specific functions of clergy and laity as divers members of the Church are distinguished, and at the same time it is remarked that in the mystical body there is a much greater call than there is in the natural body for one member to discharge in cases of necessity the functions assigned to another by positive law.

The Idea of Membership.

87. Joh. Saresb.; see above, Note 75. Thom. Aq. De reg. princ. I. c. 12; Summa Theol. II. 2, q. 58, a. 5, III. q. 8, a. 1, and above, Note 81. Aegid. Rom.; above Note 83. Eng. Volk. III. c. 16. Alv. Pel. I. a. 63: ecclesia est...unum totum ex multis partibus constitutum et sicut unum corpus ex multis membris compactum: in details he follows the learning of S. Thomas. Baldus, prooem. Feud. nr. 32: imperium est in similitudine corporis humani, a quo, si abscinderetur auricula, non esset corpus perfectum sed monstruosum. Nic. Cus.; above, Note 79. Aen. Sylv. c. 18. Ant. Ros. I. c. 67 and 69.

Likeness and Unlikeness among Members.

88. Comp. the definition of *ordo* (obtained from Aug. De civ. Dei, l. 19, c. 13) in Hug. Floriac. I. c. 1 and 12, p. 45 and Ptol. Luc. IV. 9: parium et disparium rerum sua cuique loca tribuens dispositio. Then Thom. Aq. (Summa Theol. I. q. 96, a. 3) starting from this, concludes that, even had there been no Fall of Man, inequality among men would have developed itself 'ex natura absque defectu naturae'; for 'quae a Deo sunt, ordinata sunt' and 'ordo autem maxime videtur in disparitate consistere.' See also Summa adversus gentiles, III. c. 81.—Then all Estates, groups, professional gilds and the like appear as *partes civitatis* to writers who rely on Aristotle: especially to Marsilius (II. c. 5), who distinguishes three *partes vel officia civitatis* (in a strict sense), namely, the military, priestly and judicial orders, and three *partes vel officia civitatis* (in a wider sense) namely, agriculture, handicraft and trade. A similar idea is applied to the Church; e.g. by Aquinas: see above Note 81. Alv. Pel. I. a. 63 G: the triple distinction in the Church (despite its unity) according to *status, officia et gradus* is likened to the triple distinction among carnal members according to their natures, their tasks and their beauties. See also Randuf, De mod. un. c. 2 (membra inaequaliter composita), 7 and 17.

Mediate Articulation.

89. Alv. Pel. I. a. 36 C: there are indivisible members, whose parts would not be members; e.g. in the Church the faithful man; and there are divisible members, whose parts in their turn are members, as e.g. the 'particular churches' and ecclesiastical colleges. Antonius de Butrio, c. 4, X. 1, 6, nr. 14—5: membra de membro. Marsil. Patav. II. 24: in the *regimen civile*, as well as in the *regimen ecclesiasticum*, the analogy of the *animal* requires a manifold and

graduated articulation; otherwise there would be monstrosity; finger must be directly joined, not to head but to hand; then hand to arm, arm to shoulder, shoulder to neck, neck to head. Nic. Cus. II. c. 27. [Elsewhere, D. G. R. III. 251, our author gives other illustrations from Innocent IV., Johannes Andreae and others.]

Papal Absolutism and the Mediate Articulation of the Church.

90. Already S. Bernard (De consid. III. p. 82) exhorts the Pope to pay regard to the *potestates mediocres et inferiores*; otherwise he will be putting the thumb above the hand and alongside the arm and so will create a monster: 'tale est si in Christi corpore membra aliter locas quam disposuit ipse.' Marsilius (II. c. 24) employs the same picture when complaining that the Popes have impaired the form of Christ's mystical body by disturbing its organic articulation, while that body's substance is impaired by the corruption of the clergy. The champions of the conciliar party have recourse to the same analogy for proof that the mystical body will perish if all power be concentrated in its highest member. See Randuf, c. 17 (183); Greg. Heimb. De pot. eccl. II. p. 1615 ff.

Organization and Interdependence.

91. Ptol. Luc. II. 26, where, besides the organization of the natural body, that of the heavenly spheres is adduced. Marsil. Pat. I. c. 2 and 5: see above, p. 26. Also Thom. Aquin. Summa cont. gentil. III. c. 76—83. Alv. Pelag. I. a. 63 c (*ordinatio*). Eng. Volk. III. c. 21: in ordinatione debita et proportione ad invicem...partium. Nicol. Cus. III. c. 1: omnia quae a Deo sunt, ordinata necessario sunt. Petr. de Andlo, I. c. 3.

The Idea of Function.

92. Joh. Saresb. l. c. Thom. Aq. Summa Theol. I. q. 81, a. 1; Lect. 2 ad Rom. 12: in corpore humano quaedam sunt actiones quae solum principalibus membris conveniunt, et quaedam etiam soli capiti; sed in ecclesia vicem capitis tenet papa et vicem principalium membrorum praelati maiores ut episcopi; ergo etc.—Ptol. Luc. II. c. 23: debet...quilibet in suo gradu debitam habere dispositionem et operationem. Marsil. Pat. I. c. 2 (above, p. 26) and c. 8: upon the formation and separation of the parts of the State, there must follow the allotment and regulation of their *officia*, 'ad instar naturae animalis.' Alv. Pel. I. a. 63 G: diversi actus. Ockham; above, Note 86.

The Idea of Organ.

93. The difference between an organ and a mere limb is suggested by Eng. Volk. III. c. 16: *pars civitatis* and *pars regni*. Comp. also Marsil. Patav. I. c. 5; above, Note 88.

The Governing Part.

94. Thom. Aq. Summa Theol. I. q. 96, a. 4: quandoque multa ordinantur ad unum, semper invenitur unum ut principale et dirigens; Summa cont. gentil. IV. q. 76. Ptol. Luc. IV. c. 23: there must be a *summum movens* controlling all movements of the limbs;

with this is compatible 'in qualibet parte corporis operatio propria primis motibus correspondens et in alterutrum subministrans.' Similarly Dante. Comp. Aegid. Col. III. 2, c. 34: the king as soul of the body. Marsil. Pat. I. c. 17: in the State, as in the *animal bene compositum*, there must be a *primum principium et movens*; otherwise the organism must needs 'aut in contraria ferri aut omnimodo quiescere':—this is the *pars principans*. Joh. Par. c. 1: quemadmodum corpus hominis et cuiuslibet animalis deflueret, nisi esset aliqua vis regitiva communis in corpore ad omnium membrorum commune bonum intendens, so every multitude of men needs a unifying and governing force. In closely similar words, Petr. de Andlo, I. c. 3, who then adds that among the *summi moventes* there must be *unus supremus* (the Kaiser), in relation to whom the members that are moved by the other *moventes* are *membra de membro*.

95. See above, Notes 67 ff.

Connexion with a Rightful Head.

96. This argument is often adduced on the papal side to show that the Church cannot exist without the Pope, and that no one who is not connected with the Pope can belong to the Church. Comp. e.g. Alv. Pel. I. a. 7, 13, 24, 28, 36, 38; Card. Alex. D. 15 summa.

Need for a single Head denied.

97. It is urged that there may be unity although there are many rulers; that the *principatus* as an institution is distinguishable from its occupant for the time being; that the mystical body may be headless for a time: in particular the Church, which always retains its celestial Head. Thus, Ockham, Dial. I. 5, c. 13 and 24, maintains the possibility of the continued existence of the Church after severance from the *ecclesia Romana*; for, he expressly says, though the similitude between the mystical body of Christ and the natural body of man holds good at many points, still there are points at which it fails. To the same effect Petr. Alliac. in Gerson, Opera, I. 692 and II. 112; Gerson, De aufer. pap. II. 209 ff.; Randuf, De mod. un. c. 2, ib. 163; Nic. Cus. I. c. 14 and 17.

The State a work of Human Reason.

98. Comp. Thom. Aq. Comment. ad Polit. p. 366 (ratio...constituens civitatem). He teaches that the constitution of the Church is the work of God (Summa adv. gentil. IV. c. 76), but regards the creation of the State as a task for the kingly office, which here imitates the creation of the World by God and of the Body by the Soul (De reg. princ. I. c. 13). Ptol. Luc. IV. c. 23. Aegid. Rom. De reg. princ. III. 1, c. 1, and III. 2, c. 32. Eng. Volk. De Ortu, c. 1 (ratio imitata naturam). Aen. Sylv. c. 1, 2, 4.—More of this below in Note 303.

Marsilius on the

99. Mars. Pat. I. c. 15. In the natural organism Nature, the *causa movens*, first makes the heart which is the first and indispensable

portion, and bestows on it heat as its proper force, whereby the heart then, as the proper organ for this purpose, constitutes, separates, differentiates and connects all the other parts, and afterwards maintains, protects and repairs them. On the other hand, the creative principle of the State is the rational 'anima universitatis vel eius valentioris partis.' This, following the model set by Nature, generates a *pars prima, perfectior et nobilior*, answering to the heart, and being the Princeship (*principatus*). On this the said *anima* bestows an active power, analogous to vital heat, namely, the *auctoritas iudicandi, praecipiendi et exequendi.* Thus the Princeship is empowered and authorized to institute the other parts of the State. But, just as the heart can only work in the form and power that Nature has given to it, so the Princeship has received in the Law (*lex*) a regulator of its proceedings. In accordance with the measure set by the Law, the Princeship must establish the different parts of the State, equip them with their *officia*, reward and punish them, conserve them, promote their co-operation, and prevent disturbance among them. Even when the State's life is started, the Ruling power, like the heart, can never stand still for an instant without peril. Origin of the State.

100. Thom. Aq. Summa Theol. II. 1, q. 91, a. 1: tota communitas universi gubernatur ratione divina; and therefore the *ipsa ratio gubernationis rerum*, which exists in God *sicut in principe universitatis*, has the nature of a *lex*, and indeed of a *lex aeterna.* Comp. ib. I. q. 103 (although according to a. 6 'Deus gubernat quaedam mediantibus aliis') and II. 1, q. 93, a. 3; Summa cont. gentil. III. q. 76—7. Dante, I. c. 7, and III. c. 16. And see above, Notes 7, 8, 11, 44, 67, 71. The Divine Monarchy.

101. See above, Note 15. John of Salisbury (Policr. IV. c. 1, pp. 208—9, and VI. c. 25, pp. 391—5) is especially earnest in the maintenance of the divine origin of temporal power. Ptol. Luc. (III. c. 1—8) gives elaborate proof of the proposition 'Omne dominium est a Deo': it is so *ratione entis* (for the *ens primum* is the *principium*); and it is so *ratione finis* (for all the purposes of government must culminate in God, who is *ultimus finis*). Even *dominium tyrannicum* is of God, who suffers it to exist as a method of chastisement, but Himself will not leave tyrants unpunished. Then Alv. Pel. (I. a. 8 and 41 C—K) repeats this, but expressly says that it does not disprove the sinful origin of the State. He (I. a. 56 B) distinguishes: *materialiter et inchoative* the temporal power proceeds from natural instinct and therefore from God: *perfecte et formaliter* it derives its *esse* from the spiritual power 'quae a Deo speciali modo derivatur.' Divine Origin of the State.

102. See above, Notes 38, 40, 44, and, as to the Roman Empire, Notes 53—55.

Immediately Divine Origin of the State.

103. Alv. Pel. I. a. 12, 13 U and X, 18. Aug. Triumph. I. q. 1, a. 1; a. 5: the papal power comes from God *specialius* than any other power, God being immediately active in election, government and protection; still He does not immediately generate each particular pope (as He generated Adam, Eve and Christ), but this happens *mediante homine*, as in the generation of other men; but the electoral college only has the *designatio personae*, for *auctoritas et officium*, being *quid formale in papatu*, come from Christ (q. 4, a. 3) Petr. de Andlo, I. c. 2.

The Pope as Christ's Vicar.

The Emperor as Christ's Vicar.

104. See above, Note 40. The doctrine of the Karolingian time makes the Emperor *vicarius Dei*. Then during the Strife over the Investitures this is for the first time attacked; and then defended, e.g. by P. Crassus, p. 44, by Wenrich (Martene, Thes. Nov. Anecd. I. p. 220), and by the Kaisers and writers of the Hohenstaufen age. Comp. Dante, III. c. 16: solus eligit Deus, solus ipse confirmat; the Electors are merely *denuntiatores divinae providentiae* (though sometimes, being blinded by cupidity, they fail to perceive the will of God); sic ergo patet quod auctoritas temporalis monarchiae sine ullo medio in ipsum de fonte universalis auctoritatis descendit; qui quidem fons in arce suae simplicitatis unitus in multiplices alveos influit ex abundantia bonitatis. Bartol. prooem. D. nr. 14: Deus...causa efficiens. Ant. Ros. I. c. 47—8 and 56: the Electors, the Pope (in so far as he acts at all) and the Folk, are only *organa Dei*; so the Empire is *immediate a Deo.* Gerson, IV. p. 586.—Comp. Ockham, Octo q. II. c. 1—5, and IV. c. 8—9, and Dial. III. tr. 2, l. 1, c. 18 ff., where three shades of this doctrine are distinguished, for we may suppose (1) a direct gift by God, or (2) a gift *ministerio creaturae*, i.e. by the agency of the Electors (whose action may be likened to that of the priest in baptism, or that of a patron in the transfer of an office), or (3) a difference between the purely human heathen Empire and the modern Empire legitimated by Christ.

Mediation of the Church between the State and God.

105. Joh. Saresb. V. c. 6: mediante sacerdotio. Aug. Triumph. I. q. 1, a. 1, II. q. 35, a. 1, q. 36, a. 4 (mediante papa), q. 45, a. 1. Alv. Pel. I. a. 37 D and DD, 41, 56, 59 E (a Deo...mediante institutione humana). Petr. de Andlo, II. c. 9: imperium a Deo...per subalternam emanationem. So in the Quaestio in utramque (a. 5) and the Somnium Virid. (I. c. 88, 180—1) the only dispute is whether kings are immediately or but mediately *ministri Dei.* See above, Note 22.

106. See Dante, l. c. Pet. de Andlo, I. c. 2: regimen mundi a summo rerum principe Deo eiusque divina dependet voluntate; He institutes the pope as Vicar; from the pope proceeds the *imperialis auctoritas*; and from it again 'cetera regna, ducatus, principatus et dominia mundi subalterna quadam emanatione defluxerunt.' Also II. c. 9. Tengler, Laienspiegel, p. 14, 17, 56. Delegation by God of all Human Power.

107. Thom. Aq. De reg. princ. I. c. 2: manifestum est quod unitatem magis efficere potest quod est per se unum quam plures; and c. 5; Summa Theol. II. 1, q. 105, a. 1; II. 2, q. 10, a. 11; Summa cont. gentil. IV. 76: optimum autem regimen multitudinis est ut regatur per unum; quod patet ex fine regiminis, qui est pax: pax enim et unitas subditorum est finis regentis; unitatis autem congruentior causa est unus quam multi; Comm. ad Polit. p. 489 and 507; Aegid. Rom. De reg. princ. III. 2, c. 3; Dante, I. c. 5—9 and the practical arguments in c. 10—14; Joh. Paris. c. 1; Alv. Pel. I. a. 40 D and 62 C; Ockham, Octo qu. III. c. 1 and 3; Dial. III. tr. 1, l. 2, c. 1, 6, 8, 9—11; Somn. Virid. I. c. 187; Gerson, IV. 585 (ad totius gubernationis exemplum, quae fit per unum Deum supremum); Nicol. Cus. III. praef.; Laelius in Gold. II. p. 1595 ff.; Anton. Ros. II. c. 5—7; Petrus de Andlo, I. c. 8; Patric. Sen. De regno, I. 1 and 13, p. 59 (unitas per imitationem ficta). With some divergence and greater independence, Eng. Volk. I. c. 11—12: now-a-days only a monarchy is able to unite wide territories and great masses of men. Monarchy and Unity.

108. Dante, I. c. 15. Similarly Pet. de Andlo, I. c. 3: social order depends on a sub-et-super-ordination of wills, as natural order upon a sub-et-super-ordination of natural forces. Singleness of Will in a Monarchy.

109. Thom. Aq. Summa cont. gentil. IV. q. 76: the *regimen ecclesiae*, being of divine institution, must be *optime ordinatum*, and therefore must be such *ut unus toti ecclesiae praesit*. Alv. Pel. I. a. 40 D and 54. Joh. Par. c. 2. Ockham, Dial. III. tr. 1, l. 2, c. 1, 3—11, 18—19, 29; also I. 5, c. 20—21. Somn. Virid. II. c. 168—179. Ant. Ros. II. c. 1—7. The Church a Monarchy.

110. Above all, Dante, lib. I.; in c. 6, it is argued that the *ordo totalis* must be preferable to any *ordo partialis*. Eng. Volk. De ortu, c. 14—15. Ockham, Octo q. III. c. 1 and 3; Dial. III. tr. 2, l. 1, c. 1 and 9. Aen. Sylv. c. 8. Ant. Ros. II. c. 6. Petr. de Andlo, I. c. 8. Divine institution of Temporal Monarchy.

111. Above, Note 107. Thom. Aq. l. c.; it is so in every *populus unius ecclesiae*. Compare his statements (in lib. IV. Sent. d. 17, q. 3, a. 3, sol. 5, ad 5) as to the relation of pope, bishop, and parson as the God-willed monarchical heads 'super eandem plebem immediate Monarchy the Normal Form of Government.

constituti.' Dante, I. c. 6. Petr. de Andlo, I. c. 8. In particular, Ant. Ros. II. c. 6 (above, Note 64) as to the monarchical structure of the five *corpora mystica*.

References to Republics.

112. Thom. Aq. De reg. princ. I. c. 4. Eng. Volk. De reg. princ. I. c. 12—16. Petr. de Andlo, I. c. 8. Ant. Ros. II. c. 4 (on the other hand, c. 7, pp. 314—9).

Comparison of Forms of Government.

113. Ptol. Luc. II. c. 8, and IV. c. 8, goes so far as to hold that in the *status integer* of human nature the *regimen politicum* would be preferable; and even in the corrupt state of human nature the *dispositio gentis* may decide; thus e.g. the courage of the Italian race leaves no choice but republic or tyranny. Eng. Volk. I. c. 16. Ockham, Octo q. III. c. 3 and 7 (variances in accord with *congruentia temporum*); also Dial. III. tr. 2, l. 1, c. 5.

An Aristocratic World-State.

114. Ockham, Octo q. III. c. 3, 6, 8, and Dial. III. tr. 2, l. 1, c. 1, 4, 9, 13: it is possible that the form of government best suited to a part may not be the same as that best suited to the whole.

Necessity of Monarchy in the Church doubted.

115. Ockham, Dial. III. tr. 1, l. 2, c. 2, 12—4, 16—7, 25, 30. Even with an aristocratic constitution, unity is possible: pluralitas pontificum non scindit unitatem ecclesiae: what is good for a *pars* and *parvum* may not be always good for a *totum* and *magnum*. The divine institution of the primacy is expressly disputed by Marsilius, II. c. 15—22, III. concl. 32 and 41, and, among the Conciliar pamphleteers, by Randuf (De mod. un. eccl. c. 5) and others, who are opposed by d'Ailly, Gerson, and Breviscoxa (Gers. Op. I. p. 662, II. p. 88, and I. p. 872).

Preference of the Republican Form.

116. Patricius of Sienna in one place (De inst. reip. I. 1) expressly declares for a Republic; elsewhere (De regno I. 1) he gives a preference to Monarchy, but would pay heed to differences between various nations.

'Unitas principatus' in a Republic.

117. Mars. Pat. I. c. 17 and III. concl. 11 (even for composite States). Ockham, Dial. III. tr. 2, l. 3, c. 17 and 22.

Republican Assembly as a Collective Man.

118. Aegid. Rom. III. 2, c. 3: plures homines principantes quasi constituunt unum hominem multorum oculorum et multarum manuum: but the good Monarch might become such a collective man by the association of wise councillors; and at any rate he is more *unus* than the Many can be 'in quantum tenent locum unius.' —Mars. Pat. I. c. 17: 'quoad officium principatus' the *plures* must form a unit, so that every act of government appears as 'una actio ex communi decreto atque consensu eorum aut valentioris partis secundum statutas leges in his.'—So Ockham, Dial. III. tr. 2, l. 3, c. 17, with the addition that 'plures gerunt vicem unius et locum unius tenent.'—Patric. Sen. De inst. reip. I. 1 and III. 3: the ruling

assembly constitutes 'quasi unum hominem' or 'quasi unum corpus' with manifold members and faculties; I. 5: 'multitudo universa potestatem habet collecta in unum ubi de republica sit agendum, dimissi autem singuli rem suam agunt.'

The Monarch above and outside the Group.

119. Thus Dante, Mon. I. c. 6, sees in the Ruler 'aliquod unum quod non est pars.' So again Torquemada seeks to refute the whole Conciliar Theory by asserting that the very idea of a Monarch necessarily places him above the Community, like God above the world and the shepherd above the sheep: Summa de pot. pap. c. 26, 48, 83, 84; De conc. c. 29, 30, 44.

The Monarch represents Divinity.

120. Joh. Saresb. Policr. IV. c. 1: est...princeps potestas publica et in terris quaedam divinae maiestatis imago; v. c. 25, p. 391—5. Thom. Aq. De reg. I. c. 12—14: the erection of the State, being like unto God's creation of the world, and the government of the State, being like unto God's government of the world, are the affairs of the Ruler.

Apotheosis of the Pope.

121. Gl. on c. 17 in Sexto 1, 6, v. *homini*: in hac parte non est homo sed Dei vicarius. Gl. on prooem. Cl. v. *papa*: nec Deus nec homo. Petr. Blesensis, ep. 141. Aug. Triumph. I. q. 6, a. 1—3 (identity of the Pope's sentence with God's, and therefore no appeal from the one to the other); q. 8, a. 1—3, q. 9, q. 18. Alv. Pel. I. a. 13 (non homo simpliciter, sed Deus, i.e. Dei vicarius), 37 y (Deus quodammodo, quia vicarius), 12 (unum est consistorium et tribunal Christi et Papae in terris). Bald. on l. ult. C. 7, 50. Ludov. Rom. cons. 345, nr. 6—8. Zenzelinus on c. 4, Extrav. Joh. XXII. nr. 14. Bertach. v. *papa*.

Apotheosis of the Emperor.

122. Already under the Hohenstaufen a formal apotheosis of the Emperor may be often found. See, e.g. Pet. de Vin. Ep. II. c. 7, and III. c. 44. Bald. I. cons. 228, nr. 7: imperator est dominus totius mundi et Deus in terra; cons. 373, nr. 2: princeps est Deus in terris. Joh. de Platea, l. 2, C. 11, 9, nr. 1: sicut Deus adoratur in coelis, ita princeps adoratur in terris; but only *improprie*. Theod. a Niem, p. 786: to the Emperor is due 'devotio tanquam praesenti et corporali Deo.' Aen. Sylv. c. 23: dominus mundi, Dei vicem in temporalibus gerens. Jason, II. cons. 177, nr. 11: princeps mundi et corporalis mundi Deus.

Kingship is Office.

123. Thus already in the Councils of Paris and Worms of 829 (M. G. L. I. p. 346 ff.) we find an exposition of the doctrine that the kingship is a 'ministerium a Deo commissum,' that the *Rex* is so called *a recte agendo*, that, ceasing to rule well, he becomes a tyrant. Similarly in Concil. Aquisgran. II. ann. 836 and Concil. Mogunt. ann. 888, c. 2 in Mansi XIV. p. 671 and XVIII. 62; cf.

