

A HISTORY  
OF  
MEDIÆVAL POLITICAL THEORY  
IN THE WEST

BY

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AND

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## PREFACE TO VOLUME VI.

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It was with the help of my brother that this work on the history of Mediæval Political Theory was begun in 1892; indeed his article on "The Political Theory of St Thomas Aquinas" in the 'Scottish Review,' 1896, was its first published form. He was one of the pupils of Arnold Toynbee at Balliol, and though what he learned from him was mainly in Economics, it was from him, I think, that he learned not only the significance of Economic History and Theory, but also the importance of the history of Political Thought. During the many years of his long service in the Government of India, 1880 to 1916, and in spite of the pressure of his public work, he contributed by his continual sympathy and his careful judgment and criticism to help and correct this work; and happily, in the years after his retirement in 1916 he was able to write a large part of Volume V. I had hoped to finish, as I had begun, with his help, but this was not to be, for he died in 1934, and I can only express something of what he was and did by dedicating this volume to his memory—the memory of an honourable, just, and kindly man, and an indefatigable scholar.

Till the last year of his life he was occupied with the materials for this volume, and happily something of his work I have been able to include in it, but only a little of that which he was preparing. This has unavoidably compelled the omission of one very important subject which we had hoped to treat in this volume, as in former ones—that is, the relations of the Temporal and Spiritual Powers—and I fear that it is too

late to hope to be able to deal with this. I greatly regret this, but at the same time I feel that in the fourteenth century, and still more in the fifteenth and sixteenth centuries, these relations must be studied under terms in many ways very different from those under which we have dealt with them in these volumes.

With the downfall of Boniface VIII. the long conflict between the Papacy and the Empire had, as it seems to me, really come to an end. No doubt it was renewed in the struggle between the Popes and Henry VII. and Louis of Bavaria, and it may even be said that this ended in the success of the Popes; but the Declaration of the Electors at Rhense in 1338 seems to indicate that there was little real significance in this.

Again, while there were in the fourteenth century several treatises like those of Augustinus Triumphus which asserted the theory of the temporal supremacy of the Popes in the strongest terms, these do not seem to add anything of importance to the contentions of Innocent IV., or Hostienis, or Egidius Romanus, or James of Viterbo.

The truth is, as it seems to me, that from the fourteenth century the history of the relations of the Temporal and Spiritual authorities, while we must not overlook the great importance of Papal authority, must be studied primarily under the terms of the relations of Church and State within the separate nations. This is true of the fourteenth and fifteenth centuries, and even more of the sixteenth, and that not only in the Reformed but also in the Catholic countries. These questions are so important that their proper treatment would require a detailed examination of the circumstances and the literature of the subject in each of the more important Western countries, and this is a task of a formidable complexity and magnitude.

At almost the same time as our last volume appeared, there was published the most important and valuable work of Professor J. W. Allen, 'A History of Political Thought in the Sixteenth Century,' and I would express both my high admiration for this admirable and illuminating work and also my obligation to it for much information. I trust that our readers

will recognise that what we have attempted in this volume on the sixteenth century is not like Professor Allen's work, a detailed study of every important aspect of the rich and varied "Political Thought" of that century, but a treatment of it, primarily, in its relation to that of the Middle Ages.

Among other important works recently published, I should wish to draw the attention of historical students to the very valuable work of Professor Ercole of Palermo, 'Da Bartolo all' Althusio,' and to the excellent work on the Political Theory of Hooker by Professor A. P. d'Entrèves of Pavia.

I must also express my great obligation to the late Professor G. Fournier of Paris in directing my attention to the sources of information on the French Civilians of the sixteenth century, and I should wish to express something of the regret that every serious student of mediæval civilisation must feel at the loss which we have suffered in the death of so great, so learned, so judicious a student of Canon Law. We are indeed glad that he was able to complete his work on the Collections of Canon Law from Pseudo Isidore to Gratian; and we look forward to the forthcoming treatment of Gratian himself by Fournier's learned successor in Paris, Professor Le Bras.

By the kindness of Professor Giorgio del Vecchio of Rome, one chapter of this work (Chap. II. Part II.) was translated into Italian and published in the 'Rivista Internazionale di filosofia del diritto.'

I cannot end without once again expressing my profound indebtedness to Dr R. Lane Poole, the most learned of English mediæval scholars. Looking back after fifty years I remember not only his continual kindness to an immature student, but also that it was from his 'Illustrations of Mediæval Thought' that I first learned something of the real character of the political principles of the Middle Ages.

A. J. CARLYLE.

March 1936.

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## ERRATA.

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- Page 4. *For* "1310" *read* "1311."
- „ 39. *For* "Babenburg" *read* "Bebenburg."
- „ 161. *For* "viaegio" *read* "viagio."
- „ 169. Lines 8-10, *omit* marks of quotation and *read* "such" *for* "some."
- „ 188. Line 7 from bottom, *omit* "it."
- „ 210. Line 12 from bottom, *omit* "could."
- „ 225, note 1. *Omit* "Super," *read* "Sopra."
- „ 284, note 2. In reference, *read* "note 1."
- „ 297, note 1. *Omit* comma after "credidit."
- „ 430. Line 15 from bottom, *omit* marks of quotation after "him."

PART I.  
FOURTEENTH CENTURY.

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INTRODUCTION.

WE have seen in earlier volumes that the political principles of the Middle Ages were clear and intelligible, and that, though the forms of the organisations in which they expressed themselves were in many respects different from those of the present day, the principles themselves were really not very far removed from our own. The confusion about this which is still to be found in the minds of some people is simply a confused ignorance. The mediæval world was a rational world; indeed, as has sometimes been suggested, its defect was that it was somewhat too rational. The great schoolmen, especially, appear to us sometimes to have too great a confidence in the power of the human reason to analyse the complexity of human life. However this may be, the political thinkers of the twelfth and thirteenth centuries are to us intelligible and rational.

It is very different when we come to some of the political ideas of the seventeenth century; it is difficult to say which seems to us most irrational: the absurdity of the theory of the divine right of the monarch, or the absurdity of the theory of the absolute sovereignty of the State as represented by Hobbes. It is no doubt true that we can recognise behind both these absurdities some historical conditions which serve to explain their appearance, but they do

not justify them. To us these conceptions seem, and indeed they are, irrational and mischievous. The conception of the divine right of the monarch has happily, even if only in our days, disappeared, and the theory of the absolute sovereignty of the State only lingers on among politically uneducated people or societies.

Our task, then, in this volume, is clear; we have to consider, first, the continuity of political civilisation, and, secondly, the conditions or circumstances under which this continuity was in part interrupted by the reappearance of that confused orientalism of Gregory the Great, the theory of the divine right of the monarch, and by the appearance of the conception of the absolute power of the prince, in the State.

## CHAPTER I.

### THE SOURCE AND AUTHORITY OF LAW: CONSTITUTIONAL PRACTICE AND GENERAL THEORY.

WE have seen that the most important political conception of the Middle Ages was the conception of the supremacy of law, the law which was the expression, not merely of the will of the ruler, but of the life of the community; and this life, which expressed itself in the customs, and therefore the law of the community, was conceived of as itself the expression of moral principles. The law was supreme, because it was the expression of justice; the unjust law was not law at all. This conception can, as we have shown, be traced through all mediæval literature from the ninth century to the thirteenth. It is sometimes expressed in the technical terms of the derivation of *Jus* from *Justitia*, or of the subordination of all positive law to the natural law, sometimes in the more popular terms of the distinction between the king and the tyrant.

It is then these profound conceptions of the real nature of political authority which the Middle Ages handed down to the modern world, and our first task is to consider how far these conceptions may have been modified in the period with which we are now dealing. We begin, therefore, with the consideration of the conception of the immediate source of the authority of the positive law of a political community.

As we have, in former volumes, endeavoured to show, there was from the twelfth century at least a divergence between what we have called the normal conceptions and practice of mediæval society, and the theory of some at least of the students and teachers of the Roman law, and we shall have

to consider this divergence carefully in the period with which we are now dealing, and shall have to ask how far the absolutist theory of some of the great civilians may have modified the traditional political principles of mediæval society.

We begin with some observations on the actual methods of legislation in the fourteenth century.

There is a noteworthy phrase in the coronation oath of Edward II. and Edward III. of England, which will serve to express the constitutional procedure and theory of the time. They swear to hold and maintain, not only the laws and customs granted by former kings, but also the laws and lawful customs which the community shall have chosen.<sup>1</sup> The words express both the place of custom in the system of mediæval law, and also the recognition of the principle that laws derive their authority, not only from the consent of the king but from the determination of the community. The words in which the ordinances of 1310 were annulled in 1322 only add to this the statement of the method in which the determination of the king, the barons, and the whole community was to be expressed—all those matters which are to be established for the kingdom and people are to be discussed, agreed upon, and established in Parliament by the king, with the assent of the prelates, counts, barons, and the community of the kingdom, as had heretofore been the custom.<sup>2</sup>

It is interesting to observe the parallel between these conceptions and those of the Cortes of Castile at Burgos in 1379, and at Bribiesca in 1387. At Burgos the Cortes complained that certain persons produced "Cartas" (briefs) annulling ordinances made by the king in the Cortes, and petitioned

<sup>1</sup> Rymer, 'Fœdera,' vol. iii. p. 63: "Sire, graunte vous à tenir et garder les Loys et les custumes droitureles, les quiels la Communauté de votre Roiaume aura esleu, et les defendrez et afforterez, al honur de Dieu, à vostre poer. Jeo les graunte et promette." Cf. Id. id., vol. iv. p. 244.

<sup>2</sup> 'The Statutes of the Realm,' vol. i.

p. 189: "Mes les choses q. s'rout a establir . . . pour lestat du roialme et du peuple, soient treset, accordees, establies, en parlementz, par notre Seigneur le Roi, et par l'assent des Prelatz, Countes et Barouns, et la communalte du roialme: auxint come ad este accustume cea enarere."

the king that nothing done in the Cortes should be undone except by the Cortes. The king, Juan I., seems in his reply to be a little evasive and to reserve to himself some freedom of action<sup>1</sup> (of suspending or dispensing).

At Bribiesca, however, Juan I. laid down in the most explicit terms that royal briefs (Cartas), which were contrary to custom or law, were not to be regarded, that the royal officials were not to seal any briefs which contained "non obstante" clauses, and that laws, customs and ordinances were not to be annulled except by ordinances made in the Cortes.<sup>2</sup>

These are statements of constitutional practice, and when we consider the actual methods or forms of legislation we find that there was no other method of legislation in Castile than that of the king acting with the advice, in earlier times, of his prelates, nobles and magnates, and as the representative system developed, of the prelates, nobles and delegates of the

<sup>1</sup> 'Cortes of Castile,' vol. ii. 22, 37 (1379): "Otrosy nos pedieron por merced que por algunos omes de nuestros sennorios ganen cartas para desatar los ordinamientos que nos fezimos en las Cortes e ayuntamientos por servicio de Dios et nuestro: e que mandasemos, que las tales cartas que sean obdedecidas e non cumplydas, e lo que es fecho por Cortes o por ayuntamientos que non se puede des fazer por los tales cartas, saluo por Cortes.

A esto respondemos que nos auemos ordenado que las cartas que fueren ganadas contra derecho que sean obdedecidas e non cumplydas fasta que nos seamos rroquerido dello; pero en rrazon de desatar los ordenamientos o delos dexar en su estado nos faremos en ello lo que entenderemos que cunple a nuestro servicio."

