contemptuously that this was surely an excessive authority, and very near a tyranny, and as Aristotle had said might he found among barbarous peoples. We are, however, he says, not concerned with barbarians hut with that form of government which exists among ourselves (in Spain), and with the best and most wholesome form of government.

Mariana's conception is clear, but it is further developed in a very important passage dealing directly with the Cortes. In order to restrain the king within due bounds, our ancestors, he says, had provided that nothing of greater importance should be done without the will of the chief men and the people, and to this end it was the custom to call to the assembly of the kingdom men chosen from all the orders (Estates), the Bishops, the "Proceres" and the Procurators of the cities. This still continued in Aragon and other provinces of Spain, but in Castile (in nostra gente) it had for some time come about that the "Proceres" and the Bishops had been excluded from the assembly, and he suggests that this had been done in order that public affairs should be controlled by the capricious will of the king and the desires of a few. The people complained that the Procurators of the cities who alone continued to attend were frequently corrupted by bribes and promises, especially as they were appointed by lot and not by deliberate choice.

These observations of Mariana on the composition of the Cortes of Castile are very important and interesting, and in the remainder of the chapter he develops his view of the importance of the

aristocratic clement in the Spanish constitution. We are, however, not writing a history of constitutions, and cannot therefore deal with this question as it deserves.

We turn to Hooker, and it is highly important to observe how emphatically so careful and restrained a political thinker sets out the importance of the authority of the community as represented in Parliament. In the first book of the 'Ecclesiastical Polity' he was dealing with the general principles of law, and the source of the positive law in the authority of the community; he was not concerned, except incidentally, with the question of the representation of the community. Such reference, however, as he made, was clear and unequivocal. "Laws", he says, "they are not therefore which public approbation hath not made so. But approbation not only they give who personally declare their assent by voice, sign, or act, but also when others do it in their names by right originally at least derived from them. As in parliaments, councils, and the like assemblies, although wo be not personally ourselves present, notwithstanding our assent is by reason of others, agents there in our behalf." It is Parliament which expresses that public approbation without which there is no law.

It is, however, in the eighth book that Hooker's treatment of representative authority is fully developed. Ho does this in his careful discussion of the relation of the ecclesiastical authority to that of the State, and it is in this connection that he sets out with great precision his conception of the nature of Parliament, and of its relation to the king and the whole community. "The Parliament of England, together with the convocation annexed thereunto, is that whereupon the very essence of all government within this realm doth depend ; it is oven the body of the whole realm; it consisteth of the king and of all that within the land arc subject unto him; for they are all there present, either in person or by such as they voluntarily have derived their very personal right unto". Such is Hooker's conception of the nature of Parliament, and lest there should be any confusion as to the source of its authority, he adds at the end of this section : "Which laws being made amongst us, are not by any of us to be so taken or interpreted as if they did receive their force from power which the prince doth communicate unto the Parliament, or to any other court under him, but from power which the whole body of the realm being naturally possessed with, hath by free and deliberate assent derived unto him that ruleth over them, so far forth as hath been already declared."

The authority of the laws is derived, not from the king, but from the whole community, as indeed is the authority of the king himself, as we have seen in an earlier chapter. The authority of the king in regard to the making of laws had been described a little earlier in the same section as mainly negative. "The supremacy of power which our kings have in the case of making laws, it resteth principally in the strength of a negative voice; which not to give them, were to deny them that without which they were but kings by mere title, and not in exercise of dominion."

It is clear that Hooker, like St Germans and Sir Thomas Smith, had no doubt that in England the supreme power, that is the legislative, resided not in the king alone, or in any smaller body of persons, but in that assembly which contained all, and represented all the community, the king, the peers, and the whole body of the people.

Finally, we turn once again to Althusius, who is specially important to us as expressing the continuity of that representative theory in Germany which we have seen in Leopold of Babenberg and in Nicolas of Cusa.

Althusius describes the nature and functions of the councils of the commonwealth, no doubt primarily with the constitutional system of the German Empire in his mind, but also as the embodiment of a general principle of political society. They are composed of the "members" of the political society, and consider and determine upon all the difficult and weighty matters which concern the whole "imperium", such as the fundamental laws, the "iura Maiestatis", the taxes, and other matters which require the deliberation and consent of the whole "polity". All the "members" have the right of deliberation, but the decision is made by the votes of the majority.

This is clear and important, but of equal importance is Althusius' statement of the principles (rationes) on which this representative system rests. First, that which concerns all should be done by all; second, it is better that these matters should be considered by many, for many know more and are less easily mistaken than a few; third, there are some affairs which cannot be dealt with except by the people in such councils; fourth, those who have great power are restrained and corrected by the fear of such councils, in which the demands of all are freely heard. Finally, it is in this manner that the liberty of the people is preserved, and the public officers are compelled to give account of their administration, and to acknowledge that the people or universal society, by which they have been created, is their lord.

These are drastic and emphatic statements of the principle that the supreme authority in a political society is not only derived from, but remains with the whole community or people, and the assembly which represents it. There is indeed nothing here to surprise us, for, as we have already seen, the supreme authority or "Maiestas" always remains and must remain, in the judgment of Althusius, with the whole community; but it makes it plain that in his mind this was no merely abstract judgment, but that this supreme authority had a concrete embodiment in the representative assembly.