Hefele IV. p. 91 and 546. Hincmar, Op. I. 693. Manegold v. Lautenbach, l.c., expressly uses the phrase *vocabulum officii.* John of Salisbury, IV. c. 1—3 and 5, says 'minister populi' and 'publicae utilitatis minister.' Hugh of Fleury, I. c. 4, 6, 7, 'ministerium, officium regis.' Thom. Aq. De reg. prin. I. c. 14. Alv. Pel. I. a. 62, I. Ptol. Luc. II. 5—16. Dante, I. c. 12: princes are 'respectu viae domini, respectu termini ministri aliorum,' and in this respect the Emperor is 'minister omnium.' Eng. Volk. tr. II.—VII. Gerson, IV. p. 597. Ant. Ros. I. c. 64: officium publicum; like a tutor. Pet. de Andl. I. c. 3, II. c. 16—18.

Princes exist for the Common Weal.

124. In particular, Joh. Saresb. IV. c. 1—3, and 5. Thom. Aquin. De reg. Iud. q. 6: Principes terrarum sunt a Deo instituti, non quidem ut propria lucra quaerant, sed ut communem utilitatem procurent; Comm. ad Polit. p. 586. Ptol. Luc., III. c. 11: regnum non est propter regem, sed rex propter regnum. Eng. Volk. De reg. princ. V. c. 9: sicut tutela pupillorum, ita et procuratio reipublicae inventa est ad utilitatem eorum qui commissi sunt, et non eorum qui commissionem susceperunt; II. c. 18, IV. c. 33—4. Dante, I. c. 12: non enim cives propter consules nec gens propter regem, sed e converso consules propter cives et rex propter gentem. Ockham, Octo q. III. c. 4, and I. c. 6. Paris de Puteo, De synd. p. 40, nr. 21. Petrus de Andlo, I. c. 3.

Purpose of the Ruler.

125. Councils of Paris and Worms, an. 829: to rule the Folk with righteousness and equity, to preserve peace and unity. Petr. Bles. Epist. 184, p. 476: ut recte definiant et decidant examine quod ad eos pervenerit quaestionum. Dante, Mon. I. c. 12. Thom. Aq. Comm. ad Polit., p. 592, 595 ff. Eng. Volk. I. c. 10. Gerson, III. p. 1474. Ockham, Octo q. III. c. 5, declares a *plenitudo potestatis* incompatible with the best Form of Government, which should promote the liberty and exclude the slavery of the subjects; and (VIII. c. 4) he opines that the Kaiser has smaller rights than other princes just because it behoves the Empire to have the best of constitutions.

Decline towards Tyranny.

126. Councils of Paris and Worms, an. 829. Council of Mainz, an. 888, c. 2. Nicolaus I. Epist. 4 ad Advent. Metens.: si iure principantur; alioquin potius tyranni credendi sunt quam reges habendi. Petr. Bles. l. c.: Principatus nomen amittere promeretur qui a iusto iudicii declinat tramite. Hugo Flor. I. c. 7—8. Joh. Sar. VIII. c. 17—24. Thom. Aq. De reg. princ. I. c. 3—11. Ptol. Luc. III. c. 11. Vinc. Bellov. VII. c. 8. Eng. Volk. I. c. 6 and 18. Alv. Pel. I. a. 62 D—H. Ockham, Dial. III. tr. 1, l. 2, c. 6 ff.; Octo q. III. c. 14. Gerson, l.c. Paris de Puteo, l. c. pp. 8—51.

127. This principle was never doubted. See e.g. Pet. Bles. ep. 131, p. 388. Thom. Aq. Summa Theol. II. 1, q. 96, a. 4 (quia ad hoc ordo potestatis divinitus concessus se non extendit) and II. 2, q. 104, a. 5. To the same effect the 'Summists' [i.e. the compilers of Summae Confessorum, manuals for the use of confessors], e.g. Joh. Friburgensis, Sum. Conf. lib. 2, tit. 5, q. 204. God rather than Man is to be obeyed.

128. Thus Hugh of Fleury, who therefore prescribes that tyrants be tolerated and prayed for, but that commands which contravene the law of God be disobeyed, and that punishment and death be borne in the martyr's spirit; I. c. 4, p. 17—22, c. 7, p. 31, c. 12, p. 44, II. p. 66.—Baldus also on l. 5, Dig. 1, 1, nr. 6—7, declares against any invasion into the rights of Rulers. Passive Resistance.

129. Hug. de S. Victore, Quaest. in epist. Paul. q. 300 (Migne, vol. 175, p. 505): Reges et principes, quibus obediendum est in omnibus quae ad potestatem pertinent. Thom. Aq. Sum. Theol. II. 2, q. 104, a. 5: only in special circumstances or for the avoidance of scandal and danger, need a Christian obey the command of an usurper or even the unrighteous command of the legitimate ruler. So also Vincent Bellov. x. c. 87 and Joh. Friburg l. c. (Note 127). Ockham, Dial. III. tr. 2, l. 2, c. 20: all men owe to the Emperor immediate but conditional obedience: to wit, 'in licitis' and 'in his quae spectant ad regimen populi temporalis,' so that, e.g. a prohibition of wine-drinking would not be binding. And compare c. 26 and 28. Nic. Cus. III. c. 5. Decius, Cons. 72, nr. 2: superiori non est obediendum quando egreditur fines sui officii. Nullity of Commands that are ultra vires statuentis.

130. Already Manegold of Lautenbach (see Sitzungsber. d. bair. Akad. an. 1868, II. 325) teaches that the king who has become a tyrant should be expelled like an unfaithful shepherd. Similar revolutionary doctrines were frequently maintained by the papalistic party against the wielders of State-power. John of Salisbury emphatically recommends the slaughter of a tyrant 'qui violenta dominatione populum oppremit,' for a tyranny is nothing else than an abuse of power granted by God to man. He vouches biblical and classical examples, and rejects only the use of poison, breach of trust, and breach of oath. See Policr. III. c. 15, IV. c. 1, VI. c. 24—8, VIII. c. 17—20. Thomas of Aquino is against tyrannicide, but in favour of an active resistance against a *regimen tyrannicum*, for such a *regimen* is *non iustum*, and to abolish it is no *seditio*, unless indeed the measures that are taken be such that they will do more harm than would be done by tolerating the tyranny: Sum. Theol. II. 2, q. 42, a. 2, ad 3, q. 69, a. 4; De reg. princ. I. c. 6; Comm. ad Polit. p. 553. To the same effect, Aegid. Rom. De reg. princ. I. c. 6. Active Resistance and Tyrannicide.

There is an elaborated doctrine of active resistance in Ockham, Dial. III. tr. 2, l. 2, c. 26 and 28 (it is *ius gentium*). Somn. Virid. I. c. 141. Henr. de Langenstein, Cons. pacis, c. 15. Gerson, IV. 600 and 624. Decius, Cons. 690, nr. 13. Bened. Capra, Reg. 10, nr. 42: the execution of a tyrannical measure is an act of violence which may be violently resisted. Henricus de Pyro, Inst. I. 2, § 1: iudici et ministris principum licet resistere de facto quando ipsi sine iure procedunt.—As to the thesis in which Jean Petit on 8 March, 1408 defended tyrannicide (Gerson, Op. v. pp. 15—42), the opposition of Gerson (Op. IV. 657—80) and the qualified condemnation of the thesis by the Council of Constance (sess. XV. of 6 July, 1415), see Schwab, Gerson, pp. 609—46. Wyclif (art. damn. 15 and 17) and Hus (art. 30) held that a Ruler who is in mortal sin is no true ruler.

The Pope's Plenitude of Power.

131. The first to elaborate in idea and in phrase a 'plenitudo ecclesiasticae potestatis' vested by God in the Pope, whence all other ecclesiastical power has flowed and in which all other ecclesiastical power is still comprised, was Innocent III., although substantially the same doctrine had been taught by Gregory VII., lib. I., ep. 55[a], ann. 1075. For Innocent III. see c. 13, X. 4, 17; c. 23, X. 5, 33; lib. I, ep. 127, p. 116, lib. 7, ep. 1 and 405, pp. 279 and 405, lib. 9, ep. 82, 83 and 130, pp. 898, 901 and 947. Compare Innocent IV. on c. 1, X. 1, 7; c. 10, X. 2, 2; c. 19, X. 2, 27, nr. 6. Durantis, Spec. I. 1 de legato § 6, nr. 1—58. Thom. Aquin. lib. 4, Sent. d. 20, q. 4, a. 3, ad 3, quaestiunc. 4, sol. 3: Papa habet plenitudinem potestatis pontificalis quasi rex in regno, episcopi vero assumuntur in partem sollicitudinis quasi iudices singulis civitatibus praepositi. See also lib. 2, dist. et quest. ult.; Summa Theol. II. 2, q. 1, a. 10; Opusc. cont. error. Graec. II. c. 34 and 38. Aegid. Rom. De pot. eccl. III. c. 9—12: tanta potestatis plenitudo, quod eius posse est sine pondere, numero et mensura. Petr. Palud. in Raynald, a. 1328, nr. 30. The doctrine reaches the utmost exaltation in Augustinus Triumphus, I. q. 1, 8, 10—34, II. q. 48—75, but goes yet further in Alvarius Pelagius, I. a. 5—7, 11—12, 52—58: potestas sine numero, pondere et mensura; it is exceptionless, all-embracing, the basis of all power, sovereign, boundless and always immediate. Durantis, De modo eccl. conc. P. III. Turrecremata, Summa de eccl. II. c. 54, 65. Petrus a Monte, De primatu, f. 144 ff.

Limits to Papal Sovereignty.

132. 'Lex divina et lex naturalis, articuli fidei et sacramenta novae legis' were always recognized as limits. See Alex. III. in c. 4, X. 5, 19 and Innocent III. in c. 13, X. 2, 13. Joh. Sar. Ep. 198, p. 218. Thom. Aq. Summa Theol. II. 1, q. 97, a. 4, ad 3; Quodlib. IV. a. 13.

Aug. Triumph. I. q. 22, a. 1; Alv. Pel. I. a. 7 and 46. Comp. Ockham, Dial. III. tr. 1, l. 1, c. 1, and tr. 2, l. 1, c. 23.

133. Ockham makes an elaborate attack on the doctrine which teaches that, at any rate in spiritual affairs, the Pope has a plenitude of power in the sight of God and man. This (he argues) would be incompatible with 'evangelical liberty' for it would establish an 'intolerable servitude.' In all, or at any rate all normal, cases the Pope's power is *potestas limitata*. Ockham, Octo q. I. c. 6, III. c. 4—5, Dial. III. tr. 1, l. 1, c. 2—15, tr. 2, l. 1, c. 23. Compare Joh. Paris. c. 3 and 6; Marsil. Patav. II. c. 22—30; Somn. Virid. I. c. 156—161; Randuf, De mod. un. c. 5, 10, 23, 28; Greg. Heimb. II. p. 1604. Limited Monarchy of the Pope.

134. Ockham, Octo q. I. c. 15 and III. c. 9: obedience is due only 'in his quae necessaria sunt congregationi fidelium, salvis iuribus et libertatibus aliorum'; if the Pope transcends his sphere of competence, every one, be he prelate, emperor, king, prince or simple layman, is entitled and bound to resist, regard being had to time, place and opportunity.—During the Great Schism the doctrine of a right of resistance and rejection given by Necessity became always commoner. See Matth. de Cracovia, Pierre du Mont de St Michel and other Gallicans in Hübler, pp. 366, 370—2, 377; also ib. p. 121, note 8; also ib. 373; Gerson, Trilogus, II. p. 83 ff.; Theod. a Niem, De schism. III. c. 20 (resistance, as against a *bestia*); Randuf, De mod. un. c. 9—10; Ant. Ros. II. c. 23, 27—30, III. c. 4—6. Nicholas of Cues (Op. II. pp. 825—9) held to this doctrine even after he had fallen away from the Conciliar party. Conditional Obedience due to the Pope. The Law of Necessity.

135. See the following sections.

136. Ockham refutes at large the opinion that the *lex divina vel naturalis* is the only limit to imperial power: on the contrary, 'limitata est imperatoris potestas, ut quoad liberos sibi subiectos et res eorum solummodo illa potest quae prosunt ad communem utilitatem.' Dial. III. tr. 2, l. 2, c. 26—8: in relation to persons, c. 20; in relation to things, c. 21—5. Gerson, IV. pp. 598, 601. Nic. Cus. III. c. 5. See above, Notes 126—30. Limited Monarchy in the Empire.

137. See above, Note 16. Placentinus de var. actionum, I. 4. Summa Rolandi, C. 23, q. 7, p. 96. Addition to the Gloss on § 5, Inst. 2, 1, v. *publicus* [which addition teaches that *communia* are those things which by virtue of the *ius naturale primaevum* still remain in their original condition as common to all]. Joh. Nider, Tract. de Contr. (Tr. U. J. VI. p. 279), tr. v. K. Summenhard, De contr. tr. 1, q. 8—11 [a German jurist, ob. 1502].—But Aquinas, Summa Theol. I. q. 96, a. 4 and Ptolemy of Lucca, De reg. pr. III. The State of Nature.

c. 9, and IV. c. 2—3, teach that *dominium politicum* would have come into existence even in the State of Innocence, though not *dominium servile*. [Elsewhere (D. G. R. III. 125) our author has spoken of the patristic doctrine that lordship and property are consequences of the Fall. He there refers to various works of Augustine and sends us for other patristic utterances to Hergenröther, Katholische Kirche und christlicher Staat, Freib. 1872, p. 461.]

Beginnings of the Original Contract.

138. Already in the course of the Investiture Quarrel, Manegold of Lautenbach (above, Note 130) asked: Nonne clarum est, merito illum a concessa dignitate cadere, populum ab eius dominio liberum existere, cum *pactum* pro quo constitutus est constat illum prius irrupisse? On the anti-papal side the only answer was that the People's Will when once uttered became a *necessitas*, and that therefore the grant of lordship was irrevocable. See the pronouncement of the Anti-Gregorian cardinals in Sudendorf, Registr. II. p. 41. Engelbert of Volkersdorf is the first to declare in a general way that all *regna et principatus* originated in a *pactum subiectionis* which satisfied a natural want and instinct: De ortu, c. 2. Marsil. Pat. I. c. 8, 12, 15. Ockham, Dial. III. tr. 2, l. 2, c. 24: the *ius humanum* which introduced lordship and ownership in place of the community of goods existent under divine and natural law, was a *ius populi* and was transferred by the *populus* to the Emperor, along with the *imperium*. Nic. Cus. III. c. 4. Aen. Sylv. c. 2.

Right of a People to choose a Superior.

139. Eng. Volk., De ortu, c. 10. Lup. Bebenb. c. 5 and 15. Ockham, Octo q. II. c. 4—5, V. c. 6, VIII. c. 3. Baldus, l. 5, Dig. 1, 1, nr. 5 and 8; l. 2, Cod. 6, 3, nr. 3. Paul. Castr. l. 5, Dig. 1, 1, lect. 1, nr. 5, and lect. 2, nr. 17—18.

The People as instruments of God.

140. Joh. Paris. c. 11 and 16: populo faciente et Deo inspirante. Mars. Pat. I. c. 9: where men institute a king, God is *causa remota*. Ockham, Dial. III. tr. 2, l. 1, c. 27: imperium a Deo, et tamen per homines, scil. Romanos. Ant. Ros. I. c. 56: imperium immediate a Deo, per medium tamen populi Romani, qui tanquam Dei minister et instrumentum eius iurisdictionem omnem in ipsum transtulit.—Somewhat divergently Almain, De auct. eccl. c. 1 (Gers. Op. II. pp. 978 and 1014): God gives the power to the *communitas* in order that this power may be transferred to the Ruler.

God and the People as the Source of Power.

141. Nicol. Cus. II. 19, III. praef. and c. 4, argues that all power in Church and State comes both from God and from Man, for the voluntary subjection of men gives the material power and God grants the spiritual force. Is it not divine, and not merely human, when an assembled multitude decides as though it were one heart and one soul (II. c. 5 and 15)?

142. [The famous text in question is l. 1, Dig. 1, 4 and Inst. 1, 2, 6: Quod principi placuit legis habet vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat.] Gloss on l. 9, Dig. 1, 3; l. 1, Dig. 1, 4; l. un. Dig. 1, 11; l. 2, Cod. 8, 53; l. 11, Cod. 1, 17 v. *solus imperator*; and on 1. Feud. 26. Jac. Aren. Inst. de act. nr. 5, p. 277. Cinus, l. 4, Cod. 2, 54. Baldus, l. 1, Cod. 1, 1, nr. 1—12. Innoc. c. 1, X. 1, 7, nr. 1—2: papa habet imperium a Deo, imperator a populo. Dante, III. c. 13—4. Lup. Bebenb. c. 5, p. 355: olim tenuit monarchiam imperii populus urbis Romanae; postea transtulit in ipsum imperatorem. Ockham, Octo q. II. c. 4—5; Dial. III. tr. 2, l. 1, c. 27—28. Aen. Sylv. c. 8. Ant. Ros. I. c. 32 and 36. The Lex Regia.

143. Thus Engelbert, Marsilius, Ockham and Æneas Sylvius, as in Note 138. In particular, Nic. Cus. II. c. 12: the binding force of all laws rests upon 'concordantia subiectionalis eorum qui ligantur'; II. c. 13: all power flows from the free 'subiectio inferiorum'; III. c. 4: it arises 'per viam voluntarie subiectionis et consensus'; II. c. 8 and 10. Voluntary Subjection the Ground of Lordship.

144. See above, Note 54.

145. Ockham, Dial. III. tr. 2, l. 1, c. 27, vouching Gloss on c. 6, X. 1, 2. Ant. Ros. v. c. 2 (true even for the Babylonian empire: with voucher of Dig. 3, 4, Innocentius and Bartolus).

146. See the letter of the Senatus Populusque Romanus to King Conrad in Jaffé, Monum. Corbeiens. p. 332 (also Otto Fris. Gesta Frid. I. c. 28): the Kaiser has the 'imperium a Deo,' but 'vigore senatus et populi Romani': he ought to dwell 'in urbe quae caput mundi est.' Also Otto Fris. l. c. II. c. 21; letter of Wezel, ann. 1152, in Jaffé, l. c. p. 542: set cum imperium et omnis reipublicae dignitas sit Romanorum et dum imperator sit Romanorum non Romani imperatoris,...quae lex, quae ratio senatum populumque prohibet creare imperatorem?—Even the Hohenstaufen, however decisively they may assert their divine right as against such claims as these (cf. ep. an. 1152 in Jaffé, l. c. p. 449, and Otto Fris. III. c. 16, and IV. c. 3), treat Rome as the capital town of the Empire and the Roman townsfolk as in a special sense the imperial folk (cf. Petr. de Vineis, ep. I. c. 7, III. c. 1, 18, 72). Rights of the Burghers of Rome when the Empire is vacant.

147. Lup. Bebenb. c. 12 and 17. Similarly Ockham, Dial. III. tr. 2, l. 1, c. 30: 'imperium Rom.' and 'dominium temporalium... principalissime spectat ad totam communitatem universalium mortalium.' See also Dante, III. c. 16. The People of Rome and the Roman People.

148. Joh. Paris. c. 16: acclamante populo, cuius est se subicere cui vult sine alterius praeiudicio. Marsil. Pat. Def. pac. II. c. 30: the The People's

Part in the Translation of the Empire.

Pope acted, if at all, as the delegate of the *legislator Romanus* [i.e. Roman people]. See also the changes made by Marsilius in Landulf's De transl. imp. c. 8, 9, 10, 12. Ockham, Octo q. II. c. 9, IV. c. 5 and 8: auctoritate populi Romani, with the Pope as a part or mandatory or counsellor; Dial. III. tr. 2, l. 1, c. 20: the Pope acted auctoritate et vice Romanorum...transferentibus consensit. Theod. a Niem, pp. 788—792. Aen. Sylv. c. 9: concurrente summi pontificis consensu.

The Roman Citizens and the Translation.

149. Lup. Bebenb. c. 12, p. 385; comp. c. 1—4 and 8. Ockham, Dial. III. tr. 2, l. 1, c. 29—30, raises other doubts. Could the then *populus Romanus* surrender the *imperium* to the prejudice of the *populus sequens*? Could the whole *universitas mortalium* make the transfer *invitis Romanis*? To the last question the answer is Yes, if there were *culpa* on the part of the Romans, or other reasonable cause.

Right of the People during a Vacancy of the Empire.

150. Lup. Bebenb. c. 5. Ockham, Octo q. II. c. 14, and Dial. III. tr. 2, l. 1, c. 22: only by authorization of the *Romani* or the Electors can the Pope claim any right in this matter. Ant. Ros. I. c. 64: the *populus Romanus* demises the imperial power as an *officium publicum*; on the Kaiser's death this reverts to the *populus*.

The Right to choose a Ruler.

151. See the citations in Note 138. Mars. Pat. I. c. 9 and 15. Lup. Bebenb. c. 5: secundum ius gentium...quilibet populus potest sibi regem eligere; c. 15: election or appointment by the Kaiser is, according to the common law, the only title whereby a *principatus* or *regnum* can be acquired. Ockham, Dial. III. tr. 2, l. 3, c. 5—6: if once a departure has been made from the *Omnia communia* of pure Natural law, we have as a principle of the now modified Natural Law 'quod omnes quibus est praeficiendus aliquis habeant ius eligendi praeficiendum, nisi cedant iuri suo vel superior eis ordinet contrarium.' Nic. Cus. III. c. 4: populus Romanus habet potestatem eligendi inperatorem per ipsum ius divinum et naturale; for, according to God's very own will, all lordship, and in particular that of Kings and Kaisers, arises 'per viam voluntariae subiectionis et consensus.' Ant. Ros. I. c. 69.

Consensual Origin of Hereditary Kingship.

152. Mars. Pat. I. c. 9. Eng. Volk. De ortu, c. 10. Lup. Bebenb. c. 15, p. 398. Ockham, Octo q. V. c. 6. K. Summenhard, De contr. tr. I. q. 11: an hereditary kingship arises if those who first consented gave consent *pro se et suis*, an elective kingship if they only consented *pro se*, so that 'eo sublato, libere possunt se alteri submittere quem elegerint.' Custom, ordinance proceeding from a higher power, and conquest are mentioned as other titles to hereditary rule.

153. Thom. Aq. Comm. ad Polit. pp. 495 and 501. Aegid. Col.

III. 2, c. 5. Mars. Pat. I. c. 16. Bart. De reg. civ. nr. 23. Nic. Cus. III. praef. See also Miles in Somn. Virid. I. c. 187. Elective Rulership is preferable.

154. Otto Fris. Gesta, II. c. 1. Lup. Bebenb. c. 5. Ockham, Octo q. IV. c. 5 and 9, VIII. c. 3. Baldus, l. 5, Dig. I. 1, nr. 11—15. Nic. Cus. III. c. 4. According to Lupold, the *exercitus*, which 'repraesentabat totum populum Romanorum imperio subiectum,' used to make the election; afterwards it was made by the People itself; then by the Emperor who chose a successor; finally by the Prince Electors. The Empire Elective.