<sup>2</sup> 'Cortes of Castile,' ii. 28, Tercero Tractado, 9 (1387): "Et por que nuestra voluntad es que la justicia florezca, e las cosas que contra ella podiessen venir non ayan poder dela contrariar, establescemos que si en nuestras cartas mandaremos alguna

causa que sea contra ley fuero o derecho. que la tal carta ssea obdedecida e non conplida, non enbargante que en la dicha carta faga mençion espeçial o general dela ley fuero o ordenamiento contra quien se de; nin enbargante otrosy que faga mençion espeçial desta ley nuestra nin delas clausulas derogatorias en ella contenidas; ca nuestra voluntad es que las tales cartas non ayan efecto.

Et otrosy que les fueros ualedores e leyes e ordinamientos que non fueron rrevocatos por otras, non sean peruidicados synon por ordinamientos fechos en Cortes, maguer que en las cartas ouiese las mayores firmezas que pudiessen ser puestas.

E todo lo que en contrario desta ley se feziase, nos lo damos por ninguno, et mandamos a los de nuestro conseio e a los nuestros oydores e otros oficiales quales quier, so pena de perder los officios, que non firmen carta alguna o alcuna en que se contenga, 'non enbargante ley o derecho o ordenamiento.'

E essa mesma pena aya el escrivano que la tal carta o aluala firmare."

cities. There is really no trace of any other system in Castile or England, and it is a curious misconception which has led some serious historical writers to speak as though the legislative authority in Castile belonged to the king alone. This has arisen partly from a hasty interpretation of the phrases which describe the law as the king's law, and such phrases as those used by Alfonso XI. of Castile in issuing a new law-book at the Cortes of Alcalá de Henares in 1348: "Et por que al Rey pertenesce el poder de fazer fueros e leyes e delas entrepretar e declarar e emendar."<sup>1</sup> We have pointed out in the last volume that the similar phrase used by Alfonso X. in the 'Especulo' cannot be taken to mean that he claimed an absolute or sole right to make or unmake law, but only that no law could be made without him, and that it was his part to promulgate or declare the law.<sup>2</sup> And it must be observed that in issuing the new law book at Alcalá, Alfonso XI. was acting with the counsel of the prelates and nobles and the good men of the cities,<sup>3</sup> and that it was in this same Cortes that the great law book of Alfonso X., the 'Siete Partidas,' was first formally recognised as having legal authority, for it had not hitherto been promulgated by the king or received as law.<sup>4</sup>

With regard to France it is more difficult to speak precisely; while, as we shall see in a later chapter, there is frequent mention of the States general, and of the Provincial Estates, the former at least did not meet so regularly as Parliament in England, or the Cortes in Castile, and it is more difficult,

<sup>1</sup> 'Cortes of Castile,' i. 52, 64.

<sup>2</sup> Cf. vol. v. pp. 56-58.

<sup>3</sup> 'Cortes of Castile,' i. 52: "Por ende nos Don Alfonso . . . con conseio delos perlados e ricos e caualleros, e omnes buenos que son connusco en estas Cortes que mandamos fazer en Alcalá de Henares . . . fazemos e establescemos estas leyes que se siguen."

<sup>4</sup> Id. id., 52, 64: "E los pleitos e contiendas que se non podieren librar por las leyes deste libro e por los dichos fueros, mandamos que se libren per las leyes contenidas en los libros delas

Siete Partidas que el Rey Don Alfonso nuestro visueló mando ordenar, como quier que fasta aqui non se fabla que fuesen publicadas por mandado del Rey, nin fueron auidas, nin respibidas por leyes; pero nos mandamos las rrequerir e concertar e emendar en algunas cosas que cunplia. Et asy concertadas e emendadas porque fueron sacadas e tomadas delos dichos sanctos Padres e delos derechos e dichos de muchos sabios antiguos, e de fueros e de costumbres antiguos, de Espanna, damos las por neustras leyes."

therefore, to make precise statements about the methods of legislation; but it seems, from examining the collection of Royal Ordinances, that, so far as these can be described as having the nature of law, they were promulgated under the same terms as those of the thirteenth century, by the great council, sometimes with reference to the barons and others, sometimes with the advice of the estates.<sup>1</sup>

The formulas of legislation in the Empire are more explicit, and seem to imply normally the presence of the members of the Diet.<sup>2</sup>

We can now turn to the general theory of the legislative authority in the fourteenth century. It seems hardly necessary to cite the opinions of the English writers, for it is obvious that they adhere to, and indeed frequently simply repeat, the opinions of Bracton.

Britton represents the king as issuing a law book, and as commanding that it was to be obeyed in England and Ireland, but reserves the right to repeal or annul these laws with the consent of the barons and counts and the other members of his council.<sup>3</sup> Fleta restates almost literally the judgments of Bracton. The king has indeed no equal, but it is the law which has made him king, and it is therefore right that he should recognise the authority of the law.<sup>4</sup> The king can do nothing except that which he can do lawfully, and the saying that the prince's pleasure has the force of law must be understood under the terms of the statement that it was from the "lex regia" that he derived his authority, and that, therefore, it is to be understood that that only is law which has been made after due deliberation by the advice of the "magnates" and

<sup>1</sup> 'Recueil des anciennes Lois Françaises'—*et. g.*, vol. iii. p. 315. vol. v. pp. 5, 156.

<sup>2</sup> Cf. Introduction to the Golden Bull of 1356. Senckenburg and Schmaus, 'Neue Sammlung der Reichsabschiede,' vol. i. p. 46.

<sup>3</sup> Britton, i. Prologue: "Edouard par la gracei Deu Roi de Engleterre.

. . . Et volums et commandums qe par tut Engleterre et tut Hyrelaunde soient issi usez et tenus en tous poyntz, sauve a nous de repeler les et de enyter et de amenuser et de amender a totes les foiz, qe nous veruns qe bon serra, par le assent de nos Countes et Barouns et autres de noster conseyl."

<sup>4</sup> Fleta, i. 5, 4.

the authority of the king. The king must restrain his authority by the law which is the bridle of power, and must live according to law, for it is the principle of human law that laws bind the legislator.<sup>1</sup> This was evidently the normal opinion of English lawyers, and there is therefore nothing surprising in the terms used by that curious work, the 'Mirror of Justices.' The worst of all abuses is that the king should be against the law, for he ought to be subject to it, as is expressed in his coronation oath. It is a grave abuse that ordinances should be made by the king and his clerks and others who would not venture to oppose the king, while laws ought to be made by the common consent of the king and his counts.<sup>2</sup>

It is, then, from this standpoint that we can understand the real significance of the treatment of the source of authority of law by Marsilius of Padua in the 'Defensor Pacis.'<sup>3</sup> He

<sup>1</sup> Fleta, i. 17, 7: "Nec obstat, quod dicitur, quod principi placet legis habet potestatem, quia sequitur, cum lege regia quae de ejus imperio lata est, quod est, non quicquid de voluntate regis, tantopere praesumptum est, sed quod magnatum suorum consilio. Rege auctoritatem praestante, et habita super hoc deliberatione et tractatu, recte fuerit definitum . . . 11 Temperent igitur reges potentiam suam per legem quae fraenum est potentiae, quod secundum leges vivant, quia hoc sanxit lex humana, quod leges suam ligent latorem, et alibi, digna vox majestate regnantis est, legibus alligatum se principem profiteri."

<sup>2</sup> 'Mirror of Justices,' V 1.: "La première e la souverain abuson est qe li Roi est contre la loi, car il doit être subject, sicom est contenu en son serement, 2. Abuson est qe ou les parlemantz se dussent tere sur les sauveacions des almes des trespassoeurs e ceo a Londres e as deux fois per an, la ne se font il oie forque rarement e à la volonte le roi sur aides e cueilletes

de tresor Et ou les ordenaunces se dussent fore de comun assent del roi e de ses countes, la ce funt ore par le roi e ses clers e par aliens e autres qui nosent contrerminer le Roi, einz deivent del plere e de li conseiller as son profit, tut ne soit mie lur conseil covenable al comun del people, sanz appeler les countes e saunz suire les rrules de droit, e done plusours ordenaunces se fondent ore plus sui la volonte qe sur droit."

For a critical discuss'on of the date and authorship of this work, cf. the edition of Whitaker and Maitland, published by the Selden Society in 1895

<sup>3</sup> We desire to express the gratitude, which all students of Mediaeval Literature must feel, to Mr Previté-Orton of St John's College, Cambridge, and to Professor R. Scholz of Halle, that we have now in their editions of 1928 and 1932 a masterly criticism of the text of the work of Marsilius. We have used them throughout in our citations, indicating any differences if they

is not, as appears to be thought by some writers who are not very well acquainted with mediæval political literature, setting out some new and revolutionary democratic doctrine, but is rather expressing, even if in rather drastic and unqualified terms, the normal judgment and practice of the Middle Ages: he represents not the beginning of some modern and revolutionary doctrine, but the assertion of traditional principles. It is, however, true and not unimportant that the author derives his doctrines from various sources, that he combines the principles of the actual practice of the Middle Ages with conceptions derived, on the one side, from Aristotle, and on the other, to some extent from the Civilians.

He lays down, for instance, the principle that there is no "politia" when the law is not supreme, and he cites in support of this some words of Aristotle<sup>1</sup>; but this doctrine had been implied in the Assizes of Jerusalem, and asserted by Bracton.<sup>2</sup> Again, he sets out with great emphasis the principle that the source of law is the "populus" or "universitas civium" or its "valencior pars," and not either one man or a few men, for either the one or the few might make bad laws directed to their own advantage rather than to the common good.<sup>3</sup> Marsilius refers to Aristotle as having laid down this

occur We must refer the reader to the admirable introductions to these editions for a full discussion of the most interesting textual questions, as well as for those relating to the authorship of this work.

<sup>1</sup> Marsilius, 'Defensor Pacis,' i. 11 (4)

<sup>2</sup> 'Assizes of Jerusalem,' Assises de la Cour des Bourgeois, 26. Bracton, 'De Legibus,' i. 8, 5. Cf. vol. iii. pp 32, 67.

<sup>3</sup> Marsilius of Padua, 'Defensor Pacis,' i. 12, 3. "Nos autem dicamus secundum veritatem atque consilium Aristotelis 3<sup>o</sup> Politice Cap 6<sup>o</sup>, legislatorem seu causam legis effectivam primam et propriam esse populum seu civium universitatem, aut eius valenciosem partem, per suam elec-

cionem seu voluntatem in generalibus civium congregacione per sermonem expressam, precipientem seu determinantem aliquid fieri vel omitti circa civiles actus humanos, sub poena vel supplicio temporalis. valenciosem inquam partem, considerata quantitate personarum et qualitate in communitate illa super quam lex fertur; sive id fecerit universitas predicta civium aut ejus pars valencior per se ipsam immediate, sive id alieui vel aliquibus commiserit faciendum, qui legislator simpliciter non sunt, nec esse possunt, sed solum ad aliquid et quandoque ac secundum primum legislatoris auctoritatem." Id, i. 12, 8. "Aut legum lacoms auctoritas ad solam civium universitatem pertinet, ut diximus, vel ad hominem unicum

doctrine that the *universitas* is the source of law, but the principle had been suggested by some of the earliest Civilians. We have drawn attention in the second volume to the words of works attributed to Irnerius and Bulgarus, that it is the "populus" or "universitas" which is the ultimate source of law,<sup>1</sup> and it is evident that they had learned this from the Roman law books. It seems reasonable to say that Marsilius is restating the doctrine of the ancient Roman law and of the mediæval Civilians.