The reference to the representative assembly as protecting the liberty of the people is interesting, and he returns to this in a later chapter. It is, he says, a part of liberty that those at whose risk, and by whose blood and treasure, things are done, should administer them by their own counsel and authority.

It is also clear that in the judgment of Althusius these representative councils of the community were to be found in all the countries of Central and Western Europe, not only in the Empire but in France, in England (he refers to Sir Thomas Smith), in the Netherlands, Poland, Castile, Aragon, Portugal, Denmark, Norway, Sweden, and Scotland; and it should be observed that he describes the constitutions of the various territories in the German Empire as having the same character.

Althusius was indeed no enemy of monarchy, but he maintained, in direct opposition no doubt especially to Bodin, that in a good polity the various elements must he combined; the democratic in the assemblies of the people, the aristocratic in the senate and councillors, the monarchical in the executive action of the supreme magistrate, the king. Or, as he put it in another place, every form of commonwealth was "tempered" and mixed, and he refused to recognise that there could be any simple and unmixed form of political association, the infirmity of human nature would prevent its continuance, nor could it be adjusted to a good and social life.

We think that it is clear that in theory as well as in fact the political representation of the community was important in the sixteenth as well as in the fourteenth and fifteenth centuries, and it is obvious that it was thought of as existing in almost all European countries, and not only in Spain or England or the Empire.

PART V
CONCLUSION.

We have endeavoured, in the six volumes of this History, to give some account of the most important elements in the development of the political principles of Western Europe during sixteen centuries, a large and, as some may think, an over-ambitious enterprise. We can only say that we found ourselves compelled to make the attempt. When we began this work some forty years ago our intention was much more restricted; we proposed little more than a careful study of the political theory of the thirteenth century, and we therefore began with a detailed consideration of the political theory of St Thomas Aquinas. We soon, however, found that in order to understand the real significance of that great political thinker, we were compelled to go back to the Roman Jurists of the "Corpus Juris Civilis", to the New Testament, the Christian Fathers, and the literature of the earlier Middle Ages, and even to make some study of the post-Aristotelian political theory. Some friendly critics observed, naturally enough, that the treatises of an eclectic literary man like Cicero, and a somewhat rhetorical literary philosopher like Seneca, were inadequate representatives of this, and we were, and are, very conscious of this. We can only hope that some scholar more competent than ourselves will some time take in hand the task of reconstructing from the fragments of the post-Aristotelian philosophers an adequate and critical account of their political theory. We are still convinced that, while the debt which we owe to the great political thinkers like Plato and Aristotle is unmeasurable, it is also true that it was during the centuries between Alexander the Great and the Christian era that some of the most distinctive and important principles of the mediaeval and modern world took shape. It was during this period that the Hellenistic world learned to conceive of mankind as being homogeneous and rational, or, to put it into the terms of Cicero and other Roman writers, all men are alike, for they are rational and capable of virtue. And it was during the same period that the older conception of the solidarity of the group began to be transformed by the recognition of the inalienable liberty of the human spirit.

We are also very conscious of the fact that, in the attempt to deal with the vast and complex political literature of sixteen centuries, we have had to treat of many matters for the study of which we had little technical qualification. And especially is this true of the political jurisprudence of the Roman and Canonical and Feudal lawyers, and we recognise with gratitude the forbearance and friendly treatment of our work by the Jurists. We cannot indeed regret that we ventured to do this, for we feel that without this it is really impossible to deal adequately with the political ideas of a period like the mediaeval, which was dominated by the conception of the supremacy of law.

We have at last completed the task which we had set before ourselves, and must now again make the attempt to set out what seem to us the most important elements in the political ideas and theories of the Middle Ages; but now, with special reference to this volume, we must consider how far during the centuries from the fourteenth to the sixteenth the principles of the political civilisation of the thirteenth century were modified, and how far these were continuous.

The formal aspect of Mediaeval Political Theory is to be found in that conception which is implied in the post-Aristotelian philosophy, in the Christian Fathers, and in the Digest and Institutes of Justinian, that the political and social order of society is conventional rather than natural, and represents the consequences of the fall of man from his primitive innocence. It is true that St Thomas Aquinas, under the influence of the Aristotelian "Politics", endeavoured to correct this, but it is also true that the post-Aristotelian tradition was too firmly rooted to be shaken even by St Thomas' great authority, and that the contrast between the conventional and natural conditions continued to furnish

the formal terms of political thought to the end of the sixteenth century. We can see this in so great a political thinker as Hooker, though he was evidently a disciple of St Thomas Aquinas. Indeed, we can recognise the continuance of this tradition in Locke in the seventeenth century and in the earlier essays of Rousseau in the eighteenth. It was not till Rousseau in his later work, and especially in the 'Contrat Social', restated the Aristotelian conception that man is only man in the coercive society of the State, and urged that apart from this he would be nothing but a "stupid and limited animal", that the Aristotelian principle once again became the foundation of all rational political thinking.