155. Mars. Pat. II. 26 (concessio populi is the basis) and III. concl. 9 and 10. Lup. Bebenb. c. 5 and 12: when the Karolings had died out, the princes and nobles of the Franks, Alamans, Bavarians and Saxons 'who represented the whole Folk of Germany' made the choice; then Otto III. 'by the express or at any rate the tacit consent' of the princes and people established the *Kurfürsten* (Prince Electors); and this was legitimate, for by the *ius gentium* every *universitas* may choose a king, and, in accordance with a general custom, may also confer upon him imperial rights, and moreover may delegate for ever to committees the right to make equally valid elections. Ockham, Octo q. VIII. c. 3. Nic. Cus. III. c. 4: the Electors were instituted in the time of Henry II. by the common consent of all the Germans and of all others who were subject to the Empire, and therefore 'radicalem vim habent ab ipso omnium consensu qui sibi naturali iure imperatorem constituere poterant.' Ant. Ros. I. c. 48: the 'collegium universale fidelium, et sic populus Romanus,' instituted the Electors. Theory and the Prince Electors.

156. Ockham, Dial. III. tr. 2, l. 1, c. 30: what the People has *de facto* conveyed to the Pope is knowable only by one who has seen all the papal charters, registers and authentic documents; but in principle the People might have transferred to the Pope power to constitute the Electoral College or even directly to make the election. Nic. Cus. III. c. 4 holds that it was merely as a subject of the Empire (for in temporals the Church is subject) that the Pope gave his consent, whereas the virtue (*vigor*) of the act flowed not 'ex suo sed ex communi omnium et ipsius et aliorum consensu.'—On the other hand, according to Lupold v. Bebenburg, c. 12, an authorization by the Church was requisite in order that the choice made by the Prince Electors might give a claim to imperial coronation and to imperial rights outside the realm of Charles the Great. The Pope as a Popular Delegate.

157. Mars. Pat. II. c. 26. Ockham, Octo q. VIII. c. 1—8, and IV. c. 8—9; Dial. III. tr. 2, l. 2, c. 29. Nic. Cus. III. c. 4.—So also Bebenburg, c. 5—6, but once more with an exception of imperial Election, not Coronation, confers the

Imperial Rights.

rights beyond the limits of the 'immediate' *Reich*. Ockham justly urges that Bebenburg's own argument requires that the Electing Princes should represent the World-Folk, and not merely the folk of Charles the Great's lands.

Lex Regia: an irrevocable Conveyance.

158. Accursius in Gl. upon l. 9, Dig. 1, 3, v. *non ambigitur*, decides in favour of this view, while the Gl. upon l. 11, Cod. 1, 14, v. *solus imperator* mentions it but does not decide. So also Gl. upon 1. Feud. 26, v. *an imperatorem* (imperator maior populo). Hostiensis, De const. Bartolus, l. 11, Cod. 1, 14, nr. 3—4: omnis potestas est abdicata ab eis. Baldus, l. 8, Dig. 1, 3, nr. 5—11, says that the *populus Romanus* cannot depose the Emperor and is not *imperatori similis*; the *translatio* was an *alienatio pleno iure*; otherwise the Kaiser would be, not *dominus*, but *commissarius populi*. So Baldus in 1. Feud. 26, nr. 15 and 11. Feud. 53 § 1 (princeps maior populo); l. 8, Dig. 1, 14, nr. 1—3, and l. 11, eod. nr. 6: the populus can no longer make laws. Angel. Aret. § 6, 1. I, 2, nr. 5—6. Joh. de Platea, Inst. 1, 2, nr. 51. Marcus, Dec. 1. q. 187.

Lex Regia: a revocable Delegation.

159. See the counter opinions in the Glosses cited in the last note. Gl. on l. 2, Dig. de R. D. v. *littora*: the *protectio* of the *res communes omnium* is ascribed to the Roman people: Baldus substitutes *Caesaris* for *pop. Rom.* Also Cinus, l. 12, Cod. 1, 14: but he confesses that at the present day statutes made by the Roman people would find little observance outside the walls of Rome. Ockham, Octo q. IV. c. 8. Christof. Parcus § 6, Inst. 1, 2, nr. 4 (with elaborate proof). Zabar. c. 34 § *verum*, X. 1, 6, nr. 8. Paul. Castr. l. 8, Dig. 1, 3, nr. 4—6, and l. 1, Dig. 1, 4, nr. 4: he holds that there was a *concessio* of the *usus*, not a *translatio* of the *substantia*, but since Christ's advent the Church has taken the place of the People.

Absolute Monarchy and the Will of the People.

160. See e.g. the speech of the Abp of Milan to Frederick I. in Ott. Fris. IV. c. 4, and the letter of Frederick II. in Pet. de Vin. ep. v. c. 135.

Nullity of Monarch's Acts if they tend to impair his Fundamental Rights.

161. Oldradus and, following him, Baldus, Prooem. Feud. nr. 32, and 11. Feud. 26 § 4 in generali, nr. 34. Picus a Monte Pico, 1. Feud. 7, nr. 7. Decius, Cons. 564, nr. 9—10. Franc. Curt. jun. Cons. 174, nr. 17.—Therefore to support the Donation of Constantine, an approval by Senate and People was supposed. Baldus, prooem. Dig. nr. 44—45, and 11. Feud. 26 § 4, nr. 3; Aug. Triumphus, 11. q. 43, a. 3; Ant. Rosellus, 1. c. 69; Curtius, l. c. nr. 18.

Nullity of Acts subjecting the Empire to the Church.

162. Lup. Bebenb. c. 8, p. 367, and c. 12, p. 381, but esp. c. 14, pp. 395—7: since these concessions and confessions were made without the consent of the Prince Electors and the People of the realm and empire, the said Princes and other representatives of the People can contradict them, and this contradiction is to be received; so the

subditi may always raise objection if a *dominus* would subject himself and his land to another *dominus*; for according to the *ius gentium, civile et canonicum* whatever would prejudice a community 'debet ab omnibus approbari.' Similarly, Ockham, Dial. III. tr. 2, l. 1, c. 30: a division or diminution of the Empire would be valid 'non absque consensu expresso vel tacito totius universitatis mortalium.'

163. See the Commentaries on l. 8, Cod. 1, 14; also Baldus, II. Feud. 26 § 1, nr. 13.

164. See e.g. Pet. de Vin. ep. I. c. 3, p. 105. Lup. Bebenb. c. 17, p. 406—7: even were *rex maior populo*, the people must have a right to depose him in a case of necessity; 'necessitas enim legem non habet.' Ockham, Octo q. II. c. 7, VI. c. 2, III. c. 3; the Kaiser, albeit *ius a populo habet*, stands above the People, the King above the Realm, the General of an Order above all the friars: still in case of necessity the community may depose him. Anton. Ros. III. c. 16: although the Kaiser stands as *caput* above the Assembly of the *Reich* and is judge in his own cause, an exception must be admitted if he is accused before that Assembly as 'tyrannus et scandalizans universale bonum imperii saecularis.' Comp. ib. c. 21 and 22, and above, Note 130.—On the other hand, already in the time of Henry IV. the Anti-Gregorian cardinals opine that, though the people can make a king, the will of the people, when once it is uttered, becomes a *necessitas*: see Sudendorf, Registr. II. 41. So also Baldus (Note 158); but comp. his Cons. v. c. 325—6.

The Right to depose a Ruler in a case of Necessity.

165. Thomas of Aquino attributes sovereignty sometimes to the People, sometimes to the Prince, regard being had to the different constitutions of different States. Summa Theol. II. 1, q. 90, a. 3: ordinare aliquid in bonum commune est vel totius multitudinis vel alicuius gerentis vicem totius multitudinis; et ideo condere legem vel pertinet ad totam multitudinem, vel pertinet ad personam publicam, quae totius multitudinis curam habet. So also, q. 97, a. 3. In this matter later writers follow him: e.g. Joh. Friburg. II. t. 5, q. 209, and K. Summenhard, q. 11: *potestas politica* exists 'duplici modo, uno modo in uno rege, alio in una communitate.' But as to the best constitution, Aquinas declares in favour of the mixed constitution which (so it is imagined) prevailed among the Jews. Summa Theol. II 1, q. 95, a. 4, and q. 105, a. 1: 'Unde optima ordinatio principum est in aliqua civitate vel regno in quo *unus* praeficitur secundum virtutem qui omnibus praesit; et sub ipso sunt *aliqui* participantes secundum virtutem; et tamen talis principatus ad *omnes* pertinet, tum quia ex omnibus eligi possunt, tum quia etiam ab omnibus eliguntur: talis enim est omnis politia *bene commixta* ex *regno* in

The Mixed Constitution.

quantum unus praeest, ex *aristocratia* in quantum multi principantur secundum virtutem, et ex *democratia*, id est, potestate populi, in quantum ex popularibus possunt eligi principes et ad populum pertinet electio principum.' In all cases he demands that Monarchy be subjected to limitations so that it may not degenerate into Tyranny: De reg. princ. I. c. 6. John of Paris, c. 20, p. 202, prefers to a pure Monarchy one mixed with Aristocracy and Democracy. So d'Ailly, De pot. eccl. II. c. 1, and Gerson, De pot. eccl. cons. 13. Eng. of Volkersdorf also (I. c. 14—16) portrays the advantages of mixed constitutions. Jason, l. 5, Cod. 1, 2, lect. 2, nr. 10—13, declares it to be a general maxim in Church and State, that, if there be *ardua negotia* concerned, the Head is bound to obtain the consent of a conciliar assembly. Almain, Comm. ad Occam, q. 1, c. 5 and 15, holds it to be compatible with the nature of a Monarchy that in State and Church respectively the *congregatio nobilium* or the Council is entitled to impose limits on the regal or papal power and to judge and depose the king or, as the case may be, the pope; but then it is true that he elsewhere (Tract. de auct. eccl. c. 1, Gerson, Op. II. p. 977 ff.) declares that the Prince is above all individuals, but not above the community. John Mair, Disput. a. 1518 (Gerson, II. p. 1131 ff.) supposes two highest powers, that of the folk being the more unlimited.

166. See above, Note 159. Lup. Bebenb. c. 12 and 17. Ockham, Octo q. IV. 8.

Justice to be done upon the Ruler.

167. Mars. Pat. I. c. 15 and 18; II. c. 26 and 30. Lup. Bebenb. c. 17, p. 406. Ockham, Octo q. II. c. 8 (correctio imperatoris spectat ad Romanos). Miles in Somn. Virid. I. 141: if a King imposes unjust taxes, denies justice, fails to defend the country, or otherwise neglects his duty, the People may depose him and choose another Ruler, and so the People of a part of the realm, if this part only has suffered neglect, may appoint a separate Ruler. Joh. Wiclif, art. 17: populares possunt ad suum arbitrium dominos delinquentes corrigere. Nicol. Cus. III. c. 4.—Already in the course of the Investiture Quarrel, Manegold of Lautenbach deduced the right of deposition in case of breach of contract by the Ruler.—Innoc. c. 1, X. 1, 10, nr. 1—2 concedes a right of deposition only in the case of elective kings.

The Deposition of Kings.

168. Especially in relation to the deposition of the last Merovings and the exaltation of Pipin, it is asserted at length that 'non deposuit papa, sed deponendum consuluit et depositioni consensit,' 'non substituit sed substituendum consuluit et substituentibus consensit,' 'a iuramento absolvit, i.e., absolutos declaravit'; and reference is

made to Huguccio and Glos. ord. on c. *alius*, C. 15, q. 6. Joh. Paris. c. 15. Mars. Pat. De transl. c. 6. Lup. Bebenb. c. 12, pp. 386—9: the Pope merely declared a *dubium iuris*, the Franks deposed and instituted. Ockham, Octo q. II. c. 8; VIII. c. 1 and 5; Dial. III. tr. 2, l. 1, c. 18: so too Innocents III. and IV. acted *auctoritate Romanorum*, unless indeed their doings were usurpatory. Somn. Virid. I. c. 72—73. Quaestio in utramque p. 106, ad 15—16. Nic. Cus. III. c. 4: the Pope acted as a member of the *universitas*.

169. Lup. Bebenb. c. 12, p. 385, and c. 17, p. 406.

170. Marsil. Pat. I. c. 7—8, 12—13, 15, 18, II. c. 30, III. concl. 6.

171. Nicol. Cus. III. c. 4 and 41, and II. c. 12—13. The proposals made by Cusanus for the reformation of the Empire are connected with these theories, and in a very remarkable fashion blend the forms of the medieval Land-Peace-Associations with the ideas of Nature Right, III. c. 25—40. The Emperor continues to be the monarchical Head of the Empire and is to take the initiative (c. 32). A very complicated method is proposed for his election (c. 36—37). The power of making laws for the Empire is wielded by an annually assembled Imperial Diet (*Reichstag*) which consists of Prince-Electors, Judges, Councillors and Deputies of Towns, and represents the whole People (c. 35). Then below this stand annual Provincial Assemblies of the three Estates (Clergy, Nobles and People) which regulate the special affairs of the provinces, and depute standing committees (provincial courts) with a strong executive power (c. 33). Further and detailed reforms of the imperial army (c. 39), of the finance and justice of the Empire, of the laws concerning the Land Peace (c. 34), of ecclesiastical privileges (c. 40) and so forth are proposed. As in the Empire, so generally in all territories the kings and princes are to have by their sides an aristocratic *consilium quotidianum* and an electing, legislating and deciding *consilium generale* (c. 12).—Analogous reforms in the Church are proposed; II. c. 22—33. The Projects of Nicholas of Cues.

172. See in particular the transactions of the French Estates of 1484, and on them Bezold, Hist. Zeitschr. vol. 36 (1876) 361 ff., and Baudrillart, Bodin et son temps, p. 10; the remarks of Philippe de Comynes in Baudrillart, p. 11 ff.; the doctrine of Jacob. Almain, Expos. ad Occam, q. I. c. 5 and 15; Tract. de auctor. eccl. c. 1 (Gerson, Op. II. p. 977 ff.); De dominio naturali etc. (ib. 964). Popular Sovereignty in France.

173. See the passages from the Canonists collected by v. Schulte, Die Stellung der Koncilien, p. 253 ff. Thom. Aq. Opusc. cont. err. Graec. II. c. 32—38. Innoc. c. 23, X. de V. S. nr. 3. Dur. Spec. I. 1 de leg. § 5, nr. 10. Aegid. Rom. De pot. eccl. I. c. 2. Aug. Triumph. I. q. 6, a. 6. Alv. Pel. I. a. 6 (printed in Hübler, Konst. Papal Theory of General Councils.

Ref. p. 361) and 17. Brief of Pius II. and Reply of Laelius in Gold. II. p. 1591 and 1595. Turrecremata, Summa de eccl. II. c. 54 and 65; III. c. 28, 32, 44, 47, 51, 55. Petrus de Monte in Tr. U. J. XIII. 1, p. 144 ff.

Papal Elections: Representative Character of the Cardinals.

174. If Aug. Triumphus, I. q. 3, a. 7—9, says that the electing college is not *maius papa*, since it is merely God's instrument for the *designatio personae*, makes the election *papae auctoritate*, and can confer no authority upon the pope, still in default of the college he attributes the right of election to the *Concilium Generale*, and connects this attribution with the doctrine that, during the vacancy of the see, the *collegium universalis ecclesiae* represents the Church, may assemble of its own motion or at the emperor's call, and, to this extent, possesses a 'potential superiority (*maioritas potentialis*)' which may be contrasted with the 'actual superiority (*maioritas actualis*)' of the pope. See I. q. 3, a. 2, q. 4, a. 1—8, q. 6, a. 6. However, during the vacancy the properly monarchical power, so far as its substance is concerned, lives on merely in Christ, and, so far as its use is concerned, lies dormant, for the Cardinals—here a departure from older theory—can at the most exercise the papal jurisdiction 'in minimis et quibusdam.' See also Alv. Pel. I. a. 20, Gl. on Cl. 2 de el. 1, 3, v. *non consonam*; Hinschius, Kirchenrecht, § 39.

175. See v. Schulte, Die Stellung der Koncilien, pp. 192—4 and p. 253 ff.

Deposition of an heretical Pope.

176. See c. 13, C. 2, q. 7, and c. 6, D. 40; also in v. Schulte, op. cit., the opinions of Gratian, Rufinus, Stephanus Tornacensis, Simon de Bisignano, Joh. Faventinus, Summa Coloniensis, Summa Parisiensis, Summa Lipsiensis, Huguccio, Bern. Papiensis, Joh. Teutonicus, Archidiaconus, Turrecremata, Goffr. Tranensis, Hostiensis, Joh. Andreae, Joh. de Imola, Joh. de Anania. Moreover, Gl. ord. on c. 9, C. 24, q. 1, v. *novitatibus*; Innoc. IV. on c. 23, X. de verb. sig. 5, 40, nr. 2—3; Host. de accus. nr. 7; Joh. de Anan. c. 29, X. 3, 5, nr. 9 ff.; Petrus a Monte, f. 148 ff.

The heretical Pope is deposed ipso facto.

177. This is suggested already by Joh. Teutonicus (l. c. nr. 310, p. 265), and is urged in particular by Aug. Triumphus, I. q. 5. a. 1, 2, 6 and q. 6, a. 6 (see also q. 1, a. 1, 3, q. 5, a. 3—4, q. 7, a. 1—4, q. 6, II. q. 6 and II. 45—46), and Alvarius Pelagius, I. a. 4—6 and 34, II. a. 10. Also by the Clerk in the Somnium Virid. II. c. 161 Ockham discusses the matter at length: Octo q. III. c. 8, VIII. c. 5—6, Dial. I. 6, c. 66—82.

In Matters of Faith the Pope is below

178. Already Huguccio (v. Schulte, p. 261) is of opinion that the heretical pope is 'minor quolibet catholico.' See the statement of this view in Ockham, Dial. I. 5, c. 27, and I. 6, c. 12—13, 57, 64:

in matters of faith the Council is 'maius papa' because it 'tenet vicem ecclesiae universalis.' Michael de Cesena, ep. a. 1331 (Goldast, II. p. 1237): in his quae ad fidem catholicam pertinent papa subest concilio. Henr. de Langenstein, Cons. pac. a. 1381, c. 13 and 15 in Gerson, II. p. 824, 832. the Council.

179. Thus already Huguccio and others; for *crimina notoria* comp. Ockham, Octo q. I. c. 17, II. c. 7, III. c. 8, VIII. c. 5—8; Dial. I. 6, c. 86. Letter of the University of Paris, an. 1394 (Schwab, pp. 131—2, Hübler, p. 362); for schism, Matth. de Cracovia (Hübler, p. 366—7). Pierre Plaoul, a. 1398 (Schwab, p. 147). Zabar., De schism. p. 697. Deposition of a schismatical or criminous Pope.

180. See above, Note 134. Henr. de Langenstein, l. c., c. 15. Simon Cramaud, Pierre Plaoul and other Gallicans in Schwab, 146 ff. and Hübler, 368 ff. Opinion of the University of Bologna in 1409, in Martene, Ampl. Coll. VIII. 894. A practical application of this doctrine in the French Subtraction of Obedience (Schwab, p. 146 ff.) and Declaration of Neutrality (ib. 211). Rejection of a Pope in case of Necessity.

181. Joh. Paris. c. 6, pp. 155—8, c. 14, p. 182, c. 21, p. 208, c. 25, p. 215—224.

182. Mars. Pat. II. c. 15—22, and III. concl. 32 and 41. All other powers wielded by the popes have been usurped. The Council has authority, not only in matter of faith (II. c. 18, 20, III. c. 1 and 2), but also in matters of excommunication, punishment, legislation, raising tithes, licensing schools, canonization, establishment of festivals etc. (II. c. 7, 21, III. c. 5, 34—6). Marsilius on Pope and Council.

183. See in Ockham, Dial. I. c. 5, c. 14—19, and III. tr. 1, l. 4, the opinion that the papacy rests upon human ordinance; III. tr. 1, l. 2, c. 2, 12—14, 16—17 and 25, the reasons which can be urged against there being any single, human, monarchical head of the Church; III. tr. 1, l. 1, c. 1, the question how wide a power God has committed to the Pope. See also the references to such opinions in Petr. Alliac. (Gerson, Op. I. p. 662 ff.), Gerson (ib. II. p. 88, where it is said to be a common opinion that the pope is not *iure divino* Head of the Church) and Joh. Breviscoxa, Tract. de fide (ib. I. p. 808, esp. 878 ff.). The divinity of the primacy is decisively disputed by Nilus, arch. Thessalon., De primatu (Gold. I. pp. 30—39), Randuf, De mod. un., Wyclif, Hus, and so forth.—The *auctoritas conciliorum* is often mentioned by the older canonists as one of the forces which had constituted the primacy: e.g. Huguccio, l. c. p. 266. So d'Ailly (Gers. Op. II. p. 905) seems to favour the middle opinion: licet principaliter Rom. eccl. principatum habuerit a Domino, tamen secundario a concilio. In the same spirit, Gerson (II. p. 239 ff.) distin- Divine Right of the Papal Primacy contested.

guishes those powers of the papacy that were divinely bestowed from those that have been acquired under human law.

Abolition of Papal Primacy suggested.

184. Ockham, Dial. III. tr. 1, l. 2, c. 20—27, treats the questions whether the Community of the Faithful possesses and might expediently use a power of changing the regal form of ecclesiastical government into an aristocratical, and *vice versa*. Also (c. 28) from the principle of autonomy (quaelibet ecclesia et quilibet populus Christianus propria autoritate ius proprium statuere pro sua utilitate potest) he deduces the right of every people to give itself a separate ecclesiastical head, in case the Pope be heretical, the papal see be long vacant, or access to Rome be impossible.

185. Ockham, Dial. III. tr. 2, l. 3, c. 4—13. And then to the like effect Henr. de Langenstein, Cons. pac. c. 14 and 15.

186. Ockham, Octo q. I. c. 15, III. c. 9; Dial. III. tr. 1, l. 1, c. 1 (where the fifth of the suggested opinions seems to be his own).

The Council may judge the Pope.

187. Ockham, Octo q. I. c. 17, III. c. 8; Dial. I. 5, c. 27; I. 6, c. 12—13, 57, 64, 69—72, 86. See Nilus, as in Note 183. Anonymus De aetat. eccl. c. 6, p. 28: nemo primam sedem iudicare debet, sed hoc pertinet ad dominam et reginam sponsam Christi, cuius servus et dispensator est papa, quam universales synodi repraesentant. Somn. Virid. I. c. 161. Henr. de Langenstein, Cons. pac. c. 15.

Right of the Church to assemble and to constitute a Council.

188. Ockham, Dial. I. 6, c. 84: this is but one instance of the general right of every autonomous *populus*, of every *communitas*, of every *corpus*, to assemble itself, or to constitute an assembly of deputies: potest aliquos eligere qui vicem gerant totius communitatis aut corporis absque alterius autoritate. So the Universal Church, when the holy see is vacant, might *per se convenire* were her size small enough, and, as it is, may assemble 'per aliquos electos a diversis partibus ecclesiae.' The impulse to such an assemblage may come from the temporal powers or from all the laity, in case the organs which in the first instance are entitled to give it, the prelates and divines, make default. Comp. Langenstein, l. c. c. 15: Conrad de Gelnhausen, Tr. de cong. concil. (Martene, Thesaur. II. p. 1200).

Theory of the Conciliar Party.

189. Zabarella, De schism. p. 703, and upon c. 6, X. 1, 6, nr. 16: id quod dicitur quod papa habet plenitudinem potestatis, debet intelligi non solus sed tanquam caput universitatis: ita quod ipsa potestas est in ipsa universitate tanquam in fundamento, sed in ipso tanquam ministro, per quem haec potestas explicatur. Petr. Alliac. de pot. eccl. (Gerson, Op. II. p. 949 ff.): the plenitude of ecclesiastical power is 'in papa tanquam in subiecto ipsam recipiente et ministerialiter exercente,...in universali ecclesia tanquam in obiecto ipsam causaliter et finaliter continente,...in generali concilio tanquam

in exemplo ipsam repraesentante et regulariter dirigente.' For Gerson see the next note. Theod. a Niem, De schismate. Randuf, De mod. un. especially c. 2, goes furthest: the Universal Church has the power of the keys from God, the Roman Church has the exercise thereof only in so far as this has been conceded to her by the Universal Church.