But further, as we have seen, there is scarcely any trace whatever, either in the constitutional systems or in the writers on political theory of the Middle Ages, except in the mediæval Civilians, of the conception that law could be made by any one person, even by the prince, except with the advice and consent of the community as a whole, or those who stood for it, whether they were the great and wise men, or the elected representatives of the community. Egidius Colonna stands practically alone in suggesting that the king should rule according to his own will and the laws which he had made, and not according to the laws which the citizens had made.<sup>2</sup> So far, then, Marsilius was simply expressing in clear terms the normal conception of the Middle Ages, but there are some aspects of his statement which deserve further notice, and especially the emphatic phrase which he uses about the

aut pauciores. Non ad solum unum, propterea quae dicta sunt in 11<sup>o</sup> hujus et in prima demonstracione quam in hoc adduximus; posset enim propter ignoranciam vel malitiam, aut utrumque legem pravam ferre, inspiciendo scilicet magis proprium conferens quam commune, unde tyrannica foret. Propter eandem vero causam non pertinet hoc ad pauciores; possent enim peccare in ferendo legem, ut prius, ad quorundam, scilicet paucorum, et non commune conferens, quaemadmodum videre est in oligarchiis. Pertinet hoc igitur ad civium universitatem aut ejus partem valen-

ciorem, de quibus est altera et opposita ratio."

<sup>1</sup> Irnerius, 'De Aquitate,' 2: "Universitas id est populus, hoc habet officium singulis scilicet hominibus quasi membris providere. Huic descendit hoc ut legem condant."

Bulgarus, 'Comm. on Digest,' 50, 17, 176: "Vigor judiciarius ideo est in medio constitutus ne singuli jus sibi dicant. Non enim competit singulis quod permissum est tantum universitati, vel ei qui obtinet vicem universitatis, id est populi, qualis est magistratus."

Cf. vol. ii. p. 57.

<sup>2</sup> Cf. vol. v. p. 74.

"valencior pars" of the *populus*. It will be observed that he explains these words when he adds, "Valenciozem inquam partem, considerata quantitate personarum et qualitate in communitate illa super quam lex fertur," for there seems to be no doubt that this is the correct reading. It seems clear that he does not mean simply the greater number. The history, however, of the development of the theory of the majority in the political and ecclesiastical organisations of the Middle Ages is one of great complexity, and we do not feel that we are competent to discuss this subject.<sup>1</sup>

It should also be observed that Marsilius sets out a very important defence of the authority of the whole people in making law. Men, he says, are more ready to maintain a law which they have imposed upon themselves, and it is therefore well that whatever may concern the common convenience should be known and heard by all<sup>2</sup>; and, while he admits that the legislative power should not be entrusted to a base and incompetent authority, he meets the contention that the "*universitas civium*" is a body of this kind with a flat denial. For, he declares, the great mass of the citizens (*civium pluralitas*) are not normally or generally base or incompetent, rather they are all, or for the most part, of sound mind and reason, and have a right intention towards the Common-

<sup>1</sup> We desire to draw the attention of those who wish to study this subject to the very careful and interesting monographs written by Dr E. Ruffini Avondo: "Il principio Maggioritario nelle elezioni dei re e imperatori Romano-Germanici" in 'Atti della reale Accademia delle Scienze di Torino,' vol. 60 (1924-25). "Il principio maggioritario nella storia del Diritto Canonico" in 'Archivio Giuridico,' vol. 93, fasc. I. (Quarta Serie, vol. ix. fasc. 1). "I sistemi di deliberazione collettiva nel Medioevo Italiano" in 'Nuova Collezione di Opere Giuridiche,' n. 243. Torino, Fratelli Bocca, 1927. "Il Defensor Pacis di Marsilio di Padova," in 'Rivista Storica Italiana,' fasc. II., 1924. "Il Principio

Maggioritario," 'Profilo Storico,' Torino, Fratelli Bocca, 1927 (an excellent summary).

<sup>2</sup> Marsilius, 'Defensor Pacis,' i. 12, 6: "Secundam propositionem probō: quoniam lex illa melius observatur a quocunque civium, quam sibi quilibet imposuisse videtur; talis est lex lata ex auditu et precepto universe multitudinis civium . . . (i, 12, 7). Convenerunt enim homines ad civilem communicationem propter commodum et vite sufficientiam consequendam, et opposita declinandum. Que igitur omnium possunt tangere commodum et incommodum, ab omnibus sciri debent et audiri, ut commodum assequi et oppositum repellere possint."

wealth and what is necessary for its maintenance. And, therefore, although every individual, or the greater multitude, is not capable of devising new laws, yet everyone can judge and determine as to that which is devised and proposed to him by others.<sup>1</sup>

It seems to us, then, to be clear that the constitutional procedure and the general political theory of the fourteenth century represent the same principles as to the source and supremacy of the law which, as we have seen in former volumes, were characteristic of the Middle Ages. The law of the State is the expression of the custom and will of the whole community, and it is supreme over all members of the community, even over the king and prince. We shall, however, have more to say about this in later chapters, when we deal directly with the conception of the nature and limitation of the authority of the prince in the fourteenth century.

<sup>1</sup> Id. id., i. 13, 3: "Cum ergo primum dicebatur, 'ad pravum et in pluribus indiscretum, non pertinet legumlationis auctoritas,' conceditur. Et cum additur, universitatem civium esse hujus modi, negandum est. Nam civium pluralitas neque prava neque indiscreta est quantum ad pluralitatem suppositorum, et in pluri tempore; omnes enim, aut plurimi, sane mentis et rationis sunt et recti appetitus ad

policiam et que necessaria sunt propter eius permanenciam, quemadmodum leges et alia statuta vel consuetudines, sicut prius ostensum est. Quamvis enim non quilibet aut maior multitudo civium sit legum inventor, potest tamen quilibet de inventis et ab alio sibi propositis iudicare, addendum vel minucendum aut mutandum discernere."

## CHAPTER II.

### THE LAW, ITS SOURCE AND AUTHORITY. CIVILIANS.

It remains, then, to consider the treatment of this subject by the Civilians and Canonists, for here if anywhere we may find some development of another kind. We have pointed out in earlier volumes that in the twelfth and thirteenth centuries there are clear traces of two and divergent movements of opinion: that some of the Civilians seem to think that the Roman people had so completely transferred their original legislative authority to the emperor that they no longer possessed it at all, while others thought that though they had given the emperor this authority it still, also, remained with them, and could still be reclaimed and exercised.<sup>1</sup> We have now to consider how far the Civilians and Canonists of the fourteenth century can be said to adhere to the one or the other of these opinions.

It is well to observe at the outset that there is no question in the minds of these Civilians that it was the people from whom the prince derived his authority. This is very clearly set out in a passage in the 'Commentary on the Digest' by Cynus. (Cino of Pistoia; one of the most important of the Civilians of the early fourteenth century.) Cynus maintains very dogmatically that the "imperium" is from God, but he holds that this is not inconsistent with the principle that the prince was created by the *lex regia*, the emperor derives his authority from the people, the "imperium" is from God.<sup>2</sup>

Having made ourselves clear on this point we can consider

<sup>1</sup> Cf. vol. ii. part i. chap. 7: vol v. iv. Fol. viii. R.: "Not. Ex lege ista part i. chap. 6. quod iura reputant imperatorem Deum, seu personam divinam, et hoc merito;

<sup>2</sup> Cynus, 'Comm. on Digest,' Rub.

an important discussion of the whole question of the legislative authority of the people, by Cynus in his 'Commentary on the Code,' which indicates very clearly that he was well aware of the contention between the older Civilians about this question. He cites the opinion of "Joannes" and of "Hostiensis," that the Roman people could not now make a law, but also the judgment of Hugolinus to the contrary, and says that some of the "moderni" (his contemporaries) held with Hugolinus. Cynus himself seems to be indifferent as to the question, but the reason he gives seems to imply that he is thinking not of the general authority of the people of the Roman empire, but of the authority of the people of the city of Rome, which would have no reality outside of the city.<sup>1</sup>

We must, however, observe also the opinion of Cynus

quia imperium est a Deo, ut in authent. quomodo oportet epi: in princip: De Fide instrum: § 1, et ab ipso Deo immediate processit, unde inter Imperatorem et Deum non est ponere medium, ut in authent. constit, quae de dignitate §: illud. Nec obstat quod dicitur supra l. i. quod lege regia dicitur Princeps creatus: quia hoc est permissio Divina; sicut diximus, non est malum in civitate quod non fecerit Dominus; nec est absurdum, quod sic a populo est a Deo, tamquam ab agente universali, sicut aliter dicitur, homo hominem generat; et solu. Vel molius dico, quod imperator a populo est, sed imperium cuius praesidatur imperator dicitur divinum, a Deo."

<sup>1</sup> Cynus: Comm. on the Code, Rub. 14, Fol. 29 R. (Cod. I. 14. 12). "Si imperialis . . . Item nota quod soli principi licet condere legem . . . Secundo opp. quod solus princeps non potest facere legem, imo populus . . . item senatus . . . item praefectus . . . Respondetur secundum quosdam. Primo ad l. normam. Quia praefectus facit de auctoritate principis. Unde ipse facere videtur; et idem in populo, et sic auctoritas pendet a principe, quod non est verum. Quid ergo dice-

mus? De hoc fuerunt dissensiones apud nostros antiquos patres, quae etiam et hodie vigent apud modernos. Dixit Joannes, quod non potest hodie populus Romanus facere legem, et hoc tenet Hostiensis, extra de constit. C. fin, in summa sua. Hugolinus dixit contrarium, Glossa approbat opinionem Joannis in d.c. ambigitur (Dig. I. 3, 9). Quidam moderni tenent cum Hug. et probant inter alia argumenta. Nam certum est quod Ulpianus fuit tempore quo erat concessa Imperatoribus potestas condendi leges; ut ff. de origine juris, l. ultima parte. Et tamen Ulpianus dicit, Senatam posse facere legem (Dig. I. 3, 9), non dicit potuisse; nec potest dici quod ibi loquatur in senatu, qui erat numero centum, quia jus totum remanet in uno . . . unde populus et Senatus qui regit populum potest legem facere. Et quaedam suo jure facit populus, et Senatus populi auctoritate, non Principis, quia Principis auctoritas pendet a populo, non e contra, ut dixi supra in L. 1. Quinimo dicunt quidam quod populus possit hodie deponere principem, causa subsistente, ut ff. de execut. tut. l. sed et reprobari, in princip. Secundum ergo istos expone-

on two different but related questions. He discusses with some care the meaning of the famous passage in the Code, "Digna vox maiestate regnantis legibus alligatum se confiteri" (Code I. 14, 4), and maintains that, while the emperor is not bound to observe the law "de necessitate," he feels himself bound "de honestate."<sup>1</sup> And he goes on to discuss a question whose importance we shall have to consider in relation to other writers, and even with regard to Bodin in the sixteenth century. The question is, whether the emperor

mus hic literam 'soli' (Cod. I. 14, 12) uno modo, prout dixit Glos. Vel secundum Petrum dicendum est, quod litera 'soli' exponatur sic, quod nullus alius existens solus potest facere legem, nisi Imperator. Hoc non placet mihi, quia licet populus sunt plures, tamen pro uno reputatur. Praeterea Senatus potest esse in uno, ut supra dixi. Item praefectus unus est. Expone ergo, quod litera 'soli' excludat solum alios inferiores. Non autem illos, qui possunt legem facere, sicut sunt predicti ut exposuerunt Jacobus et etiam Petrus supra oo. l. i, i; et haec vera secundum opinionem illam, quae se habet ut populus hodie possit facere legem. Sed secundum Joannem populus hodie non potest legem facere, quod et quidam alii doctores moderni tenent, ut populus non possit legem facere sino principe, et tunc ponitur, quod nullus existens solus potest facere legem nisi Princeps; unde solus princeps, id est, solus existens princeps potest facere legem, sed solus populus non: quia cum imperator est caput imperii . . . populus quantum ad regimen imperii nihil sine eo facere potest, quia universitas sine capite suo nihil agit. . . . Ipse autem, solus potest facere, ut hic, et cum populo, et cum senatu, et cum concilio procerum . . . quod probat illa littera humanum ut ibi dixi (i.e., his observations on Code I. 14, 8, in this work. Fol. 28, v.). Quid ergo dicemus. Ad l. 'non am-

bigitur' (Dig. I. 3, 9), dicendum quod hodie est immutata per legem istam, hoc non est verum, ut patet infra Tit: II. (Dig. I. 2); vel dicendum est quod Senatus potest facere legem, non tamen contrarium legi principis, sicut et praefectus ut l. normam. Contra istam opinionem est manifeste lex 'de quibus' (Dig. I. 3, 32), ubi dicitur, quod populus potest facere consuetudinem, quae legem tollit generaliter, ergo et legem, quia nihil refert, an verbis an factis, ut ibi. Nisi dicas quod hodie sit restricta potestas populi per hanc legem.