This formal mediaeval conception then is interesting, but it is doubtful how far it had any great importance. It is very different with that great principle which dominated the political thought of the Middle Ages, that the first and most fundamental quality of political society was the maintenance of justice. St Augustine, in the 'De Civitate Dei', handed down to the Middle Ages, not only Cicero's definition of the nature of the commonwealth, but also his emphatic assertion that where there is no justice there is no commonwealth. Here indeed we are dealing not with a conception which was peculiar to the post-Aristotelian philosophers, but rather with one which they carried on from Aristotle and Plato; but it is not the less important to make clear to ourselves that this was the normal principle of the Middle Ages.

It was set out by the Roman Jurists of the Digest and Institutes, by the Christian Fathers, in the political treatises of the ninth century, by the political theorists of the Middle Ages, and by the mediaeval Civilians and Canonists. It is true that in one place St Augustine had suggested that the conception of justice might be omitted from the definition of the commonwealth, but it is clear that this exorcised no influence in the Middle Ages.

This conception of justice as the *rationale* of political society may indeed seem to some persons, not well acquainted with political problems, as too obvious to require statement; or, on the other hand, it may appear to some, and especially to those who are unfamiliar with history, as too indefinite to be of much profit. It must indeed be admitted that there never has been, perhaps there cannot be, any adequate definition of justice, but to those who are better acquainted with the history of political civilisation it will be clear that it is exactly the pursuit of justice which distinguishes a rational and moral society from a stupid anarchy.

It would in any case be a very great mistake if we were not to recognise that the conception of justice found in the Middle Ages a great and effective form in the law, and its authority in the commonwealth. The numerous political treatises of the ninth century are largely composed of exhortations to the king to maintain justice, and, if we ask what they meant by justice, it is clear that they meant primarily the law—the law as distinguished from the merely arbitrary and capricious will of the ruler. It is this which was meant when the "Assizes of the Court of Burgesses", in the kingdom of Jerusalem, declared that "La Dame ne le Sire n'en est seignor se non dou dreit ... mais bien sachiés qu'il n'est mie seignor de faire tort", or when John of Salisbury said that the difference between the king and the tyrant was, that the king obeys the law while the tyrant flouts it, or when Bracton in memorable words lays down the principle that, while the king is under no man, he is under god and the law, and that there is no king when mere will rules and not the law. Nicolas of Cusa in the fifteenth century reinforced this judgment with the authority of Aristotle, whom he cites as saying that when the laws are not supreme there is no polity. This is what was meant when so wise and prudent a political thinker as St Thomas Aquinas did not hesitate to say that, while sedition is a mortal sin, revolt against a tyrant is not to be called sedition; for his rule is not just. We think that we are justified in maintaining that the first principle of medieval political society was the supremacy, not of the prince but of the law, for the law was the embodiment of justice.

If, however, we are to understand the medieval political principles, we must now consider the nature of law, not merely in its relation to justice, but also with regard to its source.

To the people of the Middle Ages the positive law was primarily and fundamentally the custom of the community—that is, the expression of the habit of life of the community; it was not properly something deliberately or consciously made. The earlier medieval codes, as everyone knows, are not acts of legislation, but records of custom, revised, no doubt, and modified from time to time by the ruler and his wise men, but not, properly speaking, made by them. The feudal laws in the same way were records of custom. The picturesque account of the origin of the laws of the kingdom of Jerusalem, given by Jean d'Ibelin and Philip of Novara, is no doubt literally unhistorical, but it represents admirably the medieval temper. Bracton asserts that English law was custom; and while he seems to think that other countries used written laws, his great contemporary, Beaumanoir, assorts in equally broad terms that "all pleas are determined by custom", and that the King of France is bound to maintain them.

When, therefore, we find that the first systematic Canonist, Gratian, begins his 'Decretum' with the great generalisation that mankind is governed by two great systems of law, Natural Law and Custom, and in another place sets out the principle that, even when the law is made by some person or persons, it must be confirmed by the custom of those who live under it, we recognise that he is not expressing a merely individual opinion, but is putting into formal phrases the general judgment of the Middle Ages. Law was not to them primarily the expression of the will of the ruler, but of the habit of life of the community. It is important to observe that even in the sixteenth century an English Jurist like St Germans looks upon custom as the normal source of English law, and that Statutes of Parliament are only added when the customs were not sufficient. The truth is that to think of the mediaeval king as making laws by his own personal authority is an absurdity.

It is, however, true that at least from the ninth century we can see that the conception of definite and deliberate legislation begins to appear, and, while there was little development of this in the tenth and eleventh centuries, we can trace its gradual progress, and can see that while the conception of law as custom continued to be of great importance, the conception of law as being the expression of the rational and moral will of the supreme power in the community became more and more important. We say the rational and moral will, for there is no trace of any conception that the merely arbitrary or capricious will had any real place in law. This is the real moaning of the principle that the supreme authority in the community is always limited by the Divine and Natural laws.

Law came, that is, to be thought of as the expression of the will of the legislator. Who, then, was the legislator? The answer is that it was the whole community, and this was the necessary consequence of the fact that law was custom before it was command. From the ninth century at least there can be no doubt about the normal conception of the Middle Ages. There are some words of Hincmar of Rheims, the most important ecclesiastical statesman of the ninth century, which express this very clearly. Kings, he says, have laws by which they must rule; they have the capitularies of their ancestors, which were promulgated with the consent of their faithful men; and this corresponds with the normal forms of legislation as we find them in the Carolingian Capitularies.