Gerson's Theory.

190. See last Note. The whereabouts of ecclesiastical power is more thoroughly discussed by Gerson than by others: Gers. II. 225 ff.; Gold. II. 1384 ff. This power bestowed by Christ's mandate must in all its elements be regarded from three points of view (c. 6). 'In se formaliter et absolute' (i.e. regarded abstractedly and according to its simple essence) it is unchangeably and indestructibly in the Church, thereby being meant the complete system of all essential offices, among which offices the primacy is only one, so that it is a part within the whole (c. 7). 'Respective et quodammodo materialiter' (i.e. regard being had to the 'subject' in which this power resides) it is in the office-holders for the time being and to this extent also in the Pope, but, if need be, can be changed or taken away (c. 8). 'Quoad exercitium et usum' it is, in a yet more changeable and more limited fashion, allotted among the various organs according to the Church's constitution (c. 9). In the first of these three senses the power comes directly from Christ; in the second and third senses 'mediante homine.'—Then as to the division of power among ecclesiastical organs, the 'plenitudo' is both in the Pope and the 'ecclesia synodaliter congregata.' It is in the latter more aboriginally and more fully in four respects (ratione indeviabilitatis, extensionis, regulationis, generalis extensionis). Indeed it is in the Pope 'formaliter et monarchice'; but it is in the Church as in its final cause (in ecclesia ut in fine) and as in its ordaining, regulating and supplementing wielder (ordinative, regulative et suppletive). It therefore is exercised by the Pope, while the Council 'usum et applicationem regulat,' and 'mortuo vel electo papa supplet' (c. 10—11; also '*concordia* quod plenitudo eccl. pot. sit in summo pontifice *et* in ecclesia,' Op. II. p. 259 and Goldast, II. p. 1405). In its *latitudo*, on the other hand, the ecclesiastical power is bestowed on *all* offices and therefore in the highest degree on the Pope, but belongs to him only in so far as respect is paid to the subordinate but independent power of other offices and to the all-embracing power of the Council. (Hübler's account of Gerson's trichotomy (p. 385 ff.) is not quite accurate.)

Practical Powers of the Council.

191. Zabarella, De schism. pp. 703, 709, and c. 6, X. 1, 6, nr. 15—20: 'ipsa universitas totius ecclesiae' is to cooperate in arduous matters, to decide on good or bad administration, to accuse, to

depose, and can never validly alienate these rights to the Pope. Gerson, De auferibilitate papae (Op. II. p. 209 and Gold. II. p. 1411) cons. 10 and 12—19, De unitate eccl. (Op. II. 113), De pot. eccl. c. 11 (comp. also Op. II. p. 275): the Church or the General Council representing the Church can repress abuses of power, can direct and moderate; can depose the Pope 'auctoritative, iudicialiter et iuridice,' not merely 'conciliative aut dictative vel denuntiative'; nay, can imprison him and put him to death: Aristotle teaches that every *communitas libera* has a like inalienable right against its *princeps*. See also Randuf, c. 5 and 9; Pierre du Mont de St Michel in Hübler, p. 380, and the doings at Constance, ib. 101—2 and 262.

Power of the Council to assemble.

192. Petr. Alliac. Propos. util. (Gerson, Op. II. p. 112): a right of the Council to assemble of its own accord is deduced both from the power given by Christ and (after Ockham's fashion) from the natural right of every *corpus civile seu civilis communitas vel politia rite ordinata* to assemble itself for the preservation of its unity. (Somewhat otherwise at an earlier date, ib. I. pp. 661—2.) Randuf, c. 3 (p. 164). Less unconditionally, Gerson, Propos. (Op. II. p. 123), De un. eccl. (ib. 113), De aufer. pap. (c. 11, ib. 211) and De pot. eccl. (ib. 249). Zabarella, De schism. pp. 689—694, attributes the right of summons to the Cardinals, and, failing them, to the Emperor 'loco ipsorum populorum,' since he represents the whole Christian people, 'cum in eum translata sit iurisdictio et potestas universi orbis': in the last resort, however, the Council may assemble itself according to the rules of Corporation Law.

Power of the Council during a Vacancy of the Holy See.

193. Gerson, De pot. eccl. c. 11. Zabar. De schism. pp. 688—9: with application to the case of a schism, for then the holy see is *quasi vacans*. Domin. Gem. Cons. 65, nr. 7.

The Cardinals are Representatives of the Whole Church.

194. Octo conclusiones per plures doctores in Italiae part. approb. ann. 1409 (Gers. Op. II. p. 110): veri cardinales in electione papae vices gerunt universalis ecclesiae Christianae. Zabarella, c. 6, X. 1, 6, nr. 9, and Panorm. eod. c. nr. 15. According to Gerson (Op. II. pp. 123, 293) the Council might institute another mode of election: according to Randuf (c. 9) it might itself elect.

An independent position assigned to the Cardinals.

195. Octo concl. l. c. Gerson, De pot. eccl. c. 7 and 11. Petr. Alliac. De pot. eccl. II. c. 1. Hübler, p. 74, and the Reform Decrees, ib. 129 and 218.

Mixed Government in the Church.

196. Gerson, De pot. eccl. c. 13: the organization of ecclesiastical power should share in the harmony and 'pulchra ordinis varietas' of *iura*, *leges*, *iurisdictiones* and *dominia*: therefore its *politia* must be compounded of the three good polities of Aristotle: the three degenerate forms also are possible in the Church. Pet. Alliac.

De pot. eccl. II. c. 1 (II. p. 946): the Church must have the best of constitutions, and therefore 'regimen regium, non purum, sed mixtum cum aristocratia et democratia.'

197. Zabar. De schism. pp. 703, 709. Octo concl. l. c.: delegated nature of all other powers. Pierre du Mont de St Michel, ann. 1406, in Hübler, p. 380. Gerson, De unit. eccl. (II. p. 113); Tract. quomodo et an liceat etc. (ib. 303 and Gold. II. 1515); De pot. eccl. 7 and 11: the Pope is only a *membrum* of the *corpus ecclesiae*, and is as little above the Church as a part is above the whole; much rather, if the General Council represents the Universal Church sufficiently and entirely, then of necessity it must include the papal power, whether there be a Pope, or whether he has died a natural or a civil death; but it will also include the power of the cardinals, bishops and priests. Randuf will allow to the Pope not a whit more power 'than is conceded to him by the Universal Church,' and only a power which is 'quasi instrumentalis et operativa seu executiva' (c. 2); the *concilium* is thoroughly 'supra papam,' and to it he owes obedience (c. 9); the Sovereignty of the Council is inalienable and all Canon Law to the contrary is invalid (c. 17; comp. c. 23). Add the famous decree of Session V. of the Synod of Constance, and Gerson, II. p. 275 thereon. The Council above the Pope.

198. Gerson, De pot. eccl.: the 'congregatio totius universitatis hominum' could, it is true, establish the Empire, but could not, without Christ, have laid the foundation of the Church (c. 9); the Church is a system of offices, including the papacy, which were instituted by Christ and are indestructible (c. 7 and 9); the papacy, though as a function it is subject to alteration and may be temporarily dispensed with (c. 8), is as an institution indestructible (c. 11). Comp. De auferib. pap. c. 8 and 20, where this is made the distinctive difference between the constitution of the Church and civil constitutions. See also Op. II. pp. 130, 146, 529—30, and IV. p. 694. Gerson on Divine Right of the Papacy.

199. See Randuf, l. c., c. 5.

200. In the Concordantia Catholica. See also his De auctor. praes. in Düx, I. p. 475 ff.

201. Gregory of Heimburg in his polemical writings touching the strife about the bishopric of Brixen: as to which see Brockhaus, Gregor v. Heimburg, pp. 149—259. [For this quarrel the English reader should refer to Creighton, Papacy, III. 237: Nicholas of Cusa and Gregory of Heimburg were concerned in it and Aeneas Sylvius was the then Pope, Pius II.] According to Heimburg the Council and only the Council represents the eternal, constant, infallible Church, realizes the Church's unity in a democratic form, and is Popular Sovereignty in the Church.

greater than the monarchical Head (Gold. II. 1604 ff., 1615 ff., 1626 ff.). Immediately from Christ it has power over the Pope in matters of faith, unity and reform, and is his *superior*. From the Pope lies an appeal to the Council, as in Rome an appeal lay from Senate to People (ib. 1583, 1589, 1591, 1595, 1627); and a papal prohibition of such an appeal is invalid (ib. 1591 and 1628). If no Council be sitting, the appeal is to a future Council, since once in every ten years the authority of the Church scattered throughout the world—an authority which lies dormant during the intervals—should become visible (ib. 1580—91).—Compare Almain, Expos. ad octo q. I. c. 15, and Tract. de auctor. eccl. et conc. gen. (Gers. Op. II. p. 977 ff.): the Church is a Limited Monarchy, in which the Council *ratione indeviabilitatis* stands above the Pope, sits in judgment on him, receives appeals from him, restrains him by laws, can depose him, and so forth.—Aeneas Sylvius, Comment. de gestis Basil. concilii libr. II.: the comparison to the relationship between King and People is consistently pursued.

Canonists and the Council.

202. Comp. Ludov. Rom., Panormitanus (e.g. upon c. 2, X. 1, 6, nr. 2: potestas ecclesiastica est in papa et in tota ecclesia, in papa ut in capite, in ecclesia ut in corpore; c. 3, eod. nr. 2—4; c. 6, eod. nr. 15; c. 17, X. 1, 33, nr. 2), Decius (e.g. c. 4, X. 1, 6, nr. 1—22; c. 5, eod. nr. 3; Cons. 151), Henr. de Bouhic (e.g. c. 6, X. 1, 6), Marcus (e.g. Dec. I. q. 935), and so forth.

The System of Antonius de Roselis.

203. The Pope stands as Monarch (*caput*) above the Council: but so soon as he prescribes anything against the Faith or the weal of the Church or beyond his official competence, the Council stands above him, judges him, and receives appeals from him (II. c. 13—22, and III. c. 16—17). Although therefore he normally has the plenitude of power and his opinion has precedence over that of 'the whole body mystical,' still the judgment of the whole Council takes precedence 'in a matter of faith, or schism, or where the good of the universal Church is in question' (III. c. 26—27), even if this good be but some secondary good; for example, if there be question as to the appointment of officers. When there is no pope or there are more popes than one or the pope is heretical, then the Council has all power (II. c. 24). The election of popes belongs to the Church universal which has committed it to the cardinals (I. c. 48). Normally it is for the Pope to summon and authorize the Council (III. c. 1 and 3): but he is bound to summon it for every arduous affair of the whole Church or if he himself is to be called to judgment (ib. c. 2). If he makes default, then the Cardinals, the Emperor, or indeed any clerk or layman may call a Council, which then con-

stitutes itself of its own authority (II. c. 4 and 24, III. c. 3). Against a pope who has been condemned or who impedes or dissolves a Council which might depose him, there is a general right of resistance and renunciation (II. c. 23, 26—30, III. c. 4—6). To deal with 'mixed' affairs 'mixed' councils, to which the Church should submit, are to be summoned by the joint action of the spiritual and temporal powers (III. c. 15—18 and 21—22).

Popular Sovereignty denied.

204. Turrecremata, De pot. pap. c. 38. So also Nicholas of Cues (Op. 825—9) in his later days: for Plurality is evolved out of Unity, and the Body out of the Head.—After as well as before the reaction in favour of the Papacy, the papalists admit the superiority of the Council in 'a cause of faith or of schism' (*contentio de papatu* and *causa contra papam*), but regard this as an exception. See, e.g., Card. Alexandr. c. 3, D. 21, c. 1, D. 23, summa, and c. 1, D. 15; Domin. Jacobatius Card. De consiliis, esp. IV. a. 7, nr. 29—31 and VI. a. 3, nr. 41 and 58—60, comp. with VI. a. 3, nr. 61; also Petrus de Monte and Turrecremata, in Schulte, Geschichte, II. p. 319 and 327.

Lay Representatives in the Councils.

205. As to the part assigned to delegates of Princes, Towns and Universities, see Hübler, p. 119, note 3, 120, note 5; Voigt, Enea Sylvio, I. p. 102 ff. Gerson, De pot. eccl. (II. p. 250), allows the laity only consultative voices. Even Nic. Cus. would allow them a real voice only under certain conditions, but lets all parishioners take part in the parochial synods, and the laity are to cooperate in the election of parsons and bishops (II. c. 16, III. c. 8—24).

The Church an Institute rather than a Fellowship.

206. Gerson, Propos. coram Anglicis, ann. 1409 (Op. II. pp. 128—130), De aufer. pap. (ib. 209 ff.), De pot. eccl. c. 7 and 9, Sermo in Op. II. p. 436 ff. So also Petr. Alliac. (ib. I. p. 666 ff. and 690) and Nic. Cus. (I. c. 7—10 and II. c. 19) regard the Priesthood as the essential and distinctive mark of the Church. As to Heinrich v. Langenstein, see his biography by O. Hartwig, I. pp. 56—57. [Dr Gierke here contrasts an idea of the Church which is *anstaltlich* with one which is *genossenschaftlich*. Some learning of a technically legal kind is implied by the employment of these words, and it cannot be briefly explained in English. But we shall not go far wrong if we contrast the idea of the Church as 'a corporation aggregate,' *congregatio fidelium*, with that of the Church as a system (*Inbegriff*) of personified offices, or (as we say in England) of 'corporations sole.']

207. So e.g. in Randuf, De mod. un. in Gerson, Op. II. p. 161 ff.

Fallibility of every

208. Ockham, Dial. I. 5, c. 1—35. So almost verbatim Petr. Alliac. (Gers. Op. I. p. 661 ff.) who, however, does not draw infer-

Part of the Church.

ences as to the active participation of the laity in the constitution of the Church. Comp. Randuf, c. 3.

The Laity and the Election of Popes.

209. Ockham, Dial. III. tr. 2, l. 3, c. 4—15: refuting opinions which would attribute this right only to the Canons, or the Clergy, or the Emperor.

The Emperor's part in Papal Elections.

210. Ockham, l. c., c. 5, 7, 12 (vice omnium eligeret): not as Emperor (c. 2, 3, 13), nor by the authority of the Pope (c. 5, 7). Comp. Octo q. IV. c. 6; also III. c. 8, and I. c. 17.

The Temporal Magistrate as Representative of the Laity.

211. See e.g. Ockham, Octo q. III. c. 8, Dial. I. 6, c. 85, 91—100.—So too Wyclif and Hus, rejecting the severance of Clergy and Laity, end by placing the ecclesiastical power in the hands of the State. See Lechner, Johan v. Wiclif, I. p. 566 ff. and 597 ff.

The Objectification of Office or Dignity.

212. [Dr Gierke here refers to other parts of his work in which he has given copious illustrations of this matter. The office or dignity can be 'objectified,' i.e. conceived as a 'thing' in which rights exist, and which remains the same while men successively hold it; and then again it can be 'subjectified' and conceived as a person (or substitute for a person) capable of owning things. In the present note he cites from Baldus 'dignitas...vice personae fungitur,' and refers to a legal opinion touching a mitre which the deposed John XXIII. was detaining from Martin V. and which was said to belong to the (subjectified) Apostolic See.]

The Prelate as Representative of his Church.

213. [Our author here refers to his treatment of this subject in other parts of his book. It was generally agreed that, although the Prelate was very often entitled solely to exercise those rights which legal texts ascribed to his *ecclesia*, still he was not the *ecclesia*. Divers analogies were sought. He acts 'sicut maritus in causa uxoris', or again, he is the *tutor* and the *ecclesia* is his *pupillus*. They all imply that, beside the Prelate, there is some other person concerned. Then practical inferences were drawn: e.g., a Prelate may not be judge *in causa propria*; but it is otherwise *in causa ecclesiae suae*.]

Is the Pope the Church?

214. Only in this sense 'papa ipse ecclesia' (e.g. Huguccio, l. c., p. 263), 'papa est sedes apostolica' (Dur. Spec. I. 1 de leg. § 5, nr 1), 'ecclesia intelligitur facere quod facit papa' (Joh. And. Nov. s. c. 1 in Sexto, 2, 12, nr. 1). Comp. Domin. Gem. Cons. 93, nr. 12; Cardin. Alex. in summa D. 15 (what the head does, the body does); Jacobat., De conc. IV. a. 7, nr. 29—31, VI. a. 3, nr. 41 and 58 ff.: the present Pope alone represents the whole church and is thus *ecclesia corporalis*: such also is the case of a Bishop in those matters in which the counsel, but not the consent, of the Chapter is requisite.

215. Ockham, Dial. I. 5, c. 25: only within certain limits is

the Pope 'persona publica totius communitatis gerens vicem et curam.' Zabar. c. 6, X. 1, 6, nr. 16: non solus sed tanquam caput universitatis. Gerson, De aufer. c. 8—20, De pot. eccl. c. 7. Nic. Cus. I. c. 14—17, II. c. 27 ff. Ant. Ros. II. c. 20—24, III. c. 16—17. Is the Pope's Representation of the Church unlimited?

216. Baldus, Rubr. C. 10, 1, nr. 12, 13, 18: princeps repraesentat illum populum et ille populus imperium etiam mortuo principe; but 'princeps *est* imperium, *est* fiscus,' because only in him does the Empire live, will and act. Cons. III. c. 159, nr. 5: 'ipsa respublica repraesentata' can be bound by the acts of the Emperor. Also Ockham, in Note 210 above, and Zabarella in Note 192. Representation of the Empire by the Emperor.

217. Already Joh. Saresb. IV. c. 3: the king 'gerit fideliter ministerium,' if he 'suae conditionis memor, universitatis subiectorum se personam gerere recordatur'; compare c. 5. Thom. Aquin. Summa Theol. II. 1, q. 90, ad 3: Ordinare autem aliquid in bonum commune est vel totius multitudinis vel alicuius gerentis vicem totius multitudinis: et ideo condere legem vel pertinet ad totam multitudinem vel pertinet ad personam publicam quae totius multitudinis curam habet. So again ib. 97, a. 3. Mars. Pat. Def. pac. I. 15: when the rulers (*principantes*) act within the sphere constitutionally assigned to them (secundum communitatis determinationem legalem), their act is that of the whole community (hoc facientibus his, id facit communitas universa). Baldus, Consil. 159, nr. 5 and especially 1 Feud. 14, pr. nr. 1: 'The city of Bologna belongs to the Church!' exclaims Baldus, 'Much rather to the Bolognese! For the Church has no authority there, save as (*tanquam*) the Republic, of which Republic it bears the name and image. Even so the city of Siena belongs to the Kaiser, but more to the Sienese: for republic, fisc, and prince are all one; the *respublica est sicut vivacitas sensuum*; the fisc is the stomach, purse and fastness of the republic; therefore the Emperor would be *quasi tyrannus* if he did not behave himself as the Republic, and such are many other kings who seek their own profit: for he is a robber, a *praedo*, who seeks his own profit and not the profit of the owner.' [Dr Gierke gives this interesting passage in Latin.] See also nr. 2: the office of ruler (*dignitas*) is inalienable, being 'totius universitatis decus.' Barth. Salic. l. 4, C. 2, 54: the *civitas* as such can demand a *restitutio in integrum*, even if the Ruler who acted in its name profited by the transaction: and, despite the *translatio*, this holds good of the *respublica imperii*. Jason, l. c., nr. 8. Nic. Cus., above in Note 171. Representative Character of Kingship.

218. Baldus, Cons. III. c. 159, nr. 5: loco duarum personarum rex fungitur; I. c. 271, nr. 4: bona propria...non tanquam rex, sed tanquam homo et animal rationabile. Alex. Tart. l. 25 § 1, Dig. 29, The Monarch's Double Personality.

2, nr. 4: fiscalis res et Caesaris res est eadem, quia omnia iura fiscalia transferuntur in eum tanquam imperatorem non tanquam Titium: but with the 'patrimonium Caesaris' it is otherwise, for this he has 'tanquam Titius.' Marcus, Dec. I. q. 338, nr. 1—7. [Reference is made by Dr Gierke to other parts of his book where the dual personality of bishops and the like is discussed: a bishop, it was said, had two persons; one 'in quantum est episcopus'; the other 'in quantum est Petrus vel Martinus.']

King's Property and State's Property.

219. See last note. Also Ockham, Octo q. II. c. 2: what the Kaiser had before he was Kaiser or afterwards acquired 'per se et non dignitati,' is his private property. On the other hand, the 'bona et iura imperii' exist 'propter bonum commune subditorum et non propter bonum proprium principatus.' Of these last he can dispose 'non nisi propter bonum commune seu utilitatem omnium subditorum,' and if he do otherwise he is bound to make restitution like anyone else who misapplies goods that have been entrusted to him.

Acts of the Prince and acts of the Man.

220. Baldus, Cons. I. 271, 326, 327; III. c. 159, 371. The question is whether and in what case a Prince, elective or hereditary, is bound by the acts of his predecessor, and Baldus always acutely reduces this to the question in what cases the State, or the Fisc, is bound by the acts of its highest organ. When it comes to particulars, he applies the ordinary rules of Corporation Law touching the liability of corporations for the contracts and torts of their governors; but in the case of Kings and more especially of hereditary Kings he supposes an unusually wide power of representation. A king is no mere 'legitimus administrator,' but stands 'loco domini' (nam regnum magis assimilatur dominio quam simplici regimini); and in particular his power to bind by contract extends to unusual as well as to usual affairs. In the same sense, Jason, Cons. III. c. 10, distinguishes the Ruler's 'pacta personalia,' and 'pacta realia nomine suae gentis inita' (c. 8), extends the principle to judicial acts (nr. 10), appeals to ecclesiastical analogies (nr. 15—19), and then declares that the successor is bound as successor 'si princeps faciat ea quae sunt de natura vel consuetudine sui officii' (nr. 21), or if the convention was made 'in utilitatem status' (nr. 14). Comp. Bologninus, Cons. 6. On the other hand Picus a Monte Pico, I. Feud. 3, nr. 1—3, and I. Feud. 7, nr. 1—17, once more throws the whole question into confusion.

221. Nic. Cus., above in Notes 171 and 209; Gerson, De pot. eccl. c. 10, and Concordia, p. 259.

Duties towards

222. See, e.g. Eng. Volk. De reg. princ. IV. c. 21—29; alongside the duties arising between individuals as men, as fellow countrymen,

as fellow burgesses, as kinsmen, as members of social groups, stand their duties to the Whole which arise out of 'illa coniunctio qua unusquisque privatus universitati sive reipublicae tanquam membrum corpori et tanquam pars toti consociatur.' Comp. VII. c. 8—12 as to the different 'status personae.' Individuals and Duties to the Community.

223. Mars. Pat. I. c. 12: the *populus* is sovereign; the *populus* is the *universitas civium*; a *civis* is one who 'secundum suum gradum' takes part in public affairs; excluded are 'pueri, servi, advenae ac mulieres.' So Thom. Aq. Comm. ad Polit. p. 452 and 460 (comp. also Summa Theol. II. 1, q. 105, a. 1) and Patric. Sen. De inst. reip. I. 3, p. 22 define *civis* in the Aristotelian way, so as to equate it with 'active citizen.' Rights of the Community exercised by its Active Members.