De his opinionibus tene quae magis tibi placet quia ego non curo. Nam si populus Romanus faceret legem vel consuetudinem, de facto scio quod non servaretur extra urbem." (Confer Cynus, Comm. on Cod. 8, Rub. 53. Fol. 520.)

<sup>1</sup> Id. id., Rub. 14, Fol. 25, v. (Code I. 14, 4): "Digna vox . . . dico ergo, quod imperator est solutus legibus, de necessitate: tamen de honestate ipse vult ligari legibus, quia honor reputatur vinculum sacri juris, et utilitas ipsius . . . contra hoc posses opponere quod ipse non bene facit hoc volendo; quia quilibet suam debet auctoritatem augere. . . . Ad hoc respondet ipsemet imperator in hac lege, quia dignitatem suam ob hoc non minuit, immo auget, quia 're vera' etc., unde honor est in tali ligamine."

and his successors are bound to observe an agreement (or contract, pactum) which he has made with any "civitas," or baron. The question, as he says, had been propounded by Guido de Suza, and it is not quite clear whether the discussion of the question is that of Cynus, or whether he is stating it in the terms of Guido, but the conclusion, at least of Guido, seems clearly to be that the emperor is bound by such a "pactum," and that the subjects may be entitled to resist any unjust and manifest violence.<sup>1</sup>

It is also important to observe that Cynus is clear that the authority of the prince does not include the right to take away a man's property without adequate cause. He can indeed take it "de facto," and his action must be assumed to be founded upon some just reason, but he cannot do this "de jure" without reason: the laws give him no such power, and if he does it, he commits a sin.<sup>2</sup>

We have given these somewhat detailed quotations from Cynus, because it appears to us that his position represents

<sup>1</sup> Id. id., Rub. 14 (Cod. I. 14, 21), Fol. 26 R.: "Ultimo sciendum quod Guido de Suza formavit hic questionem; utrum si imperator ineat aliqua pacta cum aliqua civitate vel barone, teneatur ea observare, tam ipse quam ejus successor? Videtur quod non, ut l. princeps ff. eo (Dig. I. 3, 31) et ff. de Leg. 3, l. si quis in prin., et quia par in parem non habet imperium . . . Ecoutra videtur quod sic; nam grave est fidem fallere . . . et naturalia jura suadent pacta servari, et fides etiam hostibus est servanda . . . Praeterea, ad hoc facit haec lex: quia honestas ligat etiam principem; ut hic patet per ea quae supra dixi, et nihil magis debetur homini quam pacta servare. . . . Praeterea contractus principis est lex. Ergo etc, et hanc l. et hanc partem tenet ipse Guido ad quod facit extra de probationibus. c. I. Alii distinguunt: an erit ibi justitia altera parte, an erat ibi in-

justitia et dolus, ut primo casu valeat pactum et compositio, secundo non . . . et potest esse ex parte subditorum justitia resistendo, si ex parte domini sit injusta et notoria violentia, ut infra de jure fisc. l. prohibitum, l. x. (Cod. X. l. 5, 10)."

<sup>2</sup> Id. id., Rub. 19 (Cod. I. 19, 6), Fol. 36, v.: "Secundo casu, scilicet, quando vult mihi tollere dominium rei meae, sine aliqua causa de mundo; si queratur utrum possit de facto, non est dubium. Sed utrum possit de jure et de potestate sibi per jura concessa, in veritate non potest. . . . Sed tamen quantum ad observantiam, qualitercunque scribat debet servari. Nam semper roscriptum suum supponimus ex justa causa interpositum. Et talis presumptio est violenta in persona principis; ut sup: dixi in proxima questione. Negari tamen non potest quod si mihi rem meam auferat sine causa, quod ipse peccat."

very fairly that of the fourteenth-century Civilians in general; they were, like Cynus, aware of the divergent judgments of the older Civilians. In one important passage Bartolus comments on the well-known words of the Code VIII. (52, 2) in which Constantine said that while the authority of custom is not insignificant (*vilis*) it could not override reason or law, and he points out that Azo, John Bassianus, and the Gloss (*i.e.*, the "Glossa Ordinaria" of Accursius) maintained that a local custom overrides the "lex communis" in that place, and a general custom overrides it everywhere, while Placentinus had contended that this had been true in ancient (pre-Imperial) times, but not in later. He also cites one of the earlier fourteenth-century Civilians, William of Cuneo, as maintaining that the custom of the Roman people retained its legislative authority, for this had never been transferred to the prince; and a jurist of the thirteenth century, Martin Silimani, as maintaining that the Roman people still retained the power of making a general and written law (*lex*).<sup>1</sup>

<sup>1</sup> Bartolus: Comm. on Code VIII. 52 (53) (p. 806), R.: "Tertio sic summa secundum Azo.; Jo.; et Gl.: Consuetudo specialis certi loci in eo loco vincit legem communem, et generalis generaliter, non autem specialis generaliter in quolibet loco . . . (p. 807). Sol.: multis modis. Primo secundum Plac. q. d. l. de quibus, loquitur secundum tempora antiqua, secundum quae populus Romanus poterat facere legem generalem, ergo consuetudinem generalem contrariam legi, et illam contrariam legem tollentem; haec lex loquitur secundum tempora moderna, secundum quae populus Romanus non potest legem generalem facere, ergo nec consuetudinem contrariam, illam vincentem. . . . Quod non videtur bene dictum quia secundum hoc d. l. de quibus (D. I. 3, 32) esset derogatum seu abrogatum per l. seq., quod in casu dubii dicere non debemus. . . . Praeterea Gul. de Cuneo d. l. de quibus

(D. I. 3, 32) illud impugnat, et aliter fatetur quod in principem translata est potestas condendi legem expressam et scriptam, non autem consuetudinariam, quae in eum non potuit transferri, quum procedat ex tacito consensu . . . et sic dicit hodie populum Romanum posse facere consuetudinem generalem, quum potestas ipsius legis consuetudinariae inducendae non sit translata in principem. Et secundum hoc d. l. de quibus (Dig. I. 3, 32) hodie remanet in suo statu; quod placet Mar. Silimani, ubi dicit hodie populum Romanum posse facere generalem, scriptam et expressam; de quo hic non insisto quia plene est tractatum in l. fi. s. de Leg. (*i.e.*, his Commentary on Code I. 14, 12). Sed contra predicta instatur, nam non debemus sequi quod populus Romanus fecit, s. utendo . . . moribus contra legem, sed quod facere debeat s. utendo lege communi. . . . Sed . . . (glossa re-

When we compare these passages with others in his writings we may incline to the judgment that he accepts the distinction of William of Cuneo between the continuing legal authority of the custom of the people, and their power to make law (*lex*) in the more strictly technical sense. In one place, indeed, he states clearly and dogmatically that the Roman people have not the power of making law (*lex*); the reason he gives for this is, however, rather curious. So long, he says, as the Roman people retained the right of electing and deposing the emperor, they kept the power of legislation, but this right had now passed to the princes of Germany, and the right of deposition had passed to the Pope.<sup>1</sup>

On the other hand, at the end of his discussion of the rescript of Constantine on custom, he says, dogmatically and in his own person, that, if custom is contrary to law, and the law is subsequent to the custom, the law annuls it; if, on the other hand, the custom is "praeter legem," it is superior to the law. A general custom is superior to law everywhere, and a local custom, to law locally; and it is perhaps worthy of note that here Bartolus refers to the highly important statement of Gregory IX. in the Decretals.<sup>2</sup>

spondit et bone, videlicet quod non debemus sequi quod populus Romanus facit, perperam et erroneam. . . . Sed bene sequi debemus illud quod populus Romanus ex certa scientia fecit consuetudinem inducendo. d. l. de quibus (Dig. I. 3, 32). Quia Roma est communis patria . . . et est caput mundi, sic aliae civitates debent sequi ipsius consuetudines, non autem ipsa aliarum civitatum."

<sup>1</sup> Bartolus: Comm. on Code I. 14, 12 (p. 81): "Ego credo quod populus Romanus et senatus non possunt facere legem, ratio est, postquam populus Romanus transtulit potestatem in principem, adhuc apud eos remansit potestas eligendi et privandi ut l. 2, § exactis, de origine juris (Dig. I. 2, 2, 16) et illo tempore poterat populus Romanus condere legem, et etiam senatus, sed hodie omnis potestas imperii, est

abdicata ab eis. Jus enim eligendi habent principes de Alemannia, et jus privandi habet solus Papa, ut extra de re iudicata c. Ad Apostolicae; Cum enim nihil sit quod de imperio remansisset eis non video quomodo possit legem condere."

<sup>2</sup> Id., Comm. on Code VIII. 52 (3) 2 (p. 814): "Ego autem sic dico ut s. dixi, in opp. 2 quod aut dicta consuetudo est contra legem, et lex sequens contraria illi consuetudini tollit eam. . . . Aut praeter legem, et tunc non, sed lex succumbit illi. . . ."

Aut consuetudo est generalis, et vincit legem generaliter d. l. de quibus (D. 1, 3, 32) aut est specialis et localis et vincit eam specialiter in eo loco."

Cf. Decretals, I. 4, 11: "Licet etiam longaevae consuetudinis non sit vilis auctoritas, non tamen est usque adeo valitura, ut vel iuri positivo debeat

If we turn to his great contemporary Baldus, we find that his position is much the same as that of Bartolus on this question. In commenting on the Code (I. 14, 12) he says dogmatically that the Roman people cannot make law (*lex*), for its general authority has been transferred to the prince; on the other hand, commenting on Dig. I. 3, 32, he also seems to repudiate the contention of Placentinus, that custom does not now override the written law, and that, therefore, no custom has authority unless it has been formed with the knowledge of the prince; this, he says, is not required, at least with regard to local customs, and he refers to a Decretal of Boniface VIII., and also to Gratian's well-known doctrine that laws are abrogated by custom.<sup>1</sup>

Bartolus and Baldus again agree with Cynus about the binding nature of contracts or agreements between the prince and the people.