This is again the conception of the source of law as wo find it in the twelfth and thirteenth centuries. Glanvill says that those are properly laws which are made by the king with the consent of the chief men (proceres). The Norman "Summa de Legibus" says that laws are made by the prince and maintained by the people. Bracton lays it down that that has the force of law which has been determined by the counsel and consent of the great men, the approval of the whole commonwealth and the authority of the king; and again, when the laws have been approved by the custom of those concerned and by the oath of the king they cannot be changed or annulled without the common consent of all those by whose counsel and consent they had been promulgated. The meaning of this is illustrated by the formulas of legislation as we find them in the Empire, in France, in Castile, and in England in the thirteenth century.

In this volume we have seen that these conceptions continued to be normally accepted in the fourteenth, fifteenth, and sixteenth centuries. Law was still primarily custom, but when it was made it was thought of as deriving its authority from the community. This is continually illustrated in the proceedings of the Cortes of Castile, and is expressed in theory, not only by an English Jurist like Fortescue, but by one of the greatest thinkers of the fifteenth century, Nicolas of Cusa. He thinks that the wiser men should be elected to prepare the laws, but their wisdom gives them no authority to impose these by coercion on other men ; this coercive power can only be given by the agreement and consent of the community. Marsilius of Padua, no doubt, expresses this principle in sharper and more precise terms than we generally find in northern writers, as was indeed natural in one who was thinking primarily in the terms of the Italian City Republics, but his principles were not substantially different from theirs. It would be difficult to find a better expression of the general principles of these centuries than in the words of Sir Thomas Smith, a man of great public experience and a minister of the Crown under Elizabeth : "When one person boareth the rule, they defines that to be the estate of a king, who by succession or election commeth with the good will of the people to the government, and doth administer the common wealth by the lawes of the same, and by equitie ... A tyrant they name him who by force commeth to the monarchy against the will of the people, broaketh lawes already made at his pleasure, maketh others without the advice and consent of the people."

It is no doubt true that in the later part of the sixteenth century these principles were often discussed in controversial terms by men like George Buchanan in Scotland and the writers of the Huguenot pamphlets, but in Hooker and Althusius and Mariana we find the same confidence and clearness expressed in largo and profound terms. Hooker makes the same distinction as Nicolas of Cusa between the wise men who should "devise" laws and the authority of the community which alone can give them their "constraining force"; and of England he says, "Which laws, being made amongst us, are not by any of us so taken or interpreted, as if they did receive their force from the power which the Prince doth communicate unto the Parliament, or to any other Court under him, but from power which the whole body of the Realm, being naturally possessed with, hath by free and deliberate assent derived unto him that ruleth over them, so far forth as hath been declared."

There is really no doubt that the normal political judgment, whether practical or theoretical, of the Middle Ages and down to the end of the sixteenth century, was that the Positive Law was the expression of the will or consent of the whole community, including the king, and that the conception of writers like Bodin and Barclay that the king was the legislator, represented an intrusive and alien principle. Indeed it should be carefully observed that Bodin and Barclay themselves recognized, and quite frankly, that while they thought that the King of France possessed an absolute power in legislation, it was difficult to find any other country of Central and Western Europe of which this could be said.

We have so far dealt with the source of Law, but in order to appreciate correctly the meaning of the medieval conception of the supremacy of Law, we must take account of the normal principle of the Middle Ages, that the Law was supreme over every member of the community, including the king.

We have dealt with this in relation to Feudalism in the third volume of this work, and in more general terms in the fifth volume. Professor Ganshof of Ghent has indeed brought forward strong reasons to show that the prefeudal king was, at least in civil matters, subject to the judgment of the court, like other men; and this confirms our judgment that wo are dealing with a general principle of medieval civilisation.

That this continued to be the normal political judgment of Central and Western Europe from the beginning of the fourteenth century till the end of the sixteenth is clear. We must not recapitulate what wo have said in this volume, but wo may draw attention to some of the clearest examples of this.

Nothing perhaps is more significant than the continual and emphatic protests of the Cortes of Castile and Loon against the attempts of the kings to override the laws by the issue of special briefs containing "non-obstante" clauses, or referring to their "certain knowledge or absolute authority"; nothing could be more significant except the answers of the Kings Juan I and Juan II, and the replies made by Queen Juana with regard to "Pragmatics" issued without the consent of Cortes, and by the Emperor Charles V, about "cartas de suspencion de pleytos".

Perhaps, however, even more significant of the principle of these centuries is the treatment of the relation of the King of France to the law and the Courts of Law by De Seyssel in the 'Grant Monarchie de France'. De Seyssel had been for many years in the service of the French Crown, and it is therefore the more noteworthy that he should have looked upon it as the best of all monarchies because it was neither completely absolute nor too much restrained : it was restrained by the Law and the "Parlemens". We have pointed out that Machiavelli in his 'Discourses' on Livy expressed the same judgment. And most remarkable is it that Budé, who set out the doctrine of the absolute monarchy in France in the most extravagant terms, should have at the same time felt compelled to draw attention to the fact that the French Kings submitted to the judgment of the Parliament of Paris; and that Bodin should have contended that the judges should be permanent and irremovable, except by process of law, because the kingdom should be governed by laws and not by the mere will of the prince.