224. Lup. Bebenb. c. 17, p. 406: et intelligo populum Romani imperii connumeratis principibus electoribus ac etiam aliis principibus, comitibus et baronibus regni et imperii Romanorum: nam appellatione populi continentur etiam patricii et senatores. And so other writers.—Even the Radical Marsilius admits to the legislative assembly everyone 'secundum suum gradum'; tries to secure the influence of the *docti et sapientes* in the discovery and redaction of laws, and apparently would give no unconditional support to a system of equal votes, for the *valentior pars* which decides seems to be measured 'secundum politiarum consuetudinem honestam.' See Def. pac. I. 12—13 and 15; also De transl. imp. c. 6. Representation of the People as a System of Estates.

225. Mars. Pat. Def. I. pac. c. 12—13: the *voluntas* of the *universitas civium* becomes law by being expressly declared in the *congregatio generalis*; I. c. 17: the act is a single act though done by many in common; III. c. 6. So also Aegid. Col. II. 1, c. 3. Will of the People expressed by Assemblies.

226. From Corporation Law are deduced the exclusive right of the Pope to summon the Council (e.g. Card. Alex. c. 2, D. 17), and by others a right of summons normally to be exercised by the Pope (Jacobat. De Conc. IV. a. 7, nr. 24; Ant. Ros. III. c. 1—3), but supplemented by a right of the Cardinals or such part of their body as does not make default (Zabar. De schism. p. 689; Ros. III. c. 3; Decius, Cons. 151, nr. 13—22) and of the Kaiser (above, Note 48); and the right of the Council to assemble itself is similarly deduced (above, Notes 188, 192, 203). It is opined that if all the members, though unsummoned, were present, then, as in the case of other corporations, they might proceed to business (Ros. II. c. 4). If all are not present, then Zabarella (comp. De schismate, pp. 693—4) vouching Innocent [IV.] would require the presence of two-thirds, who would then have to summon the others and wait until they either appeared or could be declared guilty of contumacy. On the The Rules of Corporation Law are applied to Political Assemblies.

other hand, Rosellus (III. c. 4) and Jacobatius (IV. a. 7, nr. 25—8) argue that in the case of the Council an *imminens periculum vel necessitas* may always be presupposed, and that, when this is so, even a minority can summon the others and preclude them, since, according to Corporation Law, the *pars in casu periculi non contumax* is in truth the *maior et sanior pars*. [In an earlier part of his book Dr Gierke has explored the formation of a law and theory of corporate assemblies. The legists, relying on certain texts which concerned the Roman *decuriones*, were inclined strictly to require the presence of two-thirds of the members. This requirement the canonists mitigated in divers fashions. They also held that if no meeting had been summoned, but two-thirds of the members were present, those present might proceed to business, but ought to summon the others unless there were danger (*periculum*) in delay. Then, according to the canonists, it was not a mere *maior pars* but a *maior et sanior pars* that could validly outvote a minority.]

Corporation Law and the General Council.

227. See especially Jacobat. IV. a. 7. He elaborately argues that l. 3 et 4, Dig. 3, 4 are not to be applied, and that, according to the canonical principle 'Vocati non venientes constituunt se alienos,' even a minority can act (nr. 1—16); also that the right of the *contempti* to re-open a question has no existence in this case, since a *citatio generalis* is sufficient (nr. 16—23); and so forth. Also Ros. III. c. 7—14 (in c. 14 the requirement of two-thirds is set aside). Card. Alex. c. 2, D. 17. [The Canonists had practically circumvented the requirement that two-thirds of the members should be present, by holding that those who failed to appear when duly summoned were in contempt, had 'made themselves alien' and were not to be counted.]

Majorities how reckoned.

228. Zabar. De schism. p. 689. Panorm. c. 26, X. 2, 27, nr. 13. Even in the Council the voice that prevailed was to be that of the greater 'and sounder' part (Card. Alex. c. 1, D. 15 in fine; Jacobat. IV. a. 3, nr. 1—41); and with this was connected the principle that matters of faith were not to be decided by mere majorities (Jacobat. l. c. nr. 7—12 and 25; Nic. Cus. I. c. 4). The words of Cusanus (II. c. 15) carry us back to old Germanic thoughts: quia quisque ad synodum pergens iudicio maioris partis se submittere tenetur... synodus finaliter ex concordia omnium definit. [The old Germanic thought is that unanimity is requisite, but that a minority ought to and can be compelled to give way.] Also we may see that the *iura singulorum* are to be protected against the vote of the majority (Jacobat. l. c. nr. 27—32). During the strife over the adjournment of the Council of Basel, an odd inference was drawn from this

principle, namely, that the minority or even any one member could resist an adjournment to another place on the ground of 'vested right' (*ius quaesitum*): see Ludov. Rom. Cons. 352, nr. 10—24, and Cons. 522; Jacobat. l. c. nr. 36—39, and ib. a. 7, nr. 35. [Under the rubric *iura singulorum*, medieval law withdraws from the power of the majority rights of individual corporators which are more or less closely implicated in the property and affairs of the corporation. A modern example would be the shareholder's 'share': this does not lie at the mercy of a majority; a medieval example would be a canon's 'prebend.']

Majorities and Nations in the Council.

229. The plan of voting by Nations was justified by the rules that dealt with the conjoint action of divers *corpora* (Panorm. c. 40, X. 1, 6, nr. 6, Jacobat. IV. a. 3, nr. 52—57), while the opponents of that plan made much of the unity of the whole body of the Church (Card. Alex. c. 1, D. 15 in fine). See Hübler, p. 279, n. 60 and 316 ff. [The federalistic character of medieval groups gave rise to many elaborate schemes for securing a certain amount of unity and independence to those smaller bodies that were components of a larger body, e.g. the faculties and nations within an university.]

The Majority as a Representation of the Whole.

230. See e.g. Mars. Pat. Def. pac. I. c. 12, 13, 15, 17: what the *valentior pars* does is 'pro eodem accipiendum' as that which the *tota universitas* does, for the 'valentior pars totam universitatem repraesentat.' Eng. Volk. De reg. pr. I. c. 5, 7, 10, 14. Lup. Bebenb. c. 6 and 12. Ockham and Ant. Ros. as above, in Note 145.

Corporate Torts of the Roman People.

231. Ockham, Dial. III. tr. 2, l. 1, c. 29—30: quaecunque universitas seu communitas particularis propter culpam suam potest privari quocunque honore et iure speciali; and therefore for *culpa* the Romans may be deprived of their lordship in the Empire; and so with other nations; and so for their *culpa* whole portions of mankind can be deprived of their active rights in the World-State, and many think that this has happened to the Jews and Heathen, their share in the Empire having 'devolved' to the Christians. But, according to l. 2, c. 5, there ought to be a formal *sententia* of the *universitas mortalium* or its representatives. Whether the papal 'translatio a Graecis in Germanos' was founded on this principle and whether that act was rightful or wrongful could, says Ockham (Octo q. II. c. 9), be known only to one who possessed all the documents of that age.

Representative Character of the Council.

232. See the definition given by Konrad v. Gelnhausen, De congreg. conc. temp. schism. an. 1391 (in Martene II. p. 1200): concilium generale est multarum vel plurium personarum rite convocatarum repraesentantium vel gerentium vicem diversorum statuum,

ordinum et personarum totius Christianitatis venire aut mittere volentium aut potentium ad tractandum de bono communi universalis ecclesiae in unum locum communem congregatio. Gerson, De aufer. c. 10; De pot. eccl. c. 7 ff. Nic. Cus. De auctor. praes. (in Düx, I. p. 475 ff.): the Pope is the remotest, the General Council the directest and surest representative of the Universal Church. Decius, c. 4, X. 1, 6, nr. 21.

The Council a mere Representative.

233. See Ockham, Dial. I. 5, c. 25—28: even the representative Council is only *pars ecclesiae*; it stands below the 'communitas fidelium si posset convenire'; is summoned by human agency and can be dissolved; and it can err, so that resistance to, appeal from, and accusation against it are not inconceivable. Similarly at some points, Petr. Alliac. in Gers. Op. I. p. 688 ff., and again at the Synod of Constance (Sess. I. in Mansi, XXVII. p. 547).—So Breviscoxa (Gers. Op. I. p. 898) speaks with hesitation about the Council's infallibility.—On the other hand, Gerson and Cusanus (II. c. 15—16) maintain its infallibility, its representation of the Church being absorptive.

Election and Representation.

234. Nic. Cus. I. c. 15 and II. c. 18: it is on the ground of election that 'praesidentes figurant suam subiectam ecclesiam' and that Councils of such prelates represent the larger circles of the Church; and so on up to a representation of the Church Universal. Ant. Butr. c. 17, X. 1, 33, nr. 27—28: at the Provincial Councils the Prelates and 'Rectores' do not appear as individuals, but 'quilibet praelatus vel rector tenet vicem universitatis.' Zabar. c. ult., X. 3, 10, nr. 1—3. Panorm. c. 17, X. 1, 33, nr. 2: in the General Council 'praelati totius orbis conveniunt et faciunt unum corpus, repraesentantes ecclesiam universalem'; so the *praelati et maiores* of the province represent their *universitates*, and so in their Provincial Assembly they represent the *universitates ecclesiarum* of the province; and again 'in una dioecesi...praelati et capitula repraesentant totum clerum'; and so also is it in the constitution of Universities.

Election of Lay Representatives.

235. Ockham, Dial. I. 6, c. 84 (above, Note 209): he appeals to the general right of every people, every commune, every *corpus*, to assemble, not only in proper person but also 'per aliquos electos a diversis partibus,' for every body 'potest aliquos eligere qui vicem gerant totius communitatis aut corporis.'

Representation in Temporal Assemblies.

236. See above, Notes 161—3, 168, 172. Marsil. Pat. I. c. 12—13: vicem et auctoritatem universitatis civium repraesentant. Nic. Cus. III. c. 12 and 25. Men thought that certain texts in the Corpus Juris assigned a similar position to the Roman Senate. [Our author is referring in particular to certain words of Pomponius (l. 2, § 9,

Dig. 1, 2) which, he says, exercised a marked influence on Political Theory; deinde quia difficile plebs convenire coepit, populus certe multo difficilius in tanta turba hominum, necessitas ipsa curam reipublicae ad senatum deduxit. He here remarks that already in the Brachylogus—a manual of Roman law which he is inclined to ascribe to Orléans and the twelfth century—these words of Pomponius are supposed to record a formal transfer of power by the *populus* to the senate.]

237. See the formulation of the general principle in Ockham (above, Note 235) and Mars. Pat. l. c.

238. Nic. Cus. III. c. 12 and 25: elected governors are to represent communities; assemblies of such governors are to represent the lands and provinces; and an *universale concilium imperiale* is to represent the *Reich*: in this council 'praesides provinciarum suas provincias repraesentantes ac etiam universitatum magnarum rectores ac magistri' and also men of senatorial rank are to meet; they will compose the 'corpus imperiale cuius caput est Caesar, et *dum simul conveniunt in uno compendio repraesentativo, totum imperium collectum est.*' The Representative Parliamentarism of Nicholas of Cues.

239. Mars. Pat. I. c. 12—13; he says in c. 12: sive id fecerit universitas praedicta civium aut eius pars valentior per se ipsam immediate, sive id alicui vel aliquibus commiserit faciendum, qui legislator simpliciter non sunt nec esse possunt, sed solum ad aliquid et quandoque ac secundum primi legislatoris auctoritatem. The Radicalism of Marsilius.

240. Lup. Bebenb. c. 5, p. 352—3 and c. 6, p. 357—8: the Prince Electors make the election 'repraesentantes in hoc omnes principes et populum Germaniae, Italiae et aliarum provinciarum et terrarum regni et imperii, quasi vice omnium eligendo.' Were it not for their institution, the 'universitas ipsa' would have to make the choice; but, as it is, the Electors choose 'vice et auctoritate universitatis.' When therefore they have made the choice, 'proinde est ac si tota universitas principum et populi...fecisset'; to prove which voucher is made of l. 6 § 1, Dig. 3, 4, and c. ult. in Sexto *de praebendis*. See also the participation of the Electors in the deposition of an Emperor, c. 12, p. 386—7, and in the alienation of rights of sovereignty, c. 14, p. 396.—Comp. Ockham, Octo q. VIII. c. 3: 'repraesentantes universitatem.' Zabar. c. 34 § *verum* X. 1, 6, nr. 8. Nic. Cus. III. c. 4: 'qui vice omnium eligerent.' Gregor. Heimb. in Gold. I. p. 561. Ant. Ros. I. c. 48. The Prince Electors as Representatives.

241 See above, Notes 174 and 194. Ockham, Dial. I. 5, c. 6 and 8. Nic. Cus. I. c. 14, 17, II. c. 14 (repraesentant); Ant. Ros. I. c. 48: ab universali ecclesia, quam cardinales et electores in hoc The Cardinals as Representatives.

ipsam totam repraesentant.—Nic. Cus. II. c. 14—15 desires therefore to extend to the Cardinals the elective principle, which is in his eyes the only conceivable foundation for a mandate in political affairs. The Cardinals ought to be elected provincial deputies forming an Estate and constituting in some sort the aristocratic Upper House of a parliamentarily organized Spiritual Polity.

Corporation Law and Imperial Elections.

242. Hostiensis, Johannes Andreae (c. 34, X. 1, 6, nr. 25) and others opined that the Prince Electors made the choice as individuals, 'ut singuli.' Lup. Bebenb. c. 6, pp. 356—8, and c. 12, pp. 379—80, argues that much rather they are representatives of an *universitas*, and must themselves meet 'tanquam collegium seu universitas' and make the choice *communiter*. Therefore he would here apply the principle of the 'ius gentium, civile et canonicum' which teaches that an election made by an absolute majority is 'electio iuris interpretatione concors' and exactly equivalent to an unanimous election. So too Zabarella (c. 34 § *verum*, X. 1, 6, nr. 8) who cites Leopold: in all respects the same procedure should be observed as 'in aliis actibus universitatum': thus, e.g., the requirement of the presence of two-thirds of the members, the preclusion of those who do not attend, and so forth. Comp. also Cons. 154, nr. 6. Felinus, c. 6, X. 1, 2, nr. 29. Bertach. Rep. v. *maior pars*, nr. 27. Petrus de Andlo, II. c. 1—4, treats the Election of an Emperor at great length, and in detail subjects it to Roman and canonical rules for the election of prelates which are stated by Johannes Andreae, Antonius de Butrio, Johannes de Anania, Baldus and Panormitanus. Thus it is in the matter of summons and presidency, form of scrutiny, decision with absolute majority, *accessio*, self-election; so also in the matter of the demand for and grant of examination and approbation on the part of the Pope, and the devolution or lapse of the election to the Pope; and so again as to the requirement of an *actus communis*, the right of objection of *unus contemptus*, the privation of *scienter eligentes indignum*. For he opines that 'these Electors have succeeded to the place of the Roman People, who *ut universitas* elected an Emperor, and so the Electors must be conceived to act in the same right [i.e. *ut universitas*], since a surrogate savours of the nature of him whose surrogate he is.'

Corporation Law and Papal Elections.

The Universal Church and the Particular Churches as Corporations.

243. See Innoc., Host., Ant. Butr., Zabar., Panorm., Dec. on c. 6, X. 1, 6; Aug. Triumph. I. q. 3; Alv. Pel. I. a. 1; Ludov. Rom. Cons. 498, nr. 1—22 (applying the whole of the law about decurions); Ant. Ros. II. c. 8—10; Bertach. v. *gesta a maiori parte*.

244. [Dr Gierke here refers to other parts of his work where he has dealt with the Canonists' conception of every church as a *corpus*.]

245. Baldus s. pac. Const. v. *imp. clem.* nr. 4: the Emperor, Baldus explains, is speaking 'de ista magna universitate, quae omnes fideles imperii in se complectitur tam praesentis aetatis quam successivae posteritatis.' Prooem. Feud. nr. 32: non potest rex facere deteriorem conditionem universitatis, i.e. regni. Rubr. C. 10, 1, nr. 11: Respublica as an 'Object' means publica res, as a 'Subject' ipsa universitas gentium quae rempublicam facit. Zabar. c. 13, X. 5, 31, nr. 1—7 brings in the learning of Corporations, defines *corpus* or *collegium* as 'collectio corporum rationabilium constituens unum corpus repraesentativum,' distinguishes 'collegia surgentia naturaliter,' which so soon as they have come into being are also 'necessaria,' and 'collegia mere voluntaria'; in the former class he reckons communes, provinces and realms, and therefore brings in at this point the learning of the six Aristotelian forms of government, and the doctrine of the World-Monarchies and their relation to the Church. The Empire or State as a Corporation.

246. Baldus, Cons. III. c. 159. Comp. ib. c. 371, and I. c. 326—327 and c. 271 (respublica et fiscus sunt quid aeternum et perpetuum quantum ad essentiam, licet disponens saepe mutetur). Comp. also Jason, Cons. III. c. 10, where in nr. 14 we already meet the phrase 'conventio facta in utilitatem *Status*.' Perpetuity of the State.

247. Baldus, Rubr. C. 10, 1, nr. 15—16.

248. See above, Notes 212 and 218—20; also 190 and 206.

249. See above, Notes 213—7.

250. See above, Note 118.

251. See above, Notes 221—231.

252. Expressly d'Ailly, Gerson (De pot. eccl. c. 10) and Nicholas of Cues (II. 34) vest all the rights of the Church in the 'omnes collective sumpti.' But also Marsilius, Randuf and others leave no room for doubt that for them the Church, considered as the Congregation of the Faithful, is coincident with the sum of individuals. And if Ockham in one passage (Octo q. I. c. 11) names as the receiver of the divine mandate the 'persona communitatis fidelium,' still his whole system, as set forth above, and most unambiguously his discussion of the whereabouts of the Church's infallibility, prove that he is not thinking of a single personality which comes to light in organization, but of a personified collective unit. See above, Notes 188 and 208. Mere Collectivism in the Concept of the Church.

253. Turrecrem. De pot. pap. c. 71—72: where the power of the keys is ascribed to 'the Church,' this means in truth that she has it in some of her members and the whole of it only in her head. The Church as a 'Subject' of Rights.

254. See in particular Nic. Cus. as above in Note 171, also III. c. 4 (vice omnium), 12 and 25; Mars. Pat. I. c. 12—13; Lup. The People a

Collective Unit.

Bebenb. c. 5—6; Ockham, Dial. 1. 6, c. 84; Patric. Sen. De inst. reip. 1. 1, 5 (multitudo universa potestatem habet collecta in unum,... dimissi autem singuli rem suam agunt).

255. See above, Notes 215—8, 228, 230, 232—42.

The Law of Nature and the Essence of Law.

256. That there was a Law of Nature was not doubted, nor that it flowed from a source superior to the human lawgiver and so was absolutely binding upon him. Such was the case whatever solution might be found for that deep-reaching question of scholastic controversy which asks whether the essence of Law is Will or Reason. In any case God Himself appeared as being the ultimate cause of Natural Law. This was so, if, with Ockham, Gerson and d'Ailly, men saw in Natural Law a Command proceeding from the Will of God, which Command therefore was righteous and binding. It was so, if, with Hugh de St Victor, Gabriel Biel and Almain, they placed the constitutive moment of the Law of Nature in the Being of God, but discovered dictates of Eternal Reason declaring what is right, which dictates were unalterable even by God himself. Lastly, it was so, if, with Aquinas and his followers, they (on the one hand) derived the content of the Law of Nature from the Reason that is immanent in the Being of God and is directly determined by that *Natura Rerum* which is comprised in God Himself, but (on the other hand) traced the binding force of this Law to God's Will. Aquinas (Summa Theol. II. 1, q. 90—92), when he has discussed the nature, kinds and operations of a *Lex* in general, and has defined it (q. 90, a. 4) as 'quaedam rationis ordinatio ad bonum commune, et ab eo, qui curam communitatis habet, promulgata,' proceeds to put at the head of his Philosophy of Law the idea of *Lex Aeterna*. And this, he says, as being 'ipsa ratio gubernationis rerum in Deo sicut in Principe universitatis existens,' and 'summa ratio in Deo existens,' is identical with the Being of God (*non aliud a Deo*), but at the same time is a true *Lex*, absolutely binding, and the source of every other *Lex* (omnis lex a lege aeterna derivatur); l. c. q. 91, a. 1, q. 93, a. 1—6. Immediately from this he derives the *Lex Naturalis* which is grounded in the participation by Man, as a reasonable being, in the moral order of the world (participatio legis aeternae in rationali creatura) and is perceived by the light of Natural Reason (lumen rationis naturalis) entrusted to us by God (q. 91, a. 2, q. 94). It is a *lex promulgata*, for 'Deus eam mentibus hominum inseruit naturaliter cognoscendam' (q. 90, a. 4); it exists *in actu* and not merely *in habitu* (q. 94, a. 1); it is in its principles a true, everywhere identical, unalterable and indestructible rule for all actions (q. 94, a. 3—6).

[Dr Gierke here cites a note in his tract on Johannes Althusius

(p. 73) in which he has dealt with the same matter and from which we take the following sentences, though they reach beyond the Middle Age.]

The older view, which is more especially that of the Realists, explained the *Lex Naturalis* as an intellectual act independent of Will—as a mere *lex indicativa*, in which God was not lawgiver but a teacher working by means of Reason—in short, as the dictate of Reason as to what is right, grounded in the Being of God but unalterable even by him. (To this effect already Hugo de S. Victore Saxo, in the days of Calixtus II. and Henry V., Opera omnia, Mog. 1617, III. p. 385, de sacramentis I. p. 6, c. 6—7; later Gabriel Biel, Almain and others.) The opposite opinion, proceeding from pure Nominalism, saw in the Law of Nature a mere divine Command, which was right and binding merely because God was the law-giver. So Ockham, Gerson, d'Ailly. The prevailing opinion was of a mediating kind, though it inclined to the principle of Realism. It regarded the substance of Natural Law as a judgment touching what was right, a judgment necessarily flowing from the Divine Being and unalterably determined by that Nature of Things which is comprised in God; howbeit, the binding force of this Law, but only its binding force, was traced to God's Will. Thus Aquinas, Caietanus, Soto, Suarez. In like fashions was decided the question, What is the constitutive element of Law [or Right] in general? Most of the Schoolmen therefore held that what makes Law to be Law is 'iudicium rationis quod sit aliquid iustum.' So with even greater sharpness Soto, De iustitia et iure, Venet. 1602 (first in 1556), I. q. 1, a. 1, and Molina, Tract. v. disp. 46, §§ 10—12. Compare also Bolognetus (1534—85), De lege, iure et aequitate, Tr. U. J. I. 289 ff. c. 3; Gregorius de Valentia, Commentarii theologici, Ingoldst. 1592, II. disp. 1, q. 1, punct. 2. The opposite party taught that Law becomes Law merely through the Will that this or that shall pass for Law and be binding; or they laid all the stress on a Command (*imperium*) given to subjects. Others, again, declared that *intellectus* and *voluntas* were equally essential. Only Suarez, who reviews at length all the older opinions, distinguished at this point between Positive Law and Natural Law, and in the case of the former sees the legislative Will (not however the law-giver's command) as the constitutive, while Reason is only a normative, moment (I. c. 4—5 and III. c. 20). In the later Philosophy of Law the derivation of all Law from Will and the explanation of both Natural and Positive Law as mere Command was well-nigh universal. Only Leibnitz (1646—1716), who in so many directions went deeper than his

contemporaries, and who, perhaps for this reason, so often turned his eyes backwards towards medieval ways of thought, disputed this 'Will-Theory' with powerful words directed against Pufendorf and Coccęji. He denied the essentialness of the idea of Compulsion in the idea of Law, and argued that *Recht* was prior to *Gesetz*. 'Das Recht is nicht Recht weil Gott es gewollt hat, sondern weil Gott gerecht ist.' See Opera, ed. Dutens, Genev. 1768, IV. 3, pp. 275—83, also p. 270 ff. § 7 ff. and § 13.