Bartolus maintains that while the prince is "legibus solutus," it is "equum et dignum" that he should live according to law, though he does this of his free will, not of necessity; but if he has made a "pactum" with any city, he is bound to keep this, for "pacta" belong to the "ius gentium."<sup>2</sup>

praeiudicium generare, nisi fuerit rationalibus et legitime sit praescripta."

Cf. vol. ii. p. 158.

<sup>1</sup> Baldus: Comm. on Code I. 14, 12 (fol. 60): "Queritur utrum hodie populus Romanus possit legem facere, dicendum est quod non; quia denu-datus est generali potestate, cum illa translata fuerit in principem."

Id., Comm. on Digest I. 3, 32, 6 (fol. 20): "Secundo opponitur et videtur quod consuetudo non possit derogari legi scriptae. . . . Sol. dicit Placentinus quod illa corrigit istam, quia hodie solus princeps facit legem, et ideo hodie nulla consuetudo valet nisi sit inducta conscientia principis. Secundum Plac: et hoc tangit glo. viii. Dist: c. frustra (i.e., Gloss: Ord:

on Gratian Decretum D. 8, 8). Sed illa opinio est falsa, nam tempore hujus legis ita erat Imperator sicut hodie; unde in sua potestate nihil est additum vel detractum. . . . Et ideo non requiritur scientia principis in consuetudine singularium locorum; casus est in c. 1. De constit. li. 6 (Sext. I. 2, 1), ubi dicit consuetudinem esse validam et tamen principem nescire, ut nota 4 distin: c. leges (Gratian Decretum D. iv. 3. Gratian's observations at the end)."

But cf. Baldus' Commentary on Code VIII. 52 (fol. 172.)

<sup>2</sup> Bartolus: Comm. on Code I. 14, 4: "Sol. fateor quod ipso (princeps) est legibus solutus, tamen acquum et dignum est quod legibus vivat; ita

Baldus, commenting on the same passage of the Code, sets out the same opinion, that the prince should obey the law, though he is not bound to do so "ex necessitate"; and he adds a judgment of considerable significance, that there is a supreme authority in the prince, as well as an ordinary authority, and that this supreme authority is not under the law. He also, however, like Bartolus, quotes Cynus as maintaining that a pactum, made by the prince with his subjects, if it has natural justice and equity, and is made for the public good, is binding, not only on the prince but on his successors, and in his comment on 'Digest' I. 3, 3 (Princeps legibus solutus), he sets out the principle again and seems to accept it for himself.<sup>1</sup>

loquitur hic: unde ipse submittit se legibus de voluntate, non de necessitate. Ita debes intelligere hanc legem. Quaero, quid si imperator facit pactum cum aliqua civitate, utrum teneatur illud pactum servare. Videtur quod non quia est solutus a legibus. . . . Contrarium est veritas. Nam pacta sunt de jure gentium I. ex hoc ff. de just: et jure (Dig. I. 1, 5). Jura gentium sunt immutabilia ut Instit, de jure nat, § sed naturalia (Inst. I. 2, 11). Ita tenent ibi Doc. ut Cynus hic refert."

<sup>1</sup> Baldus: Comm. on Code I. 14, 4 (fol. 55): "Princeps debet vivere secundum leges; quia ex lege ejusdem pendet autoritas. Intellige quod istud verbum debet intelligi de debito honestatis, quae summa debet esse in principe, sed non intelligitur precise, quia suprema et absoluta potestas principis non est sub lege; unde lex ista habet respectum ad potestatem ordinariam, non ad potestatem absolutam. . . . Nota quod imperator dicit se esse alligatum, et hoc ex benignitate non ex necessitate. Secundo nota quod auctoritas imperatoris pendet ex lege regia, quae fuit nutu divino promulgata, et ideo imperium dicitur esse immediate a Deo. . . . Quarto nota quod ille bene principatur qui vult principari

Deum et leges, unde dicit imperator se submittere principatum suum legibus.

Ultimo nota quod nemo potest imponere legem successoris dignitatis vel officii vel imperii. . . . Modo juxta hoc doctores quaerunt de una, q. lex principis non ligat successorem; quid in contractu. . . . Dominus Cynus dicit quod (si) istud pactum habet in se justitiam naturalem et equitatem, quod istud pactum est servandum; si imperator facit pacem vel capitulum cum subjectis propter generale et publicum bonum, quod ista non debent infringi per successorem, nisi ex parte subditorum intervenisset dolus vel fraus."

Id., Comm. on Digest I. 3, 31 (fol. 20): "Princeps non est sub lege fori, est tamen sub lege poli, nature et rationis, actus autem sui sunt, leg: de re iu. pastoralis, in cle. (Clementines, II. 11, 2) et dic. ut no. c. eo. digna vox (Code I. xiv. 4): Cyn. et ibi no. Cyn. quod princeps potest contrahere cum suis fidelibus, et tenetur ei de jure gentium et civili, quia civili rationi natura i, naturalis ratio comparatur. . . . Nam si princeps non obligaretur alii, certe nec alius obligaretur ei, ex regula con-relativorum; et sic esset interdictum commercium, et esset tamquam exul qui omnium praesul."

Here we have come upon an important point of contact between the Civilians and the system of Feudal law. We have, happily, an important work of Baldus upon the Feudal law, and when we turn to this we shall be led to think that the conception of the contract which is binding upon the prince is related to Feudal conceptions, and that this affects also the conception of customary law.

The emperor, Baldus says, has, no doubt, the fulness of power (plenitudo potestatis), for God subjected the (leges) laws to him, but God has not subjected to him the agreements (contracta) by which he is bound, and he gives as an example of his meaning the grant by Frederick I. of the Countship and other territories to the community of Pavia on their taking the oath of fidelity to him: this grant neither Frederick nor his successors could revoke, except on the ground of some guilty action of Pavia.<sup>1</sup>

Good and natural consuetudines, Baldus says in the same work, bind the prince, for the "jus naturale" is stronger than the "principatus": the prince is bound to maintain his "consuetudines," for customary law (jus consuetudinarium) has authority over the prince (concludit principi).<sup>2</sup> In his commentary on the Peace of Constance he sets out the same principle: if the prince had granted to any city the right to make any statutes for itself, he could not revoke the grant.<sup>3</sup>

<sup>1</sup> Baldus: Super Feudis (fol. 19): "(De Natura feudi). Pone quod Imperator vel Rex Francorum creat aliquem ducem et investitur eum de ducatu, vel marchionem . . . vel comitem . . . vel baronem . . . numquid potest pro libito divestire eum. Respondetur quod non, sed demum propter convictam culpam vel feloniam. . . . Nec obstat quod imperator habeat plenitudinem potestatis, quia verum est quod Deus subiecit ei leges, sed non subiecit ei contractus ex quibus obligatus est, ut nota in l. digna vox (Cod. I. 14, 4). . . . Et per hoc dicebam quod imperator Fredericus Primus qui fecerat commune Papiæ Comitem in certis castris et terris, ei ea conferendo

sub juramento fidelitatis, quod nec ipse concessor nec eius successor poterat revocare sine culpa communis Papiæ."

<sup>2</sup> Id. id. (fol. 9): "(Notandum est autem) . . . quaero nunquid imperator possit divestire vassalium sine convicta culpa? Respondet glossa quod non est ratio: quia bonae et naturales consuetudines ligant principem, quia potentius est jus naturale quam principatus."

Id. id. (fol. 19): "Et nota hic quod princeps tenetur servare suas consuetudines, et sic jus consuetudinarium concludit principi."

<sup>3</sup> Id. id.: 'Commentarium ejusdem Baldi super Pace Constantiæ.' (Fol. 86) "Deinde quaero, pone quod prin-

And in another place Baldus sets out as a general principle that custom is a tacit agreement of the citizens.<sup>1</sup>

We have dealt with the position of Cynus, Bartolus, and Baldus at length, for we think that they are in these matters representative of the Civilians of the fourteenth century, but we may notice a few points in others.

Joannes Faber, one of an important group of French Civilians of the early fourteenth century, asserts very dogmatically, not only that the prince derives his authority from God, but through the people, but also that the people can for proper causes depose him.<sup>2</sup> He holds that the people can no longer make a general law (*lex*), for it has transferred the power to the prince, but it can, under proper conditions, make a municipal law.<sup>3</sup> Custom, however, he seems clearly to mean, still makes and unmakes law.<sup>4</sup>

*ceps concessit civitati facere statuta, virtute cuius concessionis civitas fecit statuta sua. Quaero, numquid potest revocare, et videtur quod non.*"

<sup>1</sup> *Id.*, *Super Feudis* (fol. 31): "Illud non omitto quod consuetudo dicitur civium tacita conventio."

<sup>2</sup> Joannes Faber. 'Super Institutionibus,' 1, 2 (fol. 6) "Populus ei et in eum. Et sic videtur quod princeps habet jurisdictionem a populo . . . sed contra, imo a Deo . . . Glo ibi dicit quod imperium processit a Deo dispositive, quia eius dispositione factum est. Melius diceret Glo. si diceret quod processit a Deo permissive sed a populo dispositive, quia ita disposuit et voluit ex quadam necessitate. . . Si enim esset Dei dispositione non fuissent prelati multi turpes, luxuriosi et fatui . . . Sed an populus potest imperatorem deponere. Videtur quod sic, quia cum ad populum pertinet ejus creatio, ut hic . . . et depositio . . . Praeterea cum mandatum jurisdictionis sit revocabile de sui natura . . . et imperator jurisdictionem et potestatem habeat a populo . . . Videtur quod populus revocare possit. Praeterea

constat hoc factum fuisse antiquis temporibus . . . Sed contra (various arguments stated) . . . Sed tamen satis posset dici quod populus ex causa posset eum destruere. . . Hoc tamen attentare periculosum est."

*Cf. Id.*: 'Breviarium in Codicem,' I. 1 (p. 1): "Populus enim ad quem de jure communis spectat electio et creatio principis, potest dare jus regibus quos creavit. . . Unde quamvis imperium fuit a Deo institutum permissive, populus tamen fuit author et dispositor."

<sup>3</sup> *Id.*, 'Super Institutionibus,' I. 2 (fol. 6): "Sed an populus potest hodie legem facere. Glo: dicit quod non, cum totam potestatem transulerit, quod est verum, generalem, sed municipalem sic . . . dum tamen habeant collegum approbatum: alias non."

<sup>4</sup> *Id. id.*, 1, 2 (fol. 7): "Circa sextum, quae sunt ejus (i.e., Custom) virtutes seu vires, dicendum quod multae, nam per eam quandoque jus constituitur, quandoque acquiritur, ut satis dixi in precedentibus. Item per eam derogatur juri scripto, super quo dicitur quod aut consuetudo precedit, et jus sub-

He also raises the question whether the prince was bound to consult the "Proceres" when making a law, as laid down in *Cod. I. 14, 8*: he seems to think not.<sup>1</sup>

Jacobus Butrigarius, an important Bologna Jurist under whom Bartolus studied,<sup>2</sup> in an interesting passage discusses the question of the authority of custom, and suggests that both those who upheld the view that custom still makes and unmakes law, and Placentinus who denied this, were right, for the Roman people had transferred their authority to the prince and could not, therefore, make general laws, but they could revoke this grant to the prince and could then make any law.<sup>3</sup> We shall have to return to this passage in the later chapters, when we discuss the theory of the prince or ruler, but in the meantime it is worth noticing for Butrigarius does not stand alone in the suggestion. It is suggested by Vacarius,<sup>4</sup> and by Azo.<sup>5</sup>

The Canonists of the time do not, as far as we have been able to see, deal with these questions to any great extent,

sequit, et tunc si condens jus eam non ignorat, quia forte generalis, vel alias constat eam non ignorare, consuetudo tollitur . . . ubi autem jus precedit, consuetudo subsequens tollit ipsum, dum tamen sit rationalis . . . non tamen omnino, sed particulariter in loco in quo servatur. . . Sed an ligat fiscum vel dominum terrae in qua consuetudo obtinet, non videtur, quum lex inferioris non liget superiorem, ut dixi, § sed quod principi. De hoc fuit questum in facto ducatus Britanniae. Tamen potest dici quod sic, non enim inferior ligat, sed jus ex consuetudine emanat."