The principle of the Middle Ages is indeed admirably summed up by Hooker, after citing the words of Bracton, "Rex non debet esse sub homine, sed sub Deo et lege". "I cannot choose but commend highly their wisdom by whom the foundations of this commonwealth have been laid; wherein, though no manner person or cause be unsubjects to the king's power, yet so is the power of the king over all and in all limited, that unto all its proceedings the law itself is a rule. The axioms of our royal government are these : 'Lex facit Regem'. The king's grant of any favour made contrary to the law is void, 'Rex nihil potest, nisi quod jure potest',"

It is time, however, that we should consider the political significance of the revived study of the Roman Law in the Middle Ages. We are not indeed dealing with the general influence of this on medieval civilisation; we are concerned with it only so far as it affected its political conceptions and principles. We have endeavoured in the second and fifth volumes of this work to set out some of the more important conceptions of the nature and source of Law as we find them in the great Bologna Civilians of the twelfth and thirteenth centuries, and we think that it is important to notice that these great Jurists were as clear and emphatic as the feudal lawyers and the political theorists in asserting that positive law was the formal expression of justice. Justice is the will to establish Aequitas, and laws flow from justice as a stream from its source. They did not conceive of it as arbitrary, or as expressing the capricious will of the lawgiver. In this respect the Civilians represented the normal conception of the Middle Ages.

It is also most important to observe that the Civilians, following the tradition of the Jurists of the Digest, looked upon the community or people as the solo ultimate source of the positive law of the State. The people might grant this authority to the prince, might constitute him as legislator, but it was only in virtue of their grant that this or any other authority belonged to him. It is sometimes forgotten that when Ulpian said, "Quod principi placuit, legis habet vigorem," he added, "ut pote cum lege regia, quae do imperio eius lata est, populus ei et in oum omne suum imperium et potestatem conferat". That which has pleased the prince has the force of law, but only because the people have given him this authority. What, if any, importance this principle may have had in the ancient empire, we are not competent to discuss, but it must be remembered that this is the only theory of the immediate source of the authority of the emperor which is known to the lawyers of the Digest, and it was recognised in the Code, not only by Theodosius and Valentinian, but also by Justinian himself.

The Civilians down to the end of the sixteenth century not only recognised this, but, as we have seen, in a treatise ascribed by Professor Fitting to Irnerius, in one of the Glosses ascribed by Professor Besta to Irnerius, and in Bulgarus' Commentary on the Digest, it is drawn out into the general principle that it is the "Universitas" or "Populus", or the magistrate "qui obtinet vicem universitatis", which is the source of all law. It seems to us important that this recognition by the Civilians, that all political authority was derived from the community, coincided with the normal judgment of the Middle Ages and confirmed it.

It is, however, very different when we consider some other important elements in the tradition of the Roman Law as interpreted by the medieval Civilians. The Roman Law, as they knew it, vas the law of the Empire, not of the Republic, and while the jurisprudence of the "Corpus Juris Civilis" represented in fact a long development of juridical experience and of legal wisdom, in principle the emperor was the legislator. (We confess that we should have been glad to find some detailed historical criticism of the rescript of Theodosius and Valentinian which deals with the process of legislation; but it is also clear that Justinian looked upon the emperor as the sole legislator and the sole final interpreter of the laws.

The Roman emperor was then to the Bologna Civilians normally the legislator. We have indeed pointed out that there was a real and profound divergence among the Civilians of the twelfth and thirteenth centuries on the question whether the Roman people had transferred their authority to the emperor in such a sense that they retained nothing and could reclaim nothing. This seems to have been the judgment of some of the best-known Civilians of the twelfth and thirteenth centuries, of Irnerius, Placentinus, and Roger; but, on the other hand, Azo, Hugolinus, and Odofridus maintained that the Roman people had indeed given their authority to the emperor, but they could reclaim it. Hugolinus indeed describes the emperor as a "procurator at hoc", and they and John Bassianus were agreed that the custom of the Roman people still retained its legislative authority. In the fourteenth century the Civilians were aware of the controversy, and inclined to the view that the custom of the Roman people still retained its authority; this seems doubtful in the fifteenth century, but one Civilian, Christophorus Porcius, stoutly maintained an opinion similar to that of Azo and Hugolinus.

This is indeed interesting and important, but at the same time, even to those Civilians who thought that the custom of the Roman people retained its authority in making and unmaking law, and that it might reclaim its general legislative authority, the emperor was normally the legislator.

This conception was wholly alien to the principles of the Middle Ages, from Hincmar of Rheims in the ninth century to Hooker in the sixteenth.