[In another note Dr Gierke (Joh. Althusius, p. 74) cites the following passage from the German, Gabriel Biel (ob. 1495). In his Collectorium Sententiarum, Tubing. 1501, lib. II. dist. 35, q. un., art. 1, he says: Nam si per impossibile Deus non esset, qui est ratio divina, aut ratio illa divina esset errans, adhuc si quis ageret contra rectam rationem angelicam vel humanam aut aliam aliquam si qua esset, peccaret. Et si nulla penitus esset recta ratio, adhuc si quis ageret contra id quod agendum dictaret ratio recta si aliqua esset, peccaret. 'Already' Dr Gierke adds, 'medieval Schoolmen had hazarded the saying, usually referred to Grotius, that there would be a Law of Nature, discoverable by human reason and absolutely binding, even if there were no God, or the Deity were unreasonable or unrighteous.']

Nullity of Laws contravening the Law of Nature.

257. Thom. Aquin. Sum. Theol. II. 1, q. 91, art. 2, q. 94, a. 1—6, q. 97, a. 1 (the whole people bound); II. 2, q. 57, a. 2. Aegid. Rom. De reg. princ. III. 2, c. 29: the *rex* stands below the *lex naturalis*. Vincent. Bellovac. VII. c. 41 ff. and X. c. 87: ipso iure non valent leges quia nulla lex potest valere contra Deum. Joh. Friburg. II. t. 5, q. 204—6, t. 7, q. 43 ('leges permittentes usuras' are null). Ockham, Dial. III. tr. 1, l. 2, c. 6, and tr. 2, l. 2, c. 26—8 (as to Kaiser and Pope), ib. c. 29 (as to the *universitas populi*), and tr. 2, l. 1, c. 30 (even an unanimous decision of the *universitas mortalium* could not wholly abolish the Roman Empire). Baldus, I. Feud. 1 § 3, nr. 2 (potentius est ius naturale quam principatus), and l. 1, Cod. 1, 1, nr. 24 ff. (therefore Kaiser and Pope could not, e.g., make usury lawful). Gloss on the Sachsensp. I. a. 25 and 55. Bened. Capra, Regula 10, nr. 20—43 and 53 (as to *princeps, papa, imperator, populus seu universitas* with *iurisdictio* and *imperium*). Felinus Sand. c. 7, X. 1, 2, nr. 19—25 (as to Pope) and nr. 26 ff. (as to *imperator, princeps, populus liber*). Petr. Alliac. in Gers. Op. I. p. 652 ff. Nic. Cus. III. c. 5. Ant. Ros. IV. c. 2—14. As to the Pope, see above, Note 132, and as to the Council, see Gerson in Note 198.

Revealed Law and

258. So in particular Thom. Aquin. Sum. Theol. II. 1, q. 91, art. 1—2 and 4—5; he thereafter (q. 98—105) treats at length of

the *lex vetus*, and (q. 106 ff.) of the *lex nova*. Comp. Aegid. Rom. De reg. princ. III. 2, c. 24—9 (*lex naturalis*) and c. 30 (*lex divina*). Gerson, IV. p. 652—4. See also the passages cited in the last Note, in which the force of the *lex divina* is placed on a level with that of the *lex naturalis*, this principle being applied, e.g., when statutes that permit usury are pronounced void. Natural Law.

259. See e.g. Thom. Aquin. l. c. q. 95, a. 2 and 4: the *lex humana* carries into detail the *principia legis naturalis*, partly as *ius gentium* by way of mere *conclusiones*, partly as *ius civile* by way of *determinationes*. See also ib. II. 2, q. 57, a. 3. Aegid. Rom. III. c. 2, c. 25 and c. 29: si dicitur legem aliquam positivam esse supra principantem, hoc non est ut positiva, sed ut in ea reservatur virtus iuris naturalis. Lup. Bebenb. c. 15, p. 401. Ockham, Dial. III. tr. 2, l. 2, c. 28: the *ius gentium*, in accordance with which the highest power is subject to the common weal, 'non est imperatorum vel regum per institutionem, sed solum per approbationem et observationem.' Baldus, I. Feud. 1 § 3, nr. 2. Hieronymus de Tortis, Consilium for Florence, nr. 25: Papa et imperator non sunt supra ius gentium; therefore (nr. 20—32) a papal sentence, if not preceded by citation, is null. Nature of the Ius Gentium

260 Thus Thom. Aquin. l. c. q. 94, a. 4—6, distinguishes the *prima principia* of the *lex naturalis*, which are everywhere identical, immutable, ineradicable, and the *praecepta secundaria* of the same *lex* which are mutable and, in consequence of the depravity of human reason, 'in aliquo' destructible. Generally it is said that the *ius naturale* is immutable and can never be abrogated (*tolli*) by the *ius civile*; but that derogation from it 'quoad quid' is possible, and that 'ex causa' additions to and detractions from it can be made. See Lup. Bebenb. c. 15, p. 401. Ockham, Dial. III. tr. 2, l. 2, c. 24. Gloss on Sachsensp. I. a. 55. Anton. Rosell. IV. c. 7: the 'ius naturale divinum' is wholly unalterable; on the other hand, the 'ius naturale homini commune cum animalibus' cannot indeed be abrogated by the law-giver, but can 'ex causa' be interpreted and confined.—This limitation was unavoidable, for, according to general opinion, the very existence of lordship and ownership implied a breach of the pure Law of Nature, and even Thomas Aquinas, Sum. Theol. II. 2, q. 66, a. 2, was of opinion that 'proprietas possessionum non est contra ius naturale, sed iuri naturali superadditur per adinventionem rationis humanae.' Compare I. q. 96, a. 1—4; and K. Summenhard, Tr. I. q. 8—11, who speaks at length. Principles and Secondary Rules of the Law of Nature.

261. Anton. Ros. IV. c. 2—6 says that, though John de Lignano denies this, the legists are all agreed that though the *ius divinum* Positive Modifications of

the Law of God.

cannot be abrogated (*tolli*) it can be distinguished, limited and restrained in proper cases, and that additions can be made to it; but this holds good only of such *ius divinum* as is not *de necessitate.* Comp. Ockham, Dial. III. tr. 2, l. 2, c. 24. Such limitations become all the more necessary when men are beginning to regard Positive Canon Law as *ius divinum.*

Primeval and Secondary Ius Gentium.

262. Very usual is a distinction between the 'ius gentium primaevum' which has existed ever since men were in their original condition and the 'ius gentium secundarium' which is of later growth. According to Anton. Rosell. IV. c. 7, the law-giver can not abrogate, though he may interpret, the former, while the latter he may abrogate 'ex causa.'

Mutability of Positive Law.

263. Thom. Aquin. Sum. Theol. II. 1, q. 90, a. 2 and 3, q. 91, a. 3, q. 95, a. 2, q. 96, a. 5: but he maintains that a law has a *vis directiva* for the legislator who made it. Also q. 97, a. 1—4. Aegid. Rom. De reg. princ. III. 2, c. 24, 26—28, 31: already we see here a comparison between law and language; like language, the *lex positiva* varies according to 'consuetudo, tempus, patria et mores illius gentis.' Mars. Pat. I. c. 12—13: a quite modern definition of a law as the expressly declared will of a sovereign community. Patric. Sen. De inst. reip. I. 5.

The Prince and Positive Law.

264. Thom. Aquin. l. c. q. 90, a. 3, q. 97, a. 3; also Comm. ad Polit. p. 477, 491, 499, 518. Aeg. Rom. III. 2, c. 29: 'positiva lex est infra principantem sicut lex naturalis est supra'; the Prince stands in the middle between Natural Law and Positive; the latter receives its *auctoritas* from him and he must adapt it to the particular case. Ptol. Luc. II. c. 8, III. c. 8 and IV. c. 1: the essential difference between the *principatus regalis* and the *principatus politicus* lies in this, that the latter is a responsible government according to the laws, while in the former the *lex* is 'in pectore regentis,' wherefore he can at any time produce as law from this living fount whatever seems expedient to him. Engelb. Volk. I. c. 10—11: the *rex* as *lex animata*; and such a *lex*, since it can suit itself to the concrete case, is better than a *lex inanimata.* Joh. Saresb. IV. c. 2. Ockham, Dial. III. tr. 1, l. 2, c. 6. Petr. de Andlo, I. c. 8.

Potestas legibus soluta.

265. As to the Pope, see Boniface VIII. in c. 1 in Sexto 1, 2 (qui iura omnia in scrinio pectoris censetur habere); Aug. Triumph. I. q. 22, a. 1; Alv. Pel. I. a. 58; Laelius in Gold. II. p. 1595 ff.; Aen. Sylv. a. 1457 (Voigt, II. p. 240 ff.); Nic. Cus. after his change of opinion (Op. 825 ff.). Then as to the Emperor, see the doctrine of all civilians; the theories of the Hohenstaufen; Frederick I. in Otto Fris. III. 16 and IV. 4; Wezel, l. c.; Ep. Freder. II. in ann.

1244 and 1245 in Huillard, Hist. dipl. Frid. II. vol. VI. pp. 217, 258, and Pet. de Vin. Ep. II. c. 8 (quamquam enim Serenitati nostrae... subiaceat omne quod volumus etc.); III. c. 9, V. c. 1 ff.; Höfler, p. 70 ff.; Ficker, II. pp. 495, 539 ff., 554 ff.; Gloss on Sachsensp. I. a. 1, III. a. 52—54, 64, Lehnrecht, a. 4; the summary in Ockham, Dial. III. tr. 2, l. 2, c. 26 and tr. 1, l. 2, c. 6; Aen. Sylv. praef. and c. 19—21; Petr. de Andlo, II. c. 8 (but how does this agree with the doctrine, II. c. 10, that the Emperor can be tried by the Palsgrave?).

Only in a Republic is the Ruler below the Laws.

266. Comp. Thom. Aq., Ptol. Luc., Engelb. Volk., Ockham, Petr. de Andlo, as above in Note 264. Aegid. Rom. III. 2, c. 2: it is so in the Italian towns, where despite the existence of a Lord (*dominus*) or Podesta (*potestas*), 'totus populus magis dominatur,' since the People makes statutes 'quae non licet dominum transgredi.' Pat. Sen. De inst. reip. I. 5 (lex tantum dominatur) and III. 1 (the Magistrates rule over the People and the Laws over the Magistrates).

The Ruler is always below the Laws.

267. See above Notes 159, 166, 169—71, 186—7, 200. Most decisively Mars. Patav. I. c. 7—11, 14—15 and 18; with him the 'legislator' is in all cases the People, and the 'principans' is bound by the 'forma sibi tradita a legislatore.' Nicol. Cus. II. c. 9—10 and 20, III. praef. and c. 41: all the binding force of the laws rests on the will of the whole community; the Pope is bound by the 'canones,' the Emperor by the 'leges imperiales,' and the laws are to allow for governmental and judicial acts a no wider field of activity than is absolutely necessary. Gregor. Heimb. II. p. 1604 ff. Comp. Ockham, Dial. III. tr. 1, l. 2, c. 6: he remarks that perhaps in the whole world there is no instance of a regal form of government in the sense of a lordship unrestrained by laws, and that such a form would not deserve approbation except in the case, never found in practice, of an absolutely virtuous ruler. With this Aquinas agrees in so far that he prefers a monarchy limited by law.—Naturally those who advocated the supremacy of the laws appealed at this point to the 'lex *digna*.' In that text their opponents saw no more than that a purely voluntary observance of the laws on the part of the Princeps was promised by him as a praiseworthy practice. [This famous text (l. 4, Cod. 1, 14) runs thus: Digna vox maiestate regnantis legibus alligatum se principem profiteri.]

The 'Rechtsstaatsidee.'

268. In particular Mars. Pat. I. c. 11, 14, 15 and 18 and Nic. Cus. develop modern thoughts at this point. It is to be observed, however, that all the writers mentioned in Note 266 suppose that in a Republic there will be a separation of legislative from executive power, such as they do not allow in a Monarchy, and thereby they make this separation the distinguishing trait of a Republic. [The

translator of these pages believes that in German controversy the common contrast to the *Rechtsstaat* has been the *Beamtenstaat*. Perhaps the nearest English equivalent for the former term would be the Reign of Law. But not all theorists would allow that the Reign of Law exists in England where the State or Crown cannot be made to answer in Court for its wrongful acts.]

Popular Assemblies above the Laws.

269. In relation to the Assembly of the People, this comes out most plainly in the doctrine of Marsilius. In relation to the General Council of the Church the freedom from the restraints of Positive (canon) Law comes out in the doctrine of Epieikia which finds its clearest expression in Henr. de Langenstein, Cons. pac. c. 15, Randuf, De mod. un. c. 5 (Gerson, Op. II. p. 166) and in particular Gerson, De unit. eccl. (ib. p. 115, also p. 241 and 276).

Omnia Principis esse intelliguntur.

270. See the statement and refutation of this doctrine in Georg Meyer, Das Recht der Expropriation, Leipz. 1868, p. 86 ff.

Eminent Domain.

271. See Accursius in Gl. on l. 3, Cod. 7, 37, v. *omnia principis* and l. 2, Dig. de rer. div. v. *littora* (the Princeps has *iurisdictio vel protectio* not *proprietas*). Jac. Aren. Dig. prooem. nr. 1—7. And. Is. II. Feud. 40, nr. 27—29. Bart. Const. I. Dig. pr. nr. 3; l. 4, Dig. 50, 9, nr. 12; l. 6, Dig. 50, 12: throughout a distinction is maintained between 'dominium mundi ratione iurisdictionis et gubernationis' and 'dominium ratione proprietatis.' Baldus, l. 2, Dig. de rer. div., Const. I. Dig. pr. nr. 10—11: a double 'dominium' in 'singulae res,' but 'diversa ratione': ius publicum Caesaris, privatum privatarum personarum. Baldus, II. Feud. 51, pr. nr. 1—4: territorial lordship and ownership distinguished in the case of a city that has been given away or has subjected itself. See also Alv. Pel. II. a. 15 (*administratio* contrasted with *dominium*) and a. 57 and 63 (Christ had no *dominium particulare*, but he had *dominium generale*). Ockham, Dial. III. tr. 2, l. 2, c. 21—25, discusses all opinions at some length. He rejects both that which asserts and that which denies that the Emperor is 'dominus omnium temporalium,' and teaches the mediating doctrine of a 'dominium quodammodo' vested in him by conveyance from the People. This is evidently the 'dominium eminens' of later times, for, on the one hand, it is a 'dominium,' though 'minus pingue,' and yet is compatible with the ownership of the 'res privatorum' by private individuals and with the ownership of the 'res nullius' by the 'totum genus humanum.' Somn. Virid. II. c. 23—30 and 366: 'dominium universale' of Emperor and Pope contrasted with 'dominium appropriatius et specialius' of individuals. Ant. Ros. I. c. 70. Petr. de Andlo, II. c. 8. Almain, Expos. ad q. I. c. 6, and II. c. 2. Decius, Cons. 538, nr. 8—11: in the case of every City, as well as in the case of the Emperor, we must distinguish 'iurisdictio et imperium'

over the 'districtus et territorium,' which is a 'superioritas coercitionis,' from 'proprietas et dominium'; for 'proprietas et imperium nulla societate coniunguntur.'

272. See the work of Georg Meyer, as above in Note 270. [Dr Gierke remarks that his own notes on this subject, which had already appeared in his tract on Althusius, are supplemental to the learning collected by Meyer.] The Right of Expropriation.

273. Accursius in Gl. on l. 3, Dig. 1, 14, v. *multo magis* and other passages in G. Meyer p. 88; Gloss. Ord. on c. 1, D. 22, v. *iniustitiam*; Jac. Arena, Dig. prooem. nr. 1—7; And. Isern. II. Feud. 40, nr. 27—29; Host. Summa de rescript. nr. 11 ff.; Oldradus, Cons. 224 and 257; Bart. l. 4, Dig. 50, 9, l. 6, Dig. 50, 12, l. 6, Cod. 1, 22 and Const. 1. Dig. pr. nr. 4—6 (neither *rescribendo* nor yet *legem condendo*); Raphael Fulgosius, Cons. 6, nr. 46—47, Cons. 21, nr. 12 and 28; Paul. Castr. l. 23, Dig. 41, 2, l. 6, Cod. 1, 22, Const. 1. c. 229; Jason, l. 3, Dig. 1, 14, nr. 24—34 and Const. III. c. 86, nr. 14; Anton. Butr. c. 6, X. 1, 2, nr. 20—22; Panorm. eod. c. nr. 6; Bologninus, Cons. 58; Alex. Tart. Cons. II. c. 190 (esp. nr. 13) and c. 226, nr. 18; Franc. Curtius sen. Cons. 20, 49, 50, 60; Christof. de Castellione, Cons. 8, nr. 16—18; Joh. Crottus, Cons. II. c. 156, nr. 28—44; Ant. Ros. IV. c. 8 and 10. Ockham, Dial. III. tr. 2, l. 2, c. 23—5 mentions as an outcome of the 'dominium quodammodo' which he allows to the Emperor, a right to quash or appropriate to himself or transfer private ownership, and to forbid the occupation of 'res nullius'; but such acts as these are not to be done 'ad libitum' but only 'ex causa et pro communi utilitate' in so far as general utility is to be preferred to 'privata utilitas.' And at the same time it is Ockham who most emphatically teaches (ib. c. 27) that this is not merely a limit set to the power of the Monarch but a limit set to the power of the State itself; for, according to him, the limitation of imperial rights by the rights of individuals rests upon the fact that the *Populus*, which transferred its power to the *Princeps*, had itself no unbounded power, but (in accordance with c. 6, X. 1, 2) was entitled to invade the sphere of private rights by the resolutions of a majority only at the call of necessity (*de necessitate*). No Expropriation without Just Cause: an absolute Rule of Law.

274. To this effect, despite a strong tendency towards absolutism, Jacob. Buttrig. l. 2, Cod. 1, 19; Alber. Rosc. Const. 1. Dig. v. *omnis*, nr. 5 ff.; l. 15, Dig. 6, 1; l. 2, Cod. 1, 19; Baldus, Const. 1. Dig. pr. nr. 11; l. 7, Cod. 1, 19; l. 6, Cod. 1, 22; l. 3, Cod. 7, 37. For some intermediate opinions see Felinus Sandaeus c. 7, X. 1, 2, nr. 26—45; Decius eod. c. nr. 19—24 and Cons. 191, 198, 269, nr. 4—5, 271, nr. 3, 352, nr. 1, 357, nr. 3, 361, nr. 7, 250, nr. 5—6, 588, No Expropriation without Just Cause: a good general Rule.

606, nr. 8, 699, nr. 8; Riminald. Cons. I. c. 73. Ludov. Rom. Cons. 310 (a just cause necessary in case of a 'lex specialis' but not in case of a 'lex universalis'); Bened. Capra, Reg. 10, nr. 30 ff.

Compensation for the Expropriated.

275. As to the fluctuations of the Glossa Ordinaria, see Meyer, op. cit. p. 92—94. Decidedly in favour of compensation are Baldus, l. 2, Cod. 7, 13; Decius, l. 11, Dig. de Reg. Iur. and Cons. 520 (recompensatio); Jason, l. 3, Dig. 1, 14 and Cons. III. c. 92, nr. 11 (si causa cessat debet res illa restitui si potest); Paul. Castr. l. 5 § 11, Dig. 39, 1, nr. 4, l. 10, Cod. 1, 2, nr. 3; Lud. Rom. Cons. 310, nr. 4; Bertach. Rep. v. *civitas*, nr. 88 and 96; Fel. Sand. c. 6, X. 1, 2, nr. 2 and c. 7, eod. nr. 28—29. Aeneas Sylvius, c. 18 (if practicable, 'ex publico compensandum est'); Crottus, Cons. II. c. 156, nr. 27 (princeps propter favorem publicum si auferat dominium alicui, debet pretium solvere) nr. 28—29 (expropriatory acts of towns), nr. 31 (the Pope).— On the other side, Alber. Rosc. l. 14 § 1, Dig. 8. 6.

No Compensation in case of General Expropriatory Law.

276. Decius, Cons. 520: a law may take away rights 'generaliter' even 'sine compensatione privatorum'; on the other hand, if the law does this 'particulariter alicui subdito' then it must be 'cum recompensatione.' Jason, l. 3, Dig. 1, 14, nr. 44; Paris de Puteo, De synd. p. 41, nr. 24 and Ant. Ros. IV. c. 8 and 10.

No Compensation in a Case of Necessity.

277. So, e.g., Aen. Sylv. c. 17—18: in case 'reipublicae necessitas id expostulat,' though 'aliquibus fortasse durum videbitur et absurdum.'

Proprietary Rights proceed from the Ius Gentium.

278. Thus already the Glos. Ord. on l. 2, Cod. 1, 19, and l. 6 Cod. 1, 22; also Hostiensis, Jac. de Arena, Oldradus, Fulgosius, Iserna, Bartolus, Paul. Castrensis, Jason, Ockham, as in Note 273; also, but with less protection for property, Rosciate, Baldus, Decius and Bened. Capra, as in Note 274. See also Joh. Paris. c. 7, where private ownership is placed outside the sphere of the Public Power, temporal and spiritual, by the more specific argument that such ownership originates in the labour of an individual and thus is a right that arises without any relation to the connexion between men or to the existence of a society with a common head (commune caput). Paris de Puteo, De synd. p. 41, nr. 22—24; Somn. Virid. I. c. 156—161; Bertach. v. *plenitudo potestatis*; Pet. de Andlo, II. c. 8; Gerson, IV. p. 598; Ant. Ros. IV. c. 8 and 10 (the source of private property is *ius gentium*, but *ius gentium secundarium*, and so it is destructible).— When the objection was raised that it was only Property as an institution that existed *ex iure gentium*, and that this was not infringed if particular owners were robbed, the reply was that the *distinctio dominorum* and the permanent establishment of certain modes of acquisition were attributable to the *ius gentium*.

279. Baldus I. Feud. 7 (God subjected the laws, but not contracts, to the Emperor); Ludov. Rom. Cons. 352, nr. 15—25; Christof. Castell. Cons. 8, nr. 25; Jason, Cons. I. c. 1 and c. 56, II. c. 223, nr. 16 ff. and 226; Decius, Cons. 184 nr. 2, 286 nr. 5, 292 nr. 8, 404 nr. 8 (for 'Deus ipse ex promissione obligatur'), 528 nr. 6, 689 nr. 7—27. But, once more, 'ex iusta causa' breach of contract is permissible: Jason, Cons. I. c. 1, nr. 12 and 29 ff., II. 226, nr. 43, l. 3 Dig. 1, 14, nr. 34; Bened. Capra, Reg. 10, nr. 43 ff.; Ant. Ros. IV. c. 14. Therefore the old moot question, whether a city can revoke the freedom from taxation which it has promised to a settler, is generally answered in the negative, on the ground that such an act would be a breach of contract; but exceptions are allowed 'ex causa,' e.g., when there is the punishment of a delict, or if the city's existence is at stake; Jason, Cons. I. c. 1, nr. 21—30; Ant. Ros. IV. c. 15. Sacredness of Contracts made by the State.