*Cf. Id.*: 'Breviarium in Codicem,' VIII. 52 (p. 222).

<sup>1</sup> *Id.*, 'Super Institutionibus,' 1, 2 (fol. 6). *Id.*: 'Breviarium in Codicem,' I. 14, 8 (p. 19).

<sup>2</sup> *Cf. Woolf.*: 'Bartolus,' p. 2.

<sup>3</sup> Jacobus Butrigarius, 'Thesaurus Legum . . . In Primam et Secundam Partem Veteris Digesti,' I. 3, 32. "Opponitur primo ad casum legis, et

videtur quod consuetudo non tollat legem, ut *C. eod. l. 3. in fin.* Placentinus solvit uno modo, et glo alio modo (*Accursius*. *Gloss on Code VIII. 52 (3)* 'aut legem', and *Gloss on Digest I. 3, 32* 'abrogentur'), et tamen uterque bene dicit . . . Ad propositum, ergo quum simpliciter disponat aliquid *respublica Romanorum*, videtur potius sibi specialiter, cum non possit generaliter, nisi revocata jurisdictione translata in principem: et ideo ejus consuetudo legem generalem tollere non posset; et si sic intellexit Placentinus, bene dixit, sed si populus Romanus revocaret jurisdictionem translata in principem, quod posset, ut dixi supra. l. 9. 'non ambiguit (i.e., *Comm. on Dig. I. 3, 9*), tum posset legem condere generalem, et per consequens consuetudinem generalem inducere, et sic legem generalem, specialem non'"

<sup>4</sup> *Cf. Vacarius*, 'Liber Pauperum' (ed. Zulueta), p. 15.

<sup>5</sup> *Cf. vol. n. p. 64.*

but it is worth while to notice that the great Canonist, who is generally known as the "Archdeacon," in his Commentary on Gratian's Decretum, while he does not express his own judgment, mentions that some said that the people could not now make a law; but others maintained that they could take away from the emperor the authority they had given him, and he contrasts this with the position of the Pope.<sup>1</sup> The Archdeacon also reasserts the principle of Gratian, that all laws required to be approved and confirmed by the custom of those concerned, but he adds that if the subjects refuse to accept a reasonable constitution, the legislator can compel them to do this.<sup>2</sup>

Again, William Durandus the younger, in his important work on the mode of holding a general Council, written in the first decade, probably, of the fourteenth century, makes some important observations on the obligation of both Temporal and Spiritual rulers to obey the law,<sup>3</sup> and also maintains that the Pope should not make laws without the consent of the

<sup>1</sup> Guglielmus Baiso (The Archdeacon): 'Apparatus ad Decretum,' D. 2 (fol. 5): "Dicunt quidam quod hodie populus non potest legem condere . . . alii . . . dicunt contra, qui dixit quod populus potest auferre auctoritatem imperatori. Sed omnes ecclesiae non possunt Papae, quia non habet ab eis, sed ipsae ab eo . . . Et dicunt ipsi quod populus potest revocare illam potestatem cum vult, sicut iudex qui delegat, qua proprietates apud eum remansit"

<sup>2</sup> Id. id., D 4 (folio 6, v.): "Leges promulgantur, Id. est de novo creantur, 'approbantur' id, in iudicio populi recipiuntur, ff de legibus, de quibus § inveterata (Dig I. 3, 32). Ipsae confirmantur. Unde si constitutio non est moribus utentium approbata illi qui ei non observant non dicuntur transgressores. . . . Nam ad hoc ut constitutio suum habeat effectum et confirmationem requiritur, quod sit moribus utentium approbata . . . Sed si subditi nolent acceptare rationabilem

constitutionem, constituens eos ad hoc compellere potest, et sit factum fuit 23, q. 5 De Liguribus (Gratian Decretum, C. 23, 5, 43) ut ibi patet in casu, cum alias eius potestas esset delusoria . . ."

<sup>3</sup> William Durandus, 'De modo generalis Concilii tenendi,' I 3. "Quod predictus modus correctionis et reformationis ecclesiae et Christianitatis sit conveniens rationi et iuri, maxime quantum ad residentes spirituali et temporali potestati, et quod non debeant transgredi iura, sed se regere et limitare secundum ea . . . De principibus autem secularibus nequam dubium est, quin ipsi se velle fateantur vivere secundum leges eorum (Cod. I. 14, 4) . . . Isidorus insuper scribit in 3 Li 'De summo bono,' c. 52. (Isidore of Seville Sententiae, 3, 51) et ponitur pro palea in Decretis 9. di (Gratian Decretum. D 9). Quod justum est principem legibus obtemperare suis."

cardinals, nor kings and princes without the consent of the "Probi," for that which concerns all should be approved by all.<sup>1</sup>

Joannes Andreae, another important Canonist of the first half of the fourteenth century, discusses the authority of custom, and denies that it can change the "lex communis," canonical or civil, but admits that it may "derogate" from it in some particular province or place, and create a "municipal" law, if this is permitted by the Pope or the prince.<sup>2</sup>

It will be, we think, evident that the Civilians and Canonists can hardly be said to express any very clear judgments upon the general question of legislative power. They are, in the main, rather endeavouring to expound the tenets of the Civil Law than stating the actual and working principles of the political society of the time. At times at least they are even thinking rather of the powers of the actual citizens of the city of Rome than of the people of the empire. This

<sup>1</sup> Id. id., I. 4: "Verum cum scribatur Proverb 11, quod ibi salus ubi multa consilia, et Innocens Papa scribit quod facilius invenitur illud, quod a pluribus senioribus quaeritur; 20 di. de quibus (Gratian Dec.: D. 20, 3) . . . et exemplum habemus in vetere testamento de Moyse, qui ad consilium Jethro cognati sui, 72 Seniores secum assumpsit . . . Videretur esse salubre pro republica et pro dictis administratoribus reipublicae, quod sic sub ratione, ut premissum est in rubricis proximis, limitaretur potestas eorundem, quod absque certo consilio dominorum cardinalium, dominus papa, et reges ac principes absque aliorum proborum consilio, sicut hactenus in republica servabatur, non uterentur praerogativa huiusmodi potestatis, potissime aliquid concedendo contra concilia et contra iura approbata communiter. Et quod contra . . . concilia et iura nihil possunt de novo statuere, vel concedere, nisi generali concilio convocata; quum illud quod

omnes tangit, secundum juris utriusque regulam ab omnibus debeat communiter approbari."

<sup>2</sup> Joannes Andreae, 'Commentary on the Decretals,' I. 4, 11 (fol. 61): "Quarto sic opponitur, illius est tollere legem positivam, cujus est inducere, vel sui majoris, minoris non. . . . Sed lex communis, canonica vel civilis, inducitur a Papa vel a Principe: consuetudo insurgit ex actibus privatorum, qui sunt minores, ergo ipsorum actus legem etiam positivam tollere non possunt Sol. Fateor quod usus vel actus privatorum unus regni, vel provinciae, vel loci, legem communem abrogare, i. ubique tollere, non possunt, sed derogare possunt in eo regno, provincia, vel loco, ut sicut ibi legem municipalem facere, possunt, sic et consuetudinem inducere et tamen ad objectionis solutionem fateri oportet, quod nec in loco id possent, nisi quia Papa vel Princeps id expresse permittit."

is in strong contrast with their judgments when they turn from the general principles of constitutional law to the conception of the municipal laws of the Italian cities. We have already, but only incidentally, observed some of the references to these: we must now very briefly consider them.

We may begin by observing a general statement of Bartolus in his Comment on Gaius' famous phrase, as cited in Dig. I. 1, 9: "Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partem communi omnium hominum iure utuntur." Some argue that only the emperor could make law, but this is an error: any people can make its own law, "jus civile proprium," while only the prince can make "jus civile commune."<sup>1</sup>

This, however, raises the question, what is the relation of these municipal laws or statutes to the general law. There is an important statement on this by Bartolus, in an opinion (consilium) which he gave on the question of the validity of a will by which a certain citizen of Arezzo had left his property to his illegitimate son, born of a concubine, while his wife was alive. We are not concerned with the merits of the case, but with the reason why Bartolus advised that the will was void. He cites, and seems to agree with, the opinion that only the prince could legitimatise, and that the "jus commune" prohibited the legitimisation of "spurii," in this case the child was born in adultery, and concludes with the judgment that the people only made laws by the permission of the prince, and cannot therefore make them contrary to his prohibition.<sup>2</sup>

<sup>1</sup> Bartolus, Comm. on Digest I. 1, 9 (p. 16) "Secundo opp et videtur quod solus princeps possit facere legem . . . Hic autem dicitur, omnes populi qui legibus, etc, ergo male, cum inuat quemlibet populum posse legem condere. . . Item jus civile proprium potest constitui a populo, ut hic, sed jus civile commune constituit solus princeps" Cf. Jo Faber, Comm on Inst, I. 2 (fol 6), and Albericus a Rosate, 'Comment de Statutis,' I. 9, 3.

<sup>2</sup> Bartolus, 'Consiliorum,' Lib. II, 'Consilium' 105. "Civitas non potest

statutum condere super eo quod Imperator prohibet etiam sibi ipsi . . . ergo dictum statutum non valet."

'Consilium' 106. "Quia soli principi competit restituere natalibus, non autem ordini civitatum . . . Idem consulit Do Cynus . . . ergo vult quod per civitatem non posset legitimari"

Bartolus also cites Jo. Butriganus. "qui consulit super isto puncto per rationem, quia in casu a jure communi prohibito statutum non valet . . . Sed legitimare spurium est prohibi

Albericus of Rosate discusses the question in general terms and asks whether, if the statute of the Civitas contradicted the "jus commune," it is valid; he points out that there was much difference of opinion about the question, but he concludes that the general opinion was that the statute was valid for those who made it (inter statuentes) as long as it was not "specialiter derogatoria de statuto." He adds, however, that a city could not make a statute to the prejudice of the empire, or of those who were not subject to it.<sup>1</sup>

It is important, also, to consider the form under which the Civitates made their statutes. Bartolus discusses the question in the later part of the passage of which we have before cited the first words. If, he says, the statutes are made by the "judices maiores" or the lords of the cities, it is well that this should be done with the consent of the wise men; they can, however, do it "proprio motu." If the statutes are made by the people, this should be done by an assembly of the whole people, or of those who form the council of the people, and represent it, and the assembly should be called together by the Podestá, or some other magistrate. Another method is that some definite proposal should be put before the people, and the decision of the majority should become law.<sup>2</sup>

tum. . . . Praeterea populus non condit legem nisi auctoritate principis, ergo non condit in casu prohibito a principe"

<sup>1</sup> Albericus a Rosate, 'Comm. de Statutis,' I. 7, 1: "Sed quid si statutum civitatis contradicit juri communi, an valeat. Communis opinio est quod sic, per praeallegatam, l. omnes populi, ff. De jure et justitia (Dig I. 1, 9). . . . Quid in tanta varietate tenebimus? . . . Communis opinio quam sequitur totus mundus, ut praedixi, licet forte praedicta de stricto jure sit vera, est, quod statutum inter statuentes valeat, etiam contra jus commune, dummodo lex non sit specialiter derogatoria de statuto, ut praedixi. Non tamen potest civitas vel populus statuere in prejudicium Imperii, vel non sibi subditorum Unde si civitas statuerit,

quod non teneretur ad tributa vel alia jura Imperialia, vel quod aliter esset in prejudicium non sibi subditorum, non valeret, et ita possent intelligi jura superius ad hoc deducta."