More important still was the question of the subordination of the prince to the Law. What the real doctrine of the Roman Jurists had been we do not pretend to determine, but Ulpian had in one place said that the prince was "legibus solutus", while Bracton said that the king was under God and the Law. The mediaeval Civilians were, it seems to us, often gravely perplexed as to the real meaning of Ulpian's words, for it was difficult to reconcile these with the words of Theodosius and Valentinian, "Digna vox, &c.," and they were apparently contradicted by the rescripts of the same emperor and of Anastasius, which commanded the magistrate to ignore any imperial rescript or Pragmatic Sanction which was contrary to the Law and the public service. In the fourteenth century, however, while Bartolus uses such phrases as that it is "aequum et dignum" that the prince should obey the Law, this is of his own free will and not "de necessitate", Baldus speaks of a supreme and absolute authority in the prince which is not under the law, as contrasted with his ordinary authority, which is subject to it; and as Jason de Mayno, writing in the later fifteenth century, reports, Baldus had in another place said that the Pope and the prince can do anything, "supra ius et contra ius et extra ius."

It is true that some of the French Civilians of the sixteenth century, under the influence probably of Alciatus of Milan and Bourges, and especially the great Cujas, felt that this was a

dangerous doctrine, and set out in various terms what seemed to them the necessary correction of this interpretation of the words that the prince was "legibus solutus". We have dealt with this in detail, and here we need only recall that Cujas maintained that these words could only refer to those laws upon which Ulpian was in this passage commenting, and that the prince was not free from many others, especially if they had sworn to observe them. What the French Civilians thus contended was also maintained by Zasius of Freiburg and by Althusius.

On the other hand, we can see that this doctrine that the king was above the law was held by some in the sixteenth century. It was stated or implied in the words of the President of the Parliament of Paris in 1527, and of Michel L'Hôpital ; it was asserted in somewhat ludicrous terms by Budé in his 'Annotations on the Pandects'. This power seems at times to be attributed by Bodin to the King of France, in whom the Maiestas resides, while at other times he seems to express a different view. It is asserted dogmatically by Peter Gregory of Toulouse, and Barclay appeals rather recklessly to the most eminent Civilians of the fourteenth and fifteenth centuries as holding that the Pope and the prince, when acting "ex certa scientia", can do anything, "supra ius et contra ius et extra ius."

We do not indeed suggest that the development of the conception that the prince was above the law was due entirely to the influence of the Roman jurisprudence, but we think that it is clear that it was related to it, and we think that such phrases as those which we have just quoted illustrate the growth of this influence, for these men were no longer merely commenting upon and endeavouring to interpret the "Corpus Juris Civilis" as the mediaeval Civilians had done, but they were applying principles drawn from this to the actual constitutional and legal conditions of the Western kingdoms.

The truth is that this was an innovation, and a somewhat barbarous innovation, for the supremacy of the law over all persons is perhaps almost the most essential characteristic of a rational social order, and mediaeval political theory had always maintained it. We have thus felt compelled to recognise that the influence of Roman Law, great and useful as it was in other aspects of life, was in some respects mischievous and retrograde. The feudal system had its grave defects : it tended always towards the anarchy of the noble class, that anarchy which Machiavelli spoke of in a passage to which we have referred, in which he said that the very existence of a noble class ("gentiluomini", meaning by these a feudal territorial nobility) made a "vivere politico" almost impossible.

It is perfectly true that the absolute monarchies of the seventeenth and eighteenth centuries represented the necessity of controlling this aristocratic anarchy, but that can hardly justify before history the attempt to control it by the anarchical autocracy of an absolute king.

There was indeed another element in the political conceptions of the sixteenth century whose influence was parallel to that of the Roman Law, as we have just been dealing with it; that is, the conception of the king as being the vicar of God in such a sense that he was above all human authority, that resistance even to his unjust and illegal actions and commands was resistance to God Himself. This conception, as has been well pointed out by Professor A. Kern in his admirable work, 'Gottesgnaden und Widerstandsrecht im Mittelalter', had grown out of various elements in the earlier Middle Ages, but in the political literature with which we have been concerned, it was derived almost wholly from some of the Christian Fathers, and especially from St Gregory the Great, who drew it from certain parts of the Old Testament and the conception of the "Lord's Anointed."

The authority of Gregory the Great was naturally so strong that in the ninth century we find even Hincmar of Rheims sometimes citing his words, and a Church Court threatening those guilty of rebellion with excommunication. In the stormy times of the great conflict between Hildebrand and Henry IV we find not only Henry IV but some of the clergy maintaining that the king could be judged by God only, and Wenrich of Trier and the author of the treatise 'De Unitate Ecclesiae Conservanda' (Walther of Naumburg) appealing to the authority of Gregory the Great, and Gregory of Catino maintaining that it was God only who could take away the authority of the king.

Practically, however, the conception of Gregory the Great was overpowered by the principle that political authority was founded upon justice and law, and the distinction between the king and the tyrant. If Manegold and John of Salisbury maintain this in the sharpest terms, it must be remembered that it was St Thomas Aquinas himself, as we have seen, who declared that while sedition was a mortal sin, resistance to the unjust rule of a tyrant was not sedition. These are the principles of the political literature of the fourteenth and fifteenth centuries. Only very rarely, as in Wycliffe, in the proceedings of the Cortes of Olmedo in 1445, and in a treatise of Aeneas Sylvius (afterwards Pope Pius II) do we find this appeal to the authority of God as forbidding all resistance to the king, for he was the vicar of God.