280. Thus the Gloss. Ord. on l. 2 Cod. 1, 19 and l. 1 Cod. 1, 22 holds that private rights are suspended if the *ius civile* comes into collision with them, and that they are abolished by a simple rescript, if the intent to abolish them be clearly expressed; but many, it is added, hold that in the case last mentioned the rescript to be effectual must contain the clause 'non obstante lege.' Then the last of these opinions is developed by Hostiensis, Paulus Castrensis, Jason and others. Bartolus allows that private rights arising *ex iure civili* can be abolished 'without cause,' but only by legislation, and not (unless the damage be inconsiderable) by way of rescript. On the other hand, Baldus, Decius and others hold that such rights can be withdrawn unconditionally and in every form. Innocent IV., Alb. Rosciate and others think that the State cannot take away the right of ownership (*dominium ipsum*), but can make it illusory by taking away the rights of action which flow merely from Positive Law. Anton. Ros. III. c. 14 and Bened. Capra, Reg. 10, nr. 43—52 discuss at length the withdrawal of 'iura mere positiva.' Rights founded on Positive Law are at the mercy of the State.

281. Jason, Cons. I. c. 1, nr. 20, c. 56, nr. 1, 2, 7, 8, 21, II. c. 226, nr. 43—49: 'privileges' granted gratuitously may be revoked 'sine causa'; those granted for value 'ex causa.' Felinus Sand. c. 7 X. 1. 2, nr. 48—52: for the *princeps* can 'ius auferre, cuius ipse fuit causa ut acquireretur.' Bened. Capra, l. c., excepts the case of 'non subiecti.' Aen. Sylv. c. 15: privileges may be revoked if they be *reipublicae damnosa*.—In the Disput. inter mil. et cler. p. 686, and the Somnium Viridarii I. c. 33—34 the knight already applies this doctrine in such wise that the State 'pro ardua necessitate reipublicae vel utilitate manifesta' can withdraw all ecclesiastical privileges, since every privilege must be deemed to comprise a clause to the effect that it is not to impair the 'salus publica.' Revocation of 'Privileges.'

282. See above Notes 2, 87, 125—30; Dante, Mon. I. c. 3; Ockham, Dial. III. tr. 2, l. 2, c. 28.

Nullity of the 'Donation of Constantine.'

283. Already in the Gloss. on Auth. Coll. I. tit. 6, prooem. v. *conferens*, there is a suggestion of the arguments which the legists afterwards developed by way of proof that the Donation of Constantine was void, because the imperial power is inalienable and no 'expropriatio territorii, dignitatis vel iurisdictionis' is possible. For full discussions of this matter, see Bartol. on prooem. Dig. nr. 13—14 and Baldus eod. nr. 36—57, and prooem. Feud. nr. 32—33. Compare Dante, Mon. III. c. 10: 'nemini licet ea facere *per* officium sibi deputatum quae sunt *contra* illud officium'; the Emperor cannot destroy the Empire, which exists before he exists, and whence he draws his imperial rights (ab eo recipiat esse quod est); the seamless garment would be rent; in every grant or infeudation by the Emperor there is a reservation of 'superius illud dominium cuius unitas divisionem non patitur.' Lup. Beb. c. 13, p. 391—3. Quaestio in utramque, p. 106, ad 14. Ockham, Octo q. I. c. 12, III. c. 9, VIII. c. 1, Dial. III. tr. 2, l. 1, c. 27. Gloss on Sachsensp. III. a. 63. Damasus, Broc. M. III. br. 19. Greg. Heimb. I. p. 560. Anton. Ros. I. c. 64—70 ('officium publicum'; 'imperium indivisibile et inalienabile'; 'corpus mysticum'; 'ecclesia non capax'; 'populus Romanus liber, non in commercio').—These arguments are not attacked by the other party. The defenders of the Donation are for making an exceptional case of it. The gift was really made to God and therefore was not subject to the ordinary restrictions. So Bartolus, l. c., whose chief reason, however, is that he is teaching in the papal territory: so also Baldus and others. In particular, however, the papal party develop the doctrine that the Pope was already 'verus dominus iure divino,' and that therefore the donation bore the character of a 'restitutio.' So Innocent IV., Ptol. Luc. III. c. 16; Alv. Pel. I. a. 13 E, 43 D—E, 24 S, 56 M, 59 H, II. a. 29; Aug. Triumph. I. q. 1, a. 1, II. q. 36, a. 3, 38, a. 1, 43, a. 1—3; comp. And. Isern. I. Feud. 1, nr. 10 and Petr. de Andlo I. c. 11, and II. c. 9.—The opinion that the whole donation was a fable had never quite died out in the days before the forgery was exposed by Nic. Cusanus (III. c. 2) and Laur. Valla (ann. 1439 in Schard, p. 734—80). This is shewn by the bold words of Wezel, ann. 1152, in Jaffé, Mon. Corb. p. 542, and the mention of this opinion by Lup. Bebenb. c. 13.

Inalienability of Public Power.

284. See above, Note 58. In particular Lupold von Bebenburg (c. 15, pp. 398—401) in this context sharply formulates the general proposition that the 'imperium,' since it is 'ob publicum usum

assignatum,' stands 'extra commercium' like any other 'res in publico usu.'

285. Among the jurists and publicists we may see an always more definite apprehension of the rule that every contract which purports to sacrifice an essential right of the State is void, and that no title can give protection against that claim to submission which flows from the very idea of State-Power. (Compare the passages cited in Note 283.) Therefore contracts made by the Princeps are not binding on his successor if thereby 'monarchia regni et honor coronae diminui possit,' or 'magna diminutio iurisdictionis' would ensue, or 'regalia status' would be abandoned. See Bart. l. 3, § 2, Dig. 43, 23, nr. 5; Bald. 1. Cons. 271, nr. 3; Joh. Paris. c. 22; Somn. Virid. II. c. 293; Picus a Monte Pico, I. Feud. 7, nr. 10; Jason, Cons. III. c. 10, nr. 6—9, 16, 24—25; Crottus, Cons. II. c. 223, nr. 11 and 21—22; Bertach. v. *successor in regno*. So a contract by a city purporting to exempt a man from taxation might be valid if entered into with a new settler, but would be invalid if made with one who was 'civis iam subditus': Bart. l. 2, Dig. 50, 6, nr. 2 and 6; to the contrary, Gal. Marg. c. 30, nr. 11 and Dur. Spec. IV. 3, de cens. § 2, nr. 12. Nullity of Acts tending to diminish the State's Power.

286. See Notes 283—5. Dante, III. c. 7: Emperor or Pope, like God, is powerless in one point, namely, 'quod sibi similem creare non potest: auctoritas principalis non est principis nisi ad usum, quia nullus princeps seipsum autorizare potest.' Aen. Sylv. c. 11—12. Inalienability of Sovereignty.

287. Most definitely Nicol. Cus. (above, Note 171); but also Mars. Pat. I. c. 12 (in the words 'nec esse possunt'). As regards the Church, see above, Notes 189 and 200. According to Ockham, Dial. III. tr. 1, l. 1, c. 29, there were some who held that a renunciation of the lordship of the world by the 'Populus Romanus' was impossible and would not bind the 'populus sequens'; but this opinion is refuted, reference being made to the merely 'positive' character of the Romans' right to preeminence, and also to the doctrine about the binding force of resolutions passed by a corporation. An indestructible Sovereignty of the People.

288. Bart. Rubr. C. 10, 1, nr. 3—5 and 9—10. The idea of the Fiscus includes only 'quicquid ad commodum *pecuniarium* imperii pertinet: alia vero, quae ad iurisdictionem et honores imperii pertinent et non commodum pecuniarium et bursale, continentur nomine *reipublicae* et non fisci.' Baldus, II. Feud. 51, pr. nr. 4: a city which subjects itself to lordship thereby conveys the *iurisdictio* over the town mills, for this the city had possessed 'sicut ipsa Essential Rights of the State and casually acquired Rights of the Fisc.

civitas,' but it does not convey the ownership of the mills, for this it had 'iure privato.' Compare Bald. Rubr. C. 10, nr. 11, Cons. 1. c. 271, nr. 2, but especially l. 1, Cod. 4, 39, nr. 4, and above all l. 5, Cod. 7, 53, nr. 13: a distinction between 'res universitatis in commercio' and 'extra commercium': in things of the latter class—and to this class belong all public rights—'tenuta capi non potest' [a tenure cannot be created]; therefore, e.g., the right to impose a tax 'cum sit publicum auctoritate et utilitate et sit meri imperii' is inalienable, and can never 'privato concedi vel in tenutam dari'; only the *commoditas* [profit] of this right can be sold, given, let to farm, in such wise that the 'civitas ipsa' will still 'impose' the tax, though the buyer or lessee 'exacts' it; also the city can appoint for itself a *capitaneus* or *conservator*, who, as its proctor, will impose taxes and exercise other rights of ownership; 'et sub hoc colore perdunt civitates suas libertates, quae de decreto vendi non possunt.' See further the separation of the sovereign rights and fiscal rights of the Empire in Ockham, Dial. III. tr. 2, l. 2, c. 23: also the distinction between the *commodum pecuniarium*, which is involved in the idea of the *fiscus*, and the *regalia* which are involved in the idea of the *respublica*, in Vocab. Iuris, v. *fiscus*, in Paul. Castr. l. 4, Cod. 2, 54, Marcus, Dec. I. q. 338, nr. 8—10 and 17, Martinus Laudensis, De fisco, q. 141.

Gradual apprehension of the Distinction between Ius Publicum and Ius Privatum.

289. See the passages cited above in Notes 284, 285 and 288.—A certain, but a very distant, influence was exercised at this point by the distinctions drawn by the Philosophers between the various sorts of *iustitia*. So, in particular, the Thomistic distinction between (1) the *iustitia particularis*, which is (*a*) commutative, regulating the relationships of man to man, or (*b*) distributive, dividing among individuals what is common, and (2) the *iustitia generalis s. legalis*, which limits the rights of individuals in accordance with the demands of the *bonum commune*. See Thom. Aquin. Sum. Theol. II. 2, q. 58 ff.; also II. 1, q. 105, a. 2. Also Aegid. Rom. above, Note 83.

Nullity of the Sovereign's Acts if they conflict with Natural Law.

290. So, to some extent, all the writers mentioned in Note 257. And so in connexion with attacks on vested rights made without *iusta causa*, all the authors named in Note 273: see especially Gloss. Ord. on l. 2, Cod. 1, 19 and l. 6, Cod. 1, 22, Host. l. c., Jacob. Aren. l. c. (for the Emperor, if he orders anything contrary to law, 'quasi non facit ut imperator'), Raphael Fulgosius l. c. (the opinion that the Emperor, though he does unright, does a valid act, would practically subject everything to arbitrary power). Comp. Bened. Capra, Reg. 10, nr. 35—42.—Then Bartolus draws, and others

accept, the distinction between invasions of right (1) legem condendo, (2) iudicando, (3) rescribendo, and he is inclined to allow greater force to an act of legislation than to acts of other kinds; still it is just he who expressly declares that in conflict with Natural Right, strictly so-called, even laws are void.—See also above, Note 259 *in fine*.

291. See above, Notes 129—130 and 134.

Tribunals must give Effect to Acts of the Sovereign if done deliberately.

292. This is the core of the doctrine that the lack of a *iusta causa* for any invasion of vested rights by the Sovereign can be supplied by the deliberateness (*ex certa scientia*) with which he exercises his *plenitudo potestatis*: deliberateness which can be manifested by such a clause as 'lege non obstante.' This doctrine, which first appears in a rough form in Durantis, Speculum, I. tit. interd. leg. et sedi Apost. reserv. nr. 89 (cf. G. Meyer, op. cit. p. 101), is attacked by the jurists cited in our Note 273 (though Jason in Cons. II. c. 233, c. 236, n. 12—13 and IV. c. 107, nr. 4, makes large concessions) and is defended, though to a varying degree, by the jurists mentioned in our Note 274. See in particular Alber. Rosc. l. c. where practically all difference between Positive and Natural Right disappears and the same formal omnipotence is claimed both for rescripts and for acts of legislation. Baldus, l. c.; Felin. Sand. l. c. nr. 60—66 (despite nr. 45—52); Riminald. Cons. I. c. 73; Capra, Reg. 10, nr. 48—52, 56—59; Decius, c. 7, X. 1, 2, nr. 27—28, Cons. 198, nr. 7, 269, nr. 4—5, 271, nr. 3, 640, nr. 6—7, and esp. 588, nr. 1—14; also Aen. Sylv. c. 16—17.—The rejection of the right of active resistance is a logical consequence; see above, Note 127.

Natural Law is not reduced to the level of mere Ethics.

293. This is made externally visible by the treatment as two different subjects of (1) the '*lex* naturalis et divina,' which is binding on rulers as on others, but like all other 'leges' is concerned with 'actus exteriores,' and (2) that Instruction for the Virtuous Prince, in the development of which medieval publicists expend much of their pains.

Coercive and Directive Force of Law.

294. Already John of Salisbury, IV. c. 1, 2 and 4, speaks of a '*lex* iustitiae,' to which the Ruler remains subject, since the 'aequitas et iustitia,' of which the 'lex' is the 'interpres,' should govern his will. Then in Aquinas there comes to the front the formula that the Prince, in so far as the rules of law have no 'vis coactiva' against him, is still bound by them 'quantum ad vim directivam'; comp. Sum. Theol. II. 1, q. 96, a. 5, also q. 93, a. 3. With Thomas himself it is only the 'lex humana' which is reduced to the exercise of a merely directive force over the Prince; in this province unrighteous laws (e.g. those which proceed 'ultra sibi commissam potestatem,'

which impose unjust taxes and unjust divisions of burdens, or which are 'contra commune bonum') have formally the force of laws, though they are not binding 'in foro conscientiae': comp. ib. q. 90, a. 2, and q. 96, a. 1—4. Similarly Joh. Friburg. c. II. t. 5, q. 204. On the other hand, those who unconditionally maintain the formal sovereignty of the legislator and in so doing refuse even to Natural Law any 'coactive force' against him, are unanimous in allowing to it at least a 'directive force.' See also Ptol. Luc. De reg. princ. IV. c. 1. Ockham, Dial. III. tr. 2, l. 2, c. 28. Gerson, IV. p. 593 ff. esp. 601.

Legal Limit to the Duty of Obedience.

295. See above, Notes 127—8. The limit to the duty of obedience is steadily represented as a matter for Jurisprudence, and is deduced from the nature of *lex* or *ius*.

Unjust Acts of Sovereignty to be interpreted into Rightfulness.

296. See, e.g., Gloss. Ord. on l. 2, Cod. I, 19, and l. 1, Cod. I, 22; Baldus, as cited in Note 274; Jason, Cons. II. c. 233, nr. 9, III. c. 24, nr. 21, IV. c. 166, nr. 9; Franc. Aret. Cons. 15, nr. 9; Franc. Curt. sen. Cons. 20, 49, 50; Domin. Gem. Cons. 99, nr. 7—8, c. 104, nr. 4; Decius, Cons. 292, nr. 3 and 9, 373 nr. 10, 606 nr. 17. In case of need men were ready to feign that the Sovereign's act had been induced by subreptio, circumventio, etc.

Discharge of the Sovereign from the Moral Law.

297. For the benefit of the omnipotent Council, Randuf teaches that, if the weal of the Church requires it, the Council may disregard the Moral Law: De mod. un. c. 6, 16, 20 and 22 (Gerson, Op. II. pp. 170, 182, 188, 190). Gerson (IV. p. 671) protests against this: the Law of Morality must not be transgressed even for the sake of the common weal; perjury should not be committed even to save the whole people.

298. In my book 'Joh. Althusius und die Entwicklung der naturrechtlichen Staatstheorien' I have submitted just this side of the medieval doctrine to closer inspection, and have traced the later development of those germs that were planted in the Middle Age.

299. See above, Notes 16, 137 and 260 *in fine*.

300. See above, Notes 16, 138—9, 142—5.

301. See above, Notes 140—1.

Natural Growth of the State.

302. Aegid. Rom. De reg. princ. III. 1, c. 6, supposes three possible origins of a State: the first is the purely natural way of a gradual growth from out the Family; the second is the 'concordia constituentium civitatem vel regnum' and this is partially natural, owing to a 'naturalis impetus' which impels to this concord; the third is the way of mere violence, compulsion and conquest. Marsil. Pat. I. c. 3 combines the thought of natural increase and differentiation with the notion of a creative act of human activity.

303. Already Aquinas, however great may be the stress that he lays on man's nature as 'animal politicum et sociale in multitudine vivens' (De reg. princ. I. c. 1 and Sum. Theol. I. q. 96, a. 4), makes mention of the 'ratio constituens civitatem' (above, Note 98). Comp. Ptol. Luc. III. c. 9, and IV. c. 2—3. Aegid. Rom. III. 2, c. 32 says expressly: 'sciendum est quod civitas sit aliquo modo *quid naturale*, eo quod naturalem habemus impetum ad civitatem constituendam; non tamen efficitur nec perficitur civitas *nisi ex opera et industria hominum*.' Comp. III. 1, c. 1 (opus humanum) with c. 3—5 (homo est naturaliter animal civile et civitas aliquid secundum naturam). Engelb. Volk. De ortu, c. 1: ratio imitata naturam. Joh. Paris. c. 1. Gerson, IV. p. 648. Nic. Cus. III. praef. Aen. Sylv. c. 1, 2 and 4: human reason, 'sive docente natura sive Deo volente, totius naturae magistro,' invented and instituted the State, Lordship, Empire. Already Patric. Sen. De reip. inst. I. 3 speaks of all the manifestations of social life—living in company, making strongholds, language, the arts, the laws, the State—as 'inventions' to which mankind 'duce naturae' came by giving thought to general utility (de communi utilitate cogitare). According to III. 5, the State may be so erected that it cannot perish. Rational Origin of the State.

304. The ecclesiastical theory that the constitutive principle of the State was violence and compulsion (see above, Note 16) was still maintained by Ptolemy of Lucca, IV. c. 3, and such an origin seemed at least possible to Aegidius Romanus (above, Note 302). On the other hand, Aquinas traces the founding of the State to the office of the King (above, Note 98). The State erected by Violence.

305. See Mars. Pat. I. c. 15 as to the 'anima universitatis vel eius valentioris partis' as the 'principium factivum' of the State (above, Note 98). And so in relation to the World Empire (above, Note 145). The State founded by Incorporation.

306. Of special importance was the acceptance of Cicero's definitions of the State as a *societas*. See, e.g. Thom. Aquin. Sum. Theol. II. 1, q. 105, a. 1, II. 2, q. 42, a. 2; Vincent Bellov. VII. c. 6—7; Dom. Gem. c. 17 in Sexto, 1, 6, nr. 7; Randuf, De mod. un. c. 7, p. 171; Theod. a Niem, Nemus Unionis, tr. v. p. 261. So also the acceptance, in c. 2 § 2 D. 8, of the words of St Augustine: 'generale quippe *pactum* est *societatis* humanae obedire regibus.' The separation of the Social Contract from the Contract which institutes the ruler is suggested by John of Paris, c. 1, and is effected in clear outline by Aeneas Sylvius, who treats (De ortu, c. 1) of the grounding of a *societas civilis* by men who theretofore wandered wild in the woods, and then (c. 2) of the establishment of a The Social Contract.

regia potestas in consequence of the transgressions of the Social Contract that men were beginning to commit. See also Aegid. Rom. above in Note 302; Patric. Sen. I. 3. [The passages in Cicero's works referred to in this note are given by Dr Gierke elsewhere (D. G. R. III. p. 23). De off. I. 17, where the State appears among the *societates*. De republ. I. 25, 39: 'populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus'; ib. 26, 41; ib. 32, 49: 'lex civilis societatis vinculum, ius autem legis aequale; quid enim est civitas nisi iuris societas?'; ib. III. 31: 'neque esset unum vinculum iuris nec consensus ac societas coetus, quod est populus'; ib. 33; ib. 35, 50; ib. IV. 3: 'civium beate et honeste vivendi societas'; ib. VI. 13 (Somn. Scip.): 'concilia coetusque hominum iure sociati, quae civitates appellantur.' In another place Dr Gierke (D. G. R. III. p. 124), discussing the influence of the patristic writings, remarks that certain pregnant sentences of Cicero's long-lost *De republica* were known in the Middle Age through Lactantius and Augustine and exercised a powerful influence. In yet another place (D. G. R. III. p. 125) the words 'generale quippe pactum est societatis humanae obedire regibus' are cited from August. Confess. III. 8; but it is there remarked that Augustine is wont to give to the State a sinful origin in violence.]

Voluntary Subjection the Ground of Obedience.

307. See the derivation of the binding force of laws from a self-binding of individuals, in Mars. Pat. I. c. 12 (lex illa melius observatur a quocumque civium, quam sibi quilibet imposuisse videtur;...hanc quilibet sibi statuisse videtur ideoque contra illam reclamare non habet); in Ockham, Dial. III. tr. 2, l. 2, c. 26—28; in Nic. Cus. II. 8, 10, 12 (concordantia subiectionalis eorum qui ligantur), 13 (subiectio inferiorum), III. c. 14 (per viam voluntariae subiectionis et consensus). Add to this the supposition that the isolated individual is historically prior to the community: Aen. Sylv. l. c., and Patric. Sen. l. c.

The terms of the Contract of Subjection.

308. Already Ockham, Dial. III. tr. 2, l. 2, c. 26, says that many derive the Emperor's 'plenitudo potestatis' from Original Contracts, since 'humana societas servare tenetur ad quod se obligavit': 'sed societas humana obligat se ad obediendum generaliter regibus et multo magis imperatori'; this appears from the words of Augustine [above, Note 306]. Ockham himself, however, opines (c. 28 *in fine*) that this *pactum* secured obedience only 'in his quae ad utilitatem communem proficiunt.' Comp. Aen. Sylv. l. c.

309. See Dante, I. c. 3; Ockham, Dial. III. tr. 2, l. 2, c. 28.

Limitation of the Work of

310. So when Dante (above, Note 6) makes the institution of an 'universalis pax' the aim and object of the Empire. So when

Engelbert of Volkersdorf (De ortu, c. 7—13) finds the object of the State in the 'felicitas regni,' and, having mentioned its components, finally (c. 14) sums them all up in the one idea of 'pax,' and elsewhere (c. 19) simply identifies the 'ordinatio et conservatio pacis et iustitiae' with the object of the State. So also when Gerson, IV. p. 649, does the like. And so, again, when Petrus de Andlo, II. c. 16—18, mentions the 'cura totius reipublicae' as the State's object, but, when it comes to particulars, mentions only the administration of justice, the preservation of the peace and the protection of religion. the State to the Maintenance of Peace and Law.

311. See, e.g., Thom. Aquin. De reg. princ. I. c. 14: the object of the State is life according to virtue; but the 'virtus humana' of the 'multitudo,' which is to be realized by the 'regimen humanum,' is itself but means to that other-worldly purpose which the Church has to promote by realizing the 'virtus divina.' See also c. 7—15, and Sum. Theol. II. 1, q. 90, a. 2. On the other hand, in his Commentary on the Politics he simply follows Aristotle: see Op. XXI. pp. 307 ff., 400, 402, 424, 469, 634 ff., 678 ff. Compare Ptol. Luc. III. c. 3, and IV. c. 23; Aegid. Rom. III. 1, c. 1—2, III. 2, c. 8 and 32; Eng. Volk. De reg. princ. II. c. 2—4; Anton. Ros. I. c. 46 and 56. Final Causes of State and Church.