<sup>2</sup> Bartolus, Comm. on Digest I 1, 9 (p. 18) "Quaero secundo principaliter, qualiter statuta fiant Et si quidem judices majores vel domini hoc faciant, humanum est quod faciant consilio sapientum . . . Sed si volunt, possunt hoc facere proprio motu. et hoc subditis divulgare. . . . Si vero statuta fiunt a populo, talis est ordo, quod convocetur totus populus, seu homines qui sunt de consilio populi, qui representant populum . . . Et haec convocatio fiet auctoritate Potestatis, vel alterius magistratus, solemniter, hoc est sono tubae, vel pulsata campana, vel voce praecoens . . . Alius modus

Albericus a Rosate also states three methods of making statutes. The first is by the authority of the whole people or "universitas" in a public "parliamentum," to whom the "Rector" or magistrate is to put the question whether they desire to make statutes, and what statutes, and by whom they are to be made; and these questions are to be decided by the voice of the majority. This method, Albericus says, was now rarely used. The second method was that they should be made by the "decuriones," whose place was now taken by the Councillors of the city. The third method was that the "universitas," the "decuriones," or Councillors of the city should elect certain expert persons and give them power to make statutes, and these should be valid, as though they had been made by the "universitas." This method also, Albericus says, was now not much in use, and he seems thus to mean that normally in his time the statutes were made by the Council of the city.<sup>1</sup>

We regret that we cannot in this work discuss the constitutional forms developed in the Italian cities and their relations to the empire, nor the municipal constitutions of Northern Europe. The subject is of too great importance and complexity to be treated summarily, and it has a very large modern as well as mediæval literature.<sup>2</sup>

est, quod fiat propositio certa et limitata, an placeat populo quod sit talis lex vel statutum . . . tunc quod placuerit majori parti, illud erit firmum "

<sup>1</sup> Albericus a Rosate, 'Comment. de Statutis,' I. 4: "Item, quaero qualiter civitas facit statuta." Dic, quod tribus modis primo, congregato populo seu universitate civitatis in publico parlamento secundum morem civitatis, et ibi facta propositione per rectorem seu magistratum civitatis, an velint statuta facere, et qualia, et per quos, et quod obtinebitur per maiorem partem, valebit. . . . Et iste modus raro servatur. . . . Secundus modus est quod decuriones civitatis qui habent administrationem civitatis,

quorum loco hodie successerunt conciliarum . . . simul more solito convocentur, et inter eos fiat propositio, consultatio et reformatio de statutis fiendis . . . et iste modus magis servatur, et talis propositio fieri debet cum autoritate vel presentia rectoris civitatis vel universitatis. . . . 5 Tertius modus est quod universitas, decuriones seu conciliarum eligant aliquos peritos, quibus dent potestatem statuta condendi, et quod statuta per eos valeant, ac si statuta forent per universitatem . . . Sed neque iste modus est magis in usu "

<sup>2</sup> It will be evident that we have made no attempt in this work to deal with the great and important history of the development of the political inde-

We have given what may seem to some of our readers a disproportionate space in this chapter to the political ideas expressed or implicit in the work of the Civilians and Canonists of the fourteenth century, for, as will now be apparent, we do not think that those writers added much to the conceptions of the Civilians of the twelfth and thirteenth centuries. It is necessary, however, to consider to what extent and in what way the revived study of the Roman Law may have ultimately contributed to the development of the monarchical as contrasted with the constitutional conceptions of Western Europe, and we shall deal further with this when we come to the fifteenth and sixteenth centuries. We have therefore been compelled to examine the nature of the development of the political conception of the Civilians, even when they have little immediate relation to the actual conditions of Europe outside of Italy.

As far as the fourteenth century is concerned, we do not think that there is any reason to say that they exercised any appreciable influence upon the political theory of the rest of Europe, except so far as it may be thought that they confirmed the judgment that all authority in the State was ultimately derived from the community.

pendence of the Italian cities. This is not because we think that this was of little importance, on the contrary, as we think it represents one of the most important developments of the human spirit. We have not attempted to deal with it for two reasons in the first place, because it is far too large and complex a subject to be dealt with, except in detail and at length;

and in the second place, because it has been treated with great learning and care in a number of historical and legal works. Among the most important of these in recent years have been C. N. Woolf's 'Bartolus of Sassoferrato' and Professor Ercole's 'Da Bartolo all' Althusio' We desire to express our great obligation to both these admirable works.

## CHAPTER III.

THE SOURCE AND NATURE OF THE AUTHORITY  
OF THE RULER.

WE have in the last chapters discussed the theories of the source and authority of the law of the State. It is with these in our minds that we can now turn to the conceptions of the political theorists of this time with regard to the prince or ruler.

We turn first to a group of English works of the later thirteenth and early fourteenth centuries—that is, to Fleta, Britton, the ‘Mirror of Justice,’ and the ‘Modus tenendi Parliamentum.’

The work of Fleta would be of the very first importance, if it were not that in most essentials it does little more than re-state the principles of Bracton, with which we have dealt in a previous volume,<sup>1</sup> but even so, it is important to observe that these principles were understood and reasserted; and there are a few points in which Fleta goes beyond the genuine text of Bracton. It is only necessary in these circumstances to summarise very briefly his statements. The king has no equal or superior in the kingdom, except God and the law; but it is the law which has made him king, and he should therefore recognise the “dominium and potestas” of the law, and his rule is evil when it represents a will different from that of the law.<sup>2</sup> The king has in his hand all jurisdiction, but he is the Vicar of God and must give to every man what is his;

<sup>1</sup> Cf. vol. iii. part i. chaps. 2, 3, 4.      <sup>2</sup> Fleta, i. 5, 4 (cf. Bracton, ‘De Legibus,’ i. 8, 5).

he cannot do anything but that which he can do by law.<sup>1</sup> It is said that what is the prince’s pleasure has the authority of law, but this does not mean that everything which the king wills has the force of law, but only that which has been laid down by the king’s authority with the counsel of the magnates, and after due deliberation.<sup>2</sup> So far Fleta is only re-stating Bracton’s position, of which the essence is that the law is not the arbitrary creation of the king, and that it is supreme over him. But now we come to an important deviation from the original text of Bracton. Fleta says that no one is to presume to dispute about the action of the king, and to go against it; but he adds that the king has two superiors in ruling his people: the law, by which he has been made king, and his Curia—that is, his counts and barons. The counts are so-called “a comitiva,” and if they see that the king is without a bridle, they are bound to impose a bridle on him. And, he adds, kings should moderate their power by the law, which is the bridle of power; they should live according to law, for the human law declares that laws bind the legislator; and elsewhere it is said (*i.e.*, Cod. I. 14, 4) that it becomes the majesty of the ruler that the prince should profess that he is bound by the law.<sup>3</sup>

As we have pointed out in dealing with Bracton, it seems most probable that this passage was not in the original text of Bracton, but was interpolated by a later hand. It does not seem very probable that it has also been interpolated in Fleta, though it must be observed that the text of Fleta has not been revised by any very modern editor. If, then, we assume that this passage does not belong to the original text of Bracton, it is very important to observe that

<sup>1</sup> *Id.*, i. 17, 3 and 7 (cf. Bracton, iii. 9, 3).

<sup>2</sup> *Id.*, i. 17, 7 (cf. Bracton, iii. 9, 3).

<sup>3</sup> Fleta, i. 17, 9: “Nemo enim de facto regis presumat disputare, nec contra factum suum venire. Verum tamen in populo regendo superiores habet, ut legem, per quam factus est Rex, et curiam suam, videlicet comites et barones; comites enim a comitiva

dicuntur, qui cum viderint Regem sine fraeno, fraenum sibi apponere tenentur. . . . 11. Temperent igitur reges potentiam suam per legem, quod fraenum est potentiae, quod secundum leges vivant, quia hoc sanxit lex humana, quod leges suum ligent latorem, et a’l’bi, digna vox majestate regnantis est, legibus alligatum se principem profiteri.”

whether Fleta found it in his text of Bracton, or it was his own doctrine, it is obviously a principle of high importance, for it means that not only was the prince bound by the law, but that there was a legal process by which this could be enforced.

The statement of the principle is sharp and clear, but it must not be considered as anomalous or eccentric. For, as we have pointed out, it was the judgment of all feudal law that a lord could not be judge in a question between himself and his vassal, and Bracton, in another passage whose genuineness has not so far been contested, says that some at least maintained that in the last resort, if the king refused to do justice, this should be done by the "universitas regni et baronagium suum in curia."<sup>1</sup>

There is another passage in Fleta which, as far as we have seen, does not correspond precisely with anything in Bracton, and which is important. It is a passage in which he repeats Bracton's legal doctrine, that there is no remedy against the king by way of the Assize (of Novel Disseisin), but he goes on to say that the aggrieved person may have recourse to one of two remedies: he may proceed by way of a supplication addressed to the king, as Bracton had said, but he may also proceed directly against the "spoliator," but without bringing in the king's name. If the "spoliator" says that he cannot reply without the king, in whose name he acted, the process under the Assize is not to be postponed. If the "spoliator" has manifest grounds for his action, judgment is to be postponed till the king has been consulted; if not, the plaintiff is to receive seizin with double damages, both against the escheator, the sheriff, and the other royal officers, as well as against any private persons.<sup>2</sup>

<sup>1</sup> Cf. vol. iii. p. 73.

<sup>2</sup> Id., iv. 2, 20: "Contra dominum vero Regem non habetur remedium per Assisam, quamvis in electione spoliati sit, vel providere sibi per supplicationem versus ipsum Regem, vel quod omnino procedat Assisa versus spoliatorem, hoc excepto, quod ipso Rex in Assisa non

comprehendatur. Et si spoliator dixit quod sine Rege respondere non poterit, cujus nomine fecit id quod fecit, non propter hoc differatur Assisa, sed capiatur. Et si spoliator evidentem rationem et manifestam habeat, differatur in iudicium donec cum Rege fuerit inde tractatum; sin autem, seis-

The work of Britton contains some important statements on the nature and source of law, which we have already mentioned, and on the nature of the royal authority. The introductory statement which is put into the mouth of King Edward declares in the first place that there can be no peace among his people without law, and he has therefore caused the laws which have been in use in the kingdom to be written down. In the second place, he declares that the king has power to repeal or to annul these laws when he thinks this to be desirable, but only with the consent of his counts and barons and the other members of his council.<sup>1</sup>

In another passage Britton sets out the principle that the royal jurisdiction is over all other jurisdictions, but later he adds a very important passage, in which Edward is represented as laying down the general doctrine that no man can be judge in his own cause, and adds that in cases where he (the king) is a party—that is in cases concerning felony or treason against the king—the court is to be the judge, and not the king.<sup>2</sup>

The curious tract called the 'Mirror of Justices' has been carefully edited and criticised by Mr Westlake and Professor Maitland, and the circumstances of its origin discussed. The

inam recuperet cum dampnis duplicatis versus tam Escaetorem, Vicecomitem et alios ministros Regis, quam versus quascunque privatas personas."