It was not till the sixteenth century that this conception had any real importance in political thought, and we have treated it in some detail in this volume, first in Luther and Tyndale in the earlier part of the century, and again in some later writers, especially Bilson, James I, Peter Gregory of Toulouse, and Barclay. Luther, however, after 1530 abandoned this view, and admitted that it was the law and not the king which was supreme, and the other writers who maintained this conception of the "Divine Right" were unimportant, and their authority cannot be measured against that of Calvin and Hooker among the Protestants, or of the great Jesuits among the Catholics. How a manifestly fantastic conception such as this should have come to have some importance in the seventeenth century, it is not for us to say; perhaps the dreadful experience of the French Civil Wars, and the incompetent absurdities of the Fronde in France, and the dependence of the Anglican Church upon the Crown may serve to explain it in part.

We are clear that, as in the conception of the prince and his absolute authority, which was derived by some Civilians from the Roman Law, we have here a merely intrusive conception, which was wholly alien to the rational and intelligible political tradition of the Middle Ages, that the law was supreme and not the prince.

We turn back to a saner world than that of the absolute prince of some interpreters of the Roman Law, and of those who upheld the "Divine Right," and, curiously enough, we find it in the terms of a conception which has sometimes been thought merely antiquarian and even irrational, that is, in the principle of the contractual relation between the ruler and the ruled.

Whatever we may think of it, this was, next to the principle of the supremacy of law, perhaps the most important of all the political conceptions of the Middle Ages. We need hardly again point out that we do not mean that unhistorical and unscientific conception of a contract by which men had formed themselves into political societies. It may be said that this was implied in the Stoic theory of the conventional nature of political institutions, but it had no real place in mediaeval thought, though there may be occasional traces of it. It was not till the seventeenth and eighteenth centuries that it became the fashionable, if only hypothetical, starting-point of political theory.

The principle of the contract between the ruler and the ruled was, on the other hand, the general assumption of all mediaeval political theory, and it was upon this that there were built up the principles of the nature and limitations of the authority of the prince.

This conception indeed, so far from being merely abstract, was founded upon certain conditions of political authority which found a definite expression in the coronation ceremonies of Western Europe at least from the eighth century—that is, in the mutual oaths of the prince and the people. It is indeed a little strange that some writers should not have observed that in the ninth century these principles of mutual obligation were not only a part of the "recognition" of the prince, but that continual appeal was made to them as determining the nature of the relations of prince and people. For in these mutual oaths the prince swore to maintain not only abstract justice, but the concrete law, and the people swore to obey the prince. This was indeed an intelligible and practical conception of the relations of ruler and ruled; indeed it was only another form of the principle that

the law was supreme. The contractual conception then goes back to the earlier Middle Ages, but it continued to find expression throughout them in the importance attached to the coronation oaths.

There can, however, be no doubt that this was immensely strengthened by the development of the feudal system. For, as we have endeavoured to make plain in the third volume of this work—while there are elements in the feudal relation, especially as set out in the poetical literature, of a purely personal nature, implying an almost complete and unconditional loyalty of the vassal to his lord—when we examine the juridical literature of feudalism, it is the contractual conception of the mutual obligations of lord and vassal which we find to be dominant. Even that well-known passage in the letters of Fulbert of Chartres which sets out the obligations of the vassal in comprehensive terms, concludes by saying that the lord must also fulfil the same obligations to his vassal. And the structure of feudal society provided the methods by which this should be enforced, for in case of a dispute between the lord and vassal, the determination belonged to the Court which was composed of all the vassals and not to the lord.

The conception of the contractual relation between the prince and the community may be expressed in sharper terms by Manegold than by others, but in substance he represents the normal mode of mediaeval political thought, that the prince is bound to the community by his obligation to obey the law, and that the tyrant—that is, as John of Salisbury especially puts it, the prince who ignores or defies the law—has forfeited all claim to authority.

When therefore Marsilius of Padua laid special stress upon the principle that it was the community which was the source of all positive law, that it was from the community that the ruler (pars principans) received his authority, and that the community which had given this authority could also withdraw it, if he violated the law, he was implicitly asserting the doctrine of the contract.

There is therefore nothing to surprise us when we find that in the later sixteenth century the principle of a contract between the prince and the community, as expressing the condition on which authority was granted to him, should be reaffirmed not only by controversialists, but by the most careful and restrained political thinkers.

It is particularly interesting to find that in the ‘Apologie’ of William of Orange the conception of the contract is stated under the terms of the conditions on which Philip II held his power in the Netherlands; the oath which he took before they swore obedience to him, and the right of his vassals to enforce these conditions upon him, under the terms of feudal law. George Buchanan asserts roundly against Maitland, who urged that subjects are bound by their oath of obedience to the king, that kings are bound by their promise to administer the law, and that there is therefore a “mutual contract” between the king and the citizens. The ‘Droit des Magistrats’ maintains that the people had only surrendered their liberty to the king on certain conditions, and that, if these were violated, they had the right to withdraw the authority which they had granted. The ‘Vindiciae Contra Tyrannos’ sets out the principle of a “foedus” between king and people. It was the people who created the king on the condition that he should rule justly and according to the law, and the people and those who are responsible for their protection have the right to enforce this ; and it maintains that a “pactum” of this kind was part of the constitution, not only of the empire and other elective monarchies, but also of the great hereditary monarchies like France, Spain, and England, and was embodied in the coronation oaths. Hooker, with characteristic breadth of judgment, observes that the nature of this “compact” is to be determined not by a search for “the articles only of compact at the first beginning, which for the most part are either clean worn out of knowledge, or else known unto very few, but whatsoever hath been after in free and voluntary manner condescended unto, whether by express consent, whereof positive laws are witnesses, or else by silent allowance famously notified through custom reaching beyond the memory of man.”