312. Joh. Paris. c. 18: since the virtuous life (vivere secundum virtutem) is the object of the State, it is untrue 'quod potestas regalis sit corporalis et non spiritualis et habeat curam corporum et non animarum.' Somn. Virid. I. c. 154—5. Gerson, in Schwab, p. 88 ff.— For the rest, even Alvarius Pelagius, I. a. 56, confesses that the temporal power, since its object is the 'vita virtuosa,' has to work upon the 'anima,' and to that extent is 'spiritualis': it works, however, only 'secundum naturam,' while the spiritual power works 'secundum gratiam' and therefore is 'spiritualis' by preeminence. Extension of the State's Province in a Spiritual Direction.

313. Mars. Pat. I. c. 4—6 ascribes to the State a solicitude for the 'bene vivere' both on earth and in heaven, and therefore a widely extended care for morals and general welfare. Patric. Sen. De inst. reip. claims for the government the whole 'vita familiaris' (allotment of land and settlement of families, lib. IV.), the 'vita civilis' of every citizen (lib. V.), the ordering of the Estates of men (lib. VI.), nay, even the duty of seeing that the citizens receive none but beautiful (of course they would be classical) names (lib. VI. 7, pp. 298—304). Spiritual Aims of the State.

314. See Thom. Aquin. De reg. princ. I. c. 1; Engelb. Volk. De reg. princ. I. c. 1—4; Dante, I. c. 5; Alv. Pelag. I. a. 62 B; Joh. Paris. c. 1.

Lessons in the Art of Government.

315. Such lessons are given *ex officio* by John of Salisbury, Aquinas, Vincent of Beauvais, Engelbert of Volkersdorf, Aegidius Romanus, Patricius of Siena.

The Forms of Government.

316. See the doctrine, deriving from Aristotle, of the Forms of Government in Aquin. l. c. 1. c. 1—3; Aegid. Rom. III. 2, c. 2; Mars. Patav. 1. c. 8—9 (with five sub-forms of Monarchy); Ockham, Dial. III. tr. 1, l. 2, c. 6—8; Patric. Sen. De inst. reip. 1. 4; Almain, Expos. ad q. 1, c. 5 and 15. See also Engelb. Volk. l. c. 1. c. 5—18 who supposes four fundamental forms: *democratia*, *aristocratia*, *olicratia* (sic!) and *monarchia*, each with specific *principium* and *finis*, and four degenerate forms, *tyrannis*, *olicratia* (degenerate *aristocratia*), *clerotis* and *barbaries*. See also above, Notes 131, 135, 264—5, 283—6.

317. See above, Notes 269 and 287.

318. See above, Notes 293—6.

Possible Limitation of Monarchy.

319. See above, Notes 136, 161 and 165. At this point we may also mention the theory that a 'consilium principis' is necessary and that the law-courts should be independent: see Eng. Volk. III. c. 1—45; Aegid. Rom. III. c. 2, c. 1 ff. (the *princeps* to maintain, the *consilium* to contrive, the *iudices* to apply, the *populus* to observe, the laws).

Mixed Constitutions.

320. See above, Note 165. Engelbert of Volkersdorf (1. c. 7—8 and 14—16) is the most independent teacher of this doctrine; out of his four fundamental forms he constructs six that are doubly, four that are triply, and one that is simply compounded, and then of his fifteen forms he gives highly interesting examples from the political life of his time.

321. See above, Note 268.

322. See above, pp. 65 ff.

Growth of the Modern State. The Taxing Power.

323. A characteristic example is given by the doctrine of the right to tax. At first this is viewed as a power of Expropriation founded on and limited by the good of the public. [In another part of his work (D. G. R. III. 389) our author has spoken of the view taken by the legists: taxation is a form of expropriation, and therefore there should be a *iusta causa* for a tax.] Thom. Aquin. De reg. Iud. q. 6—7: the State may impose taxes for the 'communis populi utilitas'; but, beyond the 'soliti redditus' (accustomed revenues), only 'collectae' which are moderate or are necessitated by such emergencies as hostile attacks should be levied: if these bounds are exceeded, there is unrighteous extortion. Vincent. Bellov. X. c. 66—69. Ptol. Luc. III. c. 11: the king, because of his duty of caring for the common weal, has a right of taxation, which however is limited by

the purpose for which it exists: always therefore 'de iure naturae' he may demand 'omnia necessaria ad conservationem societatis humanae'; but never any more. Joh. Paris. c. 7 deduces the right of taxation from the fact that private property needs the protection of the State and its tribunals, and therefore should contribute; but it may be taxed only 'in casu necessitatis' and proportionately. Similarly Somn. Virid. I. 140—1: taxes which exceed traditional practice can only be imposed in those cases (they are specified) in which the 'necessitas reipublicae' requires them; they must be moderate and can only be demanded if the Ruler's own means are insufficient; and they must be rightly applied; all other taxation is sin; the Church should punish it 'in foro conscientiae' and, if possible, secure redress; and it gives the people a right to refuse payment and even to depose the ruler. Gerson, IV. p. 199 and 616: taxes should be imposed only for the purposes of the State and should be equal for all. See Decius, Cons. 649, nr. 4: the prohibition of the imposition of new taxes does not extend to sovereign cities.

Equality before the Law.

324. In quite modern fashion Patric. Sen. I. 6 proclaims the equality of all before the law (aequalitas iuris inter cives), nay, their equal capacity for all offices and their equal civic duties.

State and Citizen. Influence of Antiquity.

325. See the statements of civic duty, to sacrifice life and goods for the 'salus publica'—statements influenced by classical antiquity —in Aen. Sylv. c. 18, and Patric. Sen. V. 1—10. Also Thom. Aquin. Summa Theol. II. 1, q. 90, a. 2: 'unus autem homo est pars communitatis perfectae,' therefore all private good is to be regulated only 'secundum ordinem ad bonum commune,' for 'omnis pars ordinatur ad totum'; ib. a. 3, so in relation to the *domus*; ib. II. 2, q. 58, a. 5: 'omnes qui sub communitate aliqua continentur, comparantur ad communitatem sicut partes ad totum; pars autem id quod est totius est; unde et quodlibet bonum partis est ordinabile in bonum totius.' Joh. Friburg. II. t. 5, q. 204: duty of paying taxes incumbent on every one as 'pars multitudinis' and therefore 'pars totius.'

The Marsilian Absorption of Church in State.

326. Marsilius in his Defensor Pacis expressly declares that the Church is a State Institution and that the *sacerdotium* is 'pars et officium civitatis' (I. c. 5—6). Sovereign in things ecclesiastical is the 'universitas fidelium,' which, however, coincides with the 'universitas civium' and in this respect, as in all other matters, is represented by the *principans* whom it has instituted, so that the line between Spiritual and Temporal is always a line between two classes of affairs and never a line between two classes of persons (II. c. 2, 7,

14, 17, 18, 21). The State Power imposes conditions for admission to the *sacerdotium*, regulates the functions of the priesthood, fixes the number of churches and spiritual offices (II. c. 8; III. concl. 12 and 21). It authorizes ecclesiastical foundations and corporations (II. c. 17). It appoints the individual clergyman, pays him, obliges him to a performance of duties, removes him, nay, its consent is necessary to every ordination (II. c. 17, 24; III. 21, 40, 41). It watches over the exercise of every spiritual office, to see that it is strictly confined to purely spiritual affairs (I. 19; II. 1—10). All *iurisdictio* and *potestas coactiva* are exercised immediately and exclusively by the wielder of temporal power, even if clerical persons are concerned, or matrimonial causes, dispensations, legitimations or matters of heresy (II. c. 8; III. c. 12 and 22). Interdicts, excommunications, canonizations, appointments of fasts and feasts, require, at the very least, authorization by the State (II. c. 7, 21; III. c. 16, 34, 35). Only on the ground of express commission from the State is it conceivable that the churches should have any worldly powers or the decretals any worldly force (I. c. 12; II. c. 28; III. c. 7, 13). Education is exclusively the State's affair (I. c. 21; III. c. 25). Appeals and complaints to the State Power are always permissible (III. c. 37). All Councils, general and particular, must be summoned and directed by the State (II. c. 8, 21; III. c. 33). Church property is in part the State's property, and in part it is *res nullius* (II. c. 14). In any case it is at the disposal of the State, which thereout should provide what is necessary for the support of the clergy and for the maintenance of worship, and should collect and apply the residue for the relief of the poor and other public purposes (II. c. 14; III. c. 27, 38, 39). The State therefore may freely tax it, may divert the tithes to itself, may give and take benefices at pleasure, and for good cause may secularize and sell them, 'quoniam sua sunt et in ipsius semper potestate de iure' (II. c. 17, 21; III. c. 27). Only what has come from private foundations should, under State control, 'conservari, custodiri et distribui secundum donantis vel legantis intentionem' (II. c. 14, 17; III. c. 28).

Attitude of the State towards the Church.

327. Joh. Paris. c. 21, pp. 203—5: 'est enim licitum principi abusum gladii spiritualis repellere eo modo quo potest, etiam per gladium materialem: praecipue ubi abusus gladii spiritualis vergit in malum reipublicae, cuius cura regi incumbit.'

Church Property and Public Property.

328. Thus in Disput. inter mil. et cler. pp. 682—6 and Somn. Virid. c. 21—22, where the confiscation of church property is justified (with a strong premonitory suggestion of the 'proprieté de la nation'), since the weal and peace of Christian folk certainly are 'pious uses.'

Comp. Joh. Wiclif, Trial p. 407 ff. art. 17, and Joh. Hus, Determinatio de ablatione temporalium a clericis, in Gold. I. pp. 232—42, where the right to secularize church property, at all events in case of abuse, is deduced from the nature of government and the subjection of the clergy. Joh. Paris. c. 20, p. 203; Nic. Cus. III. c. 39 and others argue in the same manner for the State's right to tax ecclesiastical property. So too Quaest. in utramque part. p. 106, ad 17, touching statutes of mortmain.

329. Comp. Nic. Cus. III. c. 8—24, 33 and 40: the temporal power is to take in hand ecclesiastical affairs and to demand and control their reformation, for (II. c. 40) to the State belongs the care of all things pertaining 'ad bonum publicum,' and this is so 'etiam in ecclesiasticis negotiis.' Gregor. Heimb. in Gold. I. pp. 559—60. Peter Bertrand ib. II. pp. 1261—83. Patric. Sen. III. 4. As to the practical treatment of the Reform of the Church as an affair of the State, see Hübler, op. cit. pp. 281—8 and 318—22. The State's Right to reform the Church.

330. The maxim 'ius publicum est in sacris, sacerdotibus et magistratibus' was applied by the prevailing doctrine as a proof of the state-like nature of the Church; see Thom. Aquin. Sum. Theol. II. 1, q. 95, a. 4. But already Ockham, Octo q. IV. c. 6, says that many infer from this text that the Emperor 'possit ordinare apostolicam sedem et archiepiscopos et episcopos,' and also that no renunciation of such a 'ius publicum' can have been valid. Ius Sacrum is part of Ius Publicum.

331. See above, Notes 62—64.

332. Thom. Aquin. De reg. princ. I. c. 1 in fine, Summa Theol. II. 1, q. 90, a. 2—3 (civitas est communitas perfecta), Comm. ad Polit. p. 366 ff.; Aegid. Rom. III. 1, c. 1 (principalissima communitas), c. 4, III. 2, c. 32; Joh. Paris. c. 1; Eng. Volk. De reg. princ. II. c. 2—3; Mars. Pat. I. c. 4 (perfecta communitas omnem habens terminum per se sufficientiae); Ockham, Dial. III. tr. 1, l. 2, c. 3—5. Definition of the State.

333. Thus Thom. Aquin. De reg. pr. I. c. 1 sees civitas, provincia, regnum, in an ascending scale of self-sufficiency (per se sufficiens esse). Ptol. Luc. III. c. 10—22 and IV. c. 1—28 places the priest-kingly, the kingly (including the imperial), the 'political,' and the domestic as four grades of Lordship, and in so doing applies the name *politia* to the *civitates* which have been expressly defined (IV. c. 1) as cities that in some points are subject to the Emperor or King; but he then proceeds to use *civitas* now in this and now in a more general sense. The procedure of Aegidius Romanus is clearer: for him the *civitas* is the 'principalissima communitas' only 'respectu domus et vici'; the 'communitas regni' is yet 'principalior,' being State, Realm, Empire, Civitas.

related to *civitas* as *civitas* to *vicus* and *domus* (III. 1, c. 1); also he declares it highly necessary that, to secure their internal and external completion (finis et complementum), various *civitates* should be united in the body of one *regnum* or in a *confoederatio sub uno rege* (III. 1, c. 4—5; compare II. 1, c. 2 and III. 2, c. 32). Similarly Ockham, Dial. III. tr. 1, l. 2, c. 5: the 'civitas' is 'principalissima omnium communitatum,' but only of those 'simul in eodem loco habitantes'; for the rest, it is subordinated to some *ducatus* or some *regnum*, which in its turn may be subordinate. In the passages cited in Note 64 Dante, Engelbert of Volkersdorf, Augustinus Triumphus and Antonius Rosellus presuppose as matter of course that the *civitas* will be completed by some *regnum* and this by the *imperium*.

The Imperium as the only true Civitas.

334. See above, Notes 199 ff. Lupold of Bebenburg at this point adheres closely to the legists; for him (c. 15) kings are 'magistratus maiores' who differ from 'praesides provinciae' merely by being hereditary, and who in strictness owe their places to an imperial appointment made by way of 'tacit consent': so also all lower 'magistratus' and the governors of 'universitates, castra, villae.'

Legal Definitions of Civitas.

335. See the definition of *civitas* along with *urbs*, *oppidum*, *villa*, *castrum*, etc. in Joh. And. c. 17 in Sexto 5, 11 and c. 17 in Sexto 1, 6, nr. 7; Dom. Gem. c. 17 in Sexto, 5, 11, nr. 3—4; Phil. Franch. cod. c. nr. 4—5; Archid. c. 56, C. 12, q. 2; Barth. Caep. l. 2, pr. Dig. de V. S. nr. 1—28; Vocab. Iuris v. *civitas*; Baldus, l. 5, Dig. 1, 1; Barthol. l. 1, § 12, Dig. 39, 1; Ludov. Rom. l. 1, § 12, Dig. 39, 1, nr. 12—17; Jason, l. 73, § 1, de leg. 1. nr. 1—9; Marcus, Dec. 1. q. 365 and 366. The favourite definitions of *civitas* leave quite open the question whether the State or a commune is intended: thus, e.g., 'civium unitas' or 'hominum multitudo societatis vinculo adunata ad simul iure vivendum' or 'humanae multitudinis coetus iuris consensu et concordi communione sociatus,' and so forth.

City and Republic.

336. Baldus, Const. 1. Dig. pr. nr. 8: the *respublica* is sometimes Rome, sometimes 'totum imperium,' sometimes 'quaelibet civitas'; Cons. v. c. 336; Jason, l. 71, § 5, Dig. de leg. 1. nr. 29; Barth. Salic. l. 4, Cod. 2, 54; Decius, Cons. 360, 403, 468, 564, 638; Joh. de Platea, l. un. Cod. 11, 21, nr. 5; Bertach. v. *respublica*. Men help themselves out of difficulties by the confession that they are using words 'improprie.' [Dr Gierke refers to earlier pages in his book in which he has dealt with the usage of the glossators (D. G. R. III. 201) and later legists (ib. 358). Of the glossators he says that they endeavour to regard the Empire as the only true *respublica* and to maintain that all smaller communities stand 'loco privatorum'; but, under the shelter of a use of words which they admit to be

'improper,' they practically concede political rights to civic communities.]

337. This is the procedure of John of Paris, c. 1, and other Frenchmen, who treat 'the Realm' (*regnum*) as the abstract State and utterly deny the *imperium mundi* (above, Note 61). So also Mars. Pat. and Patric. Sen. (1. 3 ff.) without further definition. The State cutting itself loose from the Empire.

338. [At this point Dr Gierke refers to earlier parts of his book in which he has illustrated the slow emergence in legal theory of a line similar to that which moderns draw between State and Commune. The process takes the form of a division of corporations into two classes: namely, those that do and those that do not 'recognize a superior.' He cites (D. G. R. III. p. 382) the following passage from Bartolus, l. 7, Dig. 48, 1, nr. 14: cum quaelibet civitas Italiae hodie, praecipue in Tuscia, dominum non recognoscit, in seipsa habet liberum populum et habet merum imperium in seipsa et tantam potestatem habet in populo quantum Imperator in universo. Then the 'universitas superiorem non recognoscens' began to be regarded as being *de facto*, if not *de iure*, the *respublica* and the *civitas* (or, in modern terms, the State) of the Roman texts. But the process was gradual. The *universitas* which does 'recognize a superior' will have *iurisdictio*, and *imperium* can be acquired by privilege or prescription. After the days of Bartolus, says our author, we are often given to understand that little importance is attached to the old dispute as to whether communities can acquire sovereignty *de iure* as well as *de facto*. He cites Panormitanus (c. 7, X. 1, 2, nr. 6) for the admission that sovereign kings and cities have imperial rights in their territories.] Communities which do and Communities which do not recognize a Superior.

339. Paul. Castr. on l. 1, §§ 1—3, Dig. 3, 4, nr. 1, l. 5, Dig. 1, 1, lect. 2, l. 86, Dig. 29, 2, nr. 3, expressly says that, according to modern law, every 'populus superiorem non recognoscens' has a real and true *respublica* of its own, and other communes have 'largo modo rempublicam,' while other *collegia* are only 'partes reipublicae,' though they have a certain likeness (*similitudo*) to republics. Similarly Jason, l. 19, Cod. 1, 2, nr. 15, and l. 1, Dig. 2, 1, nr. 18. Therefore the notion of a *fiscus* is claimed for every community which does not recognize a Superior and denied to other groups. Baldus, l. 1, Dig. 1, 8, nr. 19, l. 1, Cod. 4, 39, nr. 22; Hippol. Mars. l. ult. Cod. 3, 13, nr. 189; Lud. Rom. Cons. 111; Bertach. v. *fiscus dicitur* and v. *civitas*, nr. 23, 46, 133, 135—7; Marcus, Dec. 1. q. 234 and 339. No Community above The State and only Communes below The State.

340. As to the lack that there is in medieval theory of any concept of a Federal State (*Bundesstaatsbegriff*), see S. Brie, der Federal States.

Bundesstaat, I. Leipz. 1874, p. 12 ff. If, besides alliances, mention is made of permanent 'ligae et confoederationes' between 'corpora' and 'universitates' (Bartol. on l. 4, Dig. 47, 22, nr. 6—11; Baldus, s. pac. Const. v. *ego*, nr. 1; Angel. Cons. 269, nr. 1—2) these are considered to have no political quality but to belong to the domain of Corporation Law.

Resistance to the Centralizing Idea of The State.

341. In the Church the writers of the Conciliar Party resist the centralizing trend which is to be seen in the doctrine of the Pope's Universal Episcopate (as set forth, e.g., by Augustinus Triumphus, I. q. 19, Alvarius Pelagius and Turrecremata, De pot. pap. c. 65), and in the derivation of the rights of all other Churches from the right of the Roman Church (Dom. Gem. Cons. 14, nr. 2—4 and 74, nr. 3—6), and in the assertion of the Pope's power of disposition over the rights of all particular Churches (Decius, Cons. 341, nr. 8—9: papa potest dominium et ius quaesitum alicui ecclesiae etiam sine causa auferre), and so forth. See Joh. Paris. c. 6; Petr. de Alliac. in Gers. Op. I. pp. 666 ff. and 692 and De eccl. pot. II. c. 1; Gerson, II. p. 256, for the defence on principle of the rights of the particular Churches; and, for profounder treatment, see Nic. Cus. II. c. 13, 22—28; also above, Notes 89, 90. In the State, besides Dante, Cusanus and Ant. Rosellus (above, Notes 62—64), who hold fast the medieval thought of a Community comprising All Mankind, even Marsilius, II. c. 24, upholds both in State and Church the principle of mediate organic articulation (above, Note 89). According to Ockham, Dial. III. tr. 2, l. I. c. 30, even 'ipsa tota communitas Romanorum' ought not to invade the 'iura partialia Romanorum personarum vel congregationum seu collegiorum aut communitatum particularium.' Comp. ib. 1, 2, c. 28: 'quaelibet privata persona et quodlibet particulare collegium est pars totius communitatis, et ideo bonum cuiuslibet privatae personae et cuiuslibet particularis collegii est bonum totius communitatis.' See also Paris de Puteo, Tr. de Synd. p. 40, nr. 20: Princeps sine causa non tollit universitati publicum vel commune sicut nec rem privati: it would be *rapina*. Also we often hear, as part of Aristotle's teaching, that the suppression of 'sodalitates et congregationes' is a mark of Tyranny, whereas the 'verus rex' would have his subjects 'confoederatos et coniunctos': Aegid. Rom. III. 2, c. 10; Thom. Aquin. De reg. princ. I. c. 3; Somn. Virid. c. 134; Gerson, IV. p. 600.

Political Theory and Feudalism.

342. Of the writers of this group Ptolemy of Lucca is the only one who comes to close quarters with Feudalism: he develops the thought that while salaried offices are best adapted to a Republic, infeudated offices suit a Monarchy: II. c. 10; and compare III. c. 21—22.

All other Power is derived by Delegation from Sovereign Power.

343. Towards this result both the doctrine of the Prince's 'plenitude of power' and the doctrine of Popular Sovereignty were tending. Aeneas Sylvius, c. 14—23, gives to it its sharpest form for the Kaiser's benefit. He goes so far as to declare that an appeal from Emperor to Emperor and Princes is impossible, and the attempt is *laesa maiestas*; for the 'imperator cum principibus' can do no more than the 'imperator solus':—'amat enim unitatem suprema potestas.'

Early Officialism.

344. See the notion of office entertained by the Emperor Frederick II. as formulated in Petr. de Vin. III. 68: For the fulfilment of our divine mission we must appoint officers, 'quia non possumus per universas mundi partes personaliter interesse, licet simus potentialiter ubique nos'; the officers are rightly 'ad *actum* deducere...quod in *potentia* gerimus per eos velut ministros.' See also ib. v. c. 1 ff., 100—2, VI. c. 19, 21—23. As to the transformation by the Hohenstaufen of the infeudated offices in Italy see Ficker, Forschungen, II. pp. 277, 472 ff., 477 ff. See also the notion of *officium* in Thom. Aquin. De reg. princ. I. c. 15; Mars. Pat. I. c. 5, 7, 15 (the institution of offices and the definition of spheres of official competence are matters for the legislature; the appointment, correction, payment of officers are matters for the executive power). Patric. Sen. III. 1—12.

All Power proceeds from and is revocable by the State.

345. Thus, e.g., Petr. de Andlo, I. c. 12, relying on the maxim 'contra absolutam potestatem principis non potest praescribi,' expressly says that the Emperor can withdraw all public powers from any commune or corporation, no matter the longest usage. He recommends that this be done in the case of jurisdictional rights, more especially in matters of life and limb, vested in 'plures communitates, imo castella et exiguae villae terrarum, ubi per simplicissimos rusticos ius reddi consuevit.'—Compare also the rejection of 'autonomy' in Aegid. Rom. III. 2, c. 27, and indirectly in Thom. Aquin. Summa Theol. II. 1, q. 90, a. 3; also the power that Marsilius accords to the State over ecclesiastical *collegia* (II. c. 21 and III. c. 29) and foundations (II. c. 17, 21, and III. c. 28). And see above, Note 324.

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