It is the whole body of the public laws of the community which constitutes the terms of the contract. Althusius, like the author of the ‘Vindiciae’, maintains that the contract between the “Chief

Magistrate" and the community was a part of the constitutional system in almost all modern kingdoms, whether elective or hereditary, and he relates it to the form of the mutual oaths of kings and subjects; and, in still more general terms, he declares that no kingdom, no commonwealth was ever created without a mutual contract between the prince and his future subjects, which was to be religiously kept by both, and that if this were violated the authority founded upon it would fall to the ground.

Finally, we must also recognise that in the political structure of the Middle Ages there was always implicit, and sometimes expressed, the principle that the best form of government was that in which all the members of the political community had their share. St Thomas Aquinas said that in his judgment, in a good form of government it was in the first place important that all should have some share in authority; this tends to the peace of the community, for all men will love and maintain such an order; and he found this in a monarchy in which one should rule "secundum virtutem", and under him others, also ruling "secundum virtutem", and yet the authority would belong to all, for they may be elected from all, and are elected by all. Such a constitution, he continues, combines the character of a monarchy, an aristocracy, and a democracy. St Thomas claimed to derive this from Aristotle, and he found an example of it in the constitution established by Moses for the people of Israel.

St Thomas then clearly thought that the mixed constitution, in which the authority of the whole community—king, nobles, and people—was represented, would be the best form of government. How far he was conscious that this corresponded with the development of the representative system which was taking place in his time we cannot say, hut he thought of the mixed government as superior to all the simple forms, and he found the essence of this in the elective and representative method.

We have often said that it was the supremacy of justice and law which was the fundamental principle of Mediaeval Political Theory, but we must now put beside this the principle that, subject to the final authority of justice and the divine and natural laws, it was the community which was supreme— the community which included the king, the nobles, and the people. This was the principle out of which the representative system grew.

It is a rather curious incompetence of judgment which sees in the words of Edward I's summons of the bishops to the Parliament of 1295, "quod omnes tangit, ab omnibus approbetur", nothing but the rhetorical use of an incidental phrase in the "Corpus Juris Civilis". What it meant to those who drafted the summons is quite immaterial; the fact is that it expressed the development of the political self-consciousness of the community. Implicit indeed it had always been in the authority which lay behind the custom and law of the community, but in the later centuries of the Middle Ages it found for itself a new form in the representative system.

The Huguenot pamphlets of the sixteenth century may express this conception of the supremacy of the community in extravagant terms, but they were saying nothing more than Mariana said in Spain and than Hooker said in England : "In kingdoms, therefore, of this quality the highest governor hath indeed universal dominion, but with dependence upon that whole entire body, over the several parts of which he hath dominion; so that it standeth for an axiom in this ease. The king is 'maior singulis, universis minor'."

It was the supreme power of the community which, in the judgment of the most important political writers of the sixteenth century, found its embodiment in the Diet of the Empire, in the Cortes of Spain, in the States General of France, and in the Parliament of England.

It is in the Parliament, says Sir Thomas Smith, that the whole absolute power resides, for there are present the king, the nobles, the commons, and the clergy are represented by the bishops. The Huguenot writers demanded the restoration of the Estates to that place which they had held till some of the French kings had desired to rule absolutely and uncontrolled, and Boucher, representing the Catholic League, said that the "Maiestas" was embodied in the Estates. Mariana in Spain

contemptuously repudiated the contention that the authority of the king was equal to that of the Cortes. Hooker says, “The Parliament of England, together with the convocation annexed thereunto, is that whereupon the very essence of all government within this realm doth depend; it is even the body of the whole realm; it consisteth of the king and of all that within this realm are subject to him; for they are all there present, either in person or by such as they voluntarily have derived their very personal right unto”. And Althusius expresses the principle of the authority of these representative assemblies when he says that it is by such Councils that the liberty of the people is preserved, and that the “public administrators” are taught that the people—that is, the universal community—is their lord. The representative system was then the form of the principle of the supremacy of the community, of the whole community, including the king, the nobles, and the commons.

We are not here dealing with the developments of the seventeenth and eighteenth centuries, with the conditions or circumstances which brought about the conflicts between the monarchy and the community, whether in England or in the continental countries. We are in this work concerned with the development of the principles of political civilisation in the Middle Ages, and we think that it is true to say that in those wo can see not only principles of profound and permanent value, but also that the moral and political genius of the Western nations was making its way through immense difficulties, and through what often seems an intolerable confusion, to rational and intelligible ends, to some kind of reconciliation of the principles of liberty and authority.

THE END