<sup>1</sup> Britton, i., Introduction: "Eduard par la grace Dieu, roi de Engleterre, . . . Desirauntz pes entre le poeple qe est en nostre proteccioun, par la sufraunce de Dieu, la quele pes ne poet mie ben estre sauntz leys, si avoms les leys, qe hom ad usé en noster reaume avant ces hores, fet mettre en escrit solum ceo qe cy est ordeyné. Et volums e commanduns qe par tut Engleterre et tut Hyrelaunde soient issi usez et tenus en touz poyntz, sauve à nous de repeler les et de enoyter et de amenuser et de amender à totes les foiz qe nous

verums qe bon serra, par le assent de nos countes et barouns et autres de noster conseyl, sauve les usages à ceux qe par prescripcioun de tens ont autrement usé en taunt qe lour usages ne soynt mie descordauntz à dreiture."

<sup>2</sup> Id., i. 23, 8: "Et quant à la juridiccioun put-il dire, qe il n'est mie tenu a respoudre en place ou le juge est partie, disium nul jugement ne se put fere de meyns qe de III. porsones, ceo est a saver de un juge, de un pleyntif, et de un defendaunts; et en cas ou nous sums partie, voloms nous qe notre court soit juge, sicum countes et barouns en tens de Parlement." Cf. vol. iii. part i. chap. 4.

work undoubtedly represents a very individual and eccentric point of view. But it is not without value, when it agrees with other judgments of the time, even though it may express these in sharper terms than more careful writers would have done.

In one Book the author discusses a series of what he calls "Abusions," and the first and chief of these is, as we have seen, that the king should be over the law, for he ought to be under it, in accordance with his oath.<sup>1</sup> The king, he says in another place, has to swear at his coronation that he will maintain the Christian Faith and that he will guide his people according to law, without regard of persons, and be liable to judgment in law, like any of his people.<sup>2</sup> And again, the king's court is open to all suitors against the king or the queen, as much as against other persons, except with regard to "vengeance" of life or limb.<sup>3</sup> In the Book on the "Abusions," he says that it is an "abusion" that a man should not have remedy for a wrong inflicted by the king or queen, except by the will of the king.<sup>4</sup>

In another place, again, he asserts that, while the king should have no equal in his land, neither the king nor the king's commissioners can be judges in the case of a wrong (tort) done by the king to one of his subjects, and it is therefore law that the king should have companions who should hear and determine in the Parliament the complaints about such injuries done by the king or queen or their children, or "leur especiaus"; these companions are, he says, called

<sup>1</sup> 'Mirror of Justices,' s. v. 1: "Abusion est desus ou mesus de dreits usages, tournant en abusions. . . ."

1. La première et la souverain abusion est que li Roi est outre la lei ou il dois estre subject, sicom est contenu en son serement."

Cf. p. 8, and Bracton, 'De Legibus,' iii. 9, 2.

<sup>2</sup> Id., i. 2: "Al corouement le firent jurer q'il meintendreit la sainte foi cristiene a tut son poer, e son poeple guieroit par droit, saunz regard à nule persone, e serreit obeissant à

Seint Eglise, e justisiable a souffrir droit com autre de son poeple."

<sup>3</sup> Id., i. 3: "Ordene fu que la curt le Rei fust overte à touz pleintifs, par quei il usent sanz delai brefs remedials aussi sur le Rei ou sur la Reine comme sur autre del poeple, de chescun injurie, forpris en vengeance de vie ou de membre, ou pleint tient leu sans bref."

<sup>4</sup> Id., v. 1. 153: "Abusion est que nul ne ad recoverer del tort le Rei ou de la Reine si non a la volentie le Rei."

counts, from the Latin word "comites."<sup>1</sup> This is the general principle, and it is therefore of less significance that he asserts it also with regard to the relation of the king to his immediate vassals, the tenants-in-chief.<sup>2</sup>

He also denounces as an "abusion" the notion that "Parlementz" are only to be held rarely and at the king's will, while they ought to be held twice in the year. And when they meet, their function is not merely to provide aids for the king, but to make ordinances by the common consent of the king and the counts. These ought not to be made, as was being done, without summoning the counts, and without consideration of the rules of law, by the king and his "clerks" and others who would not dare to go against the king, but only desire to please him. Such counsel was not directed to the wellbeing of the community of the people, and some of the ordinances which were being made were founded rather on will (volontie) than upon law.<sup>3</sup>

The principles of the writer are asserted very definitely and even contentiously, but that does not mean that they are abnormal or inconsistent with the general conceptions of the time. The principle, that the king is under the law, is, as we have so frequently said, the normal political principle of the Middle Ages, and no one had expressed it more definitely or emphatically than Bracton. The principle that the king,

<sup>1</sup> Id., i. 2: "Et tut seit que li Roi ne deut aver nul pier en sa terre, pur ceo neqedent que le Rei de son tort, s'il peeche vers ascun de son poeple, no nul de ces commissaires, ne poet estre juge e partie, convenist par dreit que li Roi ust compaignouns pur oir et terminer as Parlementz trestuz les brefs e les pointes de torz le Roi, de la Reyne, e de leur enfanz, et de leur especiaus, de qi torz len ne poet aver autrement comun dreit. Ceus compaignouns sunt ore appelez contes apres le Latin de comites."

<sup>2</sup> Id., iv. 11.

<sup>3</sup> Id., v. 1. 2: "Abusion est que ou les parlementz se duissent fere sur les

sauvacions les almes des trespasours, et ceo à Londres e as deux fois par an, la ne se funt il ore forque rement e a la volentie le Roi sur eides o cueillettes de tresor. E ou les ordonnances se duissent fere de comun assent del Roi et de ses countes, la ce funt lur conseil Roi e ces clerks e par aliens et autres qi n'osent contreriner le Roi, einz désirent del plere et de li conseilleur as son profit, tut ne soit mie lur conseil covenable al comun del poeple, sanz appeler les countes e saunz suivre les riules de droit; e donc plusours ordonnances se fondent ore plus sur la volentie que sur droit."

in cases between himself and his subject, was "justiciable"—that is, that he was under the jurisdiction of a court, was clearly a matter of some complexity; but it must be remembered that it was strictly in accordance with the general principles of feudal law, and probably, even, as has been recently urged by M. Ganshof, of pre-feudal law.<sup>1</sup> The 'Mirror of Justices' is only expressing the same judgment as the interpolator of Bracton, as Fleta, and as Britton. The principle that laws were to be made, not by the king alone, but with the advice and consent of his great council, corresponds with the constitutional usage of the Middle Ages. The principle that Parliaments should be held frequently and regularly belongs to the question of constitutional usage, while the assertion that when they met they were not concerned solely with granting "aids," clearly corresponds with the facts.

There is yet another English treatise of this time, the 'Modus Tenendi Parliamentum,' which has considerable importance as representing opinions upon the nature of the constitution of the time, which must not be taken as universally accepted, but are not therefore unimportant.<sup>2</sup>

In the first place, it is laid down in emphatic terms that when the king requires "aids," he must ask for these in full Parliament, they cannot be imposed without the consent of Parliament.<sup>3</sup>

What is perhaps more significant in the treatise is the assumption that all difficult and serious questions in the

<sup>1</sup> Cf. Ganshof's Essay in 'Mélanges d'histoire offerts a Henri Pirenne.' Cf. vol. v., page 111 of this work.

<sup>2</sup> For a discussion of the date and character of this work, we would refer the reader to the edition by Sir T. Duffus Hardy, 1846. He dates the work as probably written between 1294 and 1327. Professor Pollard, in his 'Evolution of Parliament,' expresses the opinion that it belongs to the early years of Edward III.

<sup>3</sup> 'Modus tenendi Parliamentum,' page 41: "Rex non solebat petere auxilium de regno suo nisi pro guerra instante, vel filios suos milites faciendo, vel filias suas maritando, et tunc debent hujusmodi auxilia peti in pleno Parlamento, et in scriptis cuilibet gradui Parliamenti liberari et in scriptis responderi; et sciendum est quod si huiusmodi auxilia concedenda oportet, quod omnes pares parliamenti consentiant."

government of the country should be brought before Parliament,<sup>1</sup> and a description of what the writer conceived to be the proper order of business in Parliament. He puts first, questions of war and the affairs of the king and his family; second, the common affairs of the kingdom, the amendment of laws, &c.; and third, the affairs of private persons and petitions.<sup>2</sup>

Another passage of some importance is that in which the author declares that Parliament must not disperse until all petitions have been considered, and that if the king permits this, he is perjured.<sup>3</sup>

We may put beside these English works a treatise written evidently in France in the latter part of the fourteenth century, for it is addressed to Charles V., the 'Somnium Viridarii.'<sup>4</sup>

In Book I., Chapter 134, the discussion turns upon the nature of the tyrant, but this part of the work corresponds so closely with Bartolus' tract, 'De Tyranno,' with which we deal in a later chapter, that it is unnecessary to consider it here.<sup>5</sup>

In Chapter 140, however, the discussion takes a new direction, and raises important questions about the nature of the royal power and the rights of the community in regard to this. "Clericus" asks by what right the King of France imposes upon his subjects the "Gabella" and other intolerable burdens. Is not this tyranny? "Miles" replies that the King of France has certainly the right to impose such taxation, but he is guilty of sin if he does this without cause. He can do it for the defence of the Commonwealth against the enemy, but if he uses the money thus raised for other purposes, the blood and sweat of his subjects will be demanded of him at the Day of Judgment. This leads him to the important distinction between the ordinary revenues of the crown and the extraordinary; the prince should not normally demand of his subjects more than the former. Even with regard to

<sup>1</sup> Id., page 17: "De Casibus et judiciis difficilibus."

<sup>2</sup> Id., page 23.

<sup>3</sup> Id., page 45.

<sup>4</sup> 'Somnium Viridarii,' ed. Goldast; 'Monarchia,' 1611, vol. i. p. 58.

<sup>5</sup> Cf. p. 80.

these, however, it must be assumed that they were originally granted for such great purposes as the defence of the country and the administration of justice, and they must be used for the purposes for which they were granted; if they were diverted to other purposes, they may justly be refused, the prince may justly be deposed, and the people may elect another prince.<sup>1</sup>

He repeats that the prince may impose talliages for the defence of the country, but he may not spend the money on his personal pleasures and vices; if he does so, he must repay it. Except for public purposes, no king or prince may impose such taxes; and if he does so, the subjects are not bound to obey, for he is exceeding the limits of his power.<sup>2</sup> It is clear that the author has definite and dogmatic views about the limitations of the authority of the king in matters of taxation.

The principle of the right of the subjects to resist and even

'Somnium Viridarum,' I. 141  
"Miles: Credendum enim est, quod  
justa de causa isti (ordinarii) redditus  
fuerunt principi concessi, scilicet, pro  
defensione patriae, pro justitia inter  
populum exercenda, et similibus de  
causis. ita tamen quod dominus  
compleat illud, propter quod dicti  
redditus fuerunt instituti

Si enim princeps justitiam dene-  
garet subditis, utpote appellantes non  
reciperet, vel patriam non defenderet,  
tales redditus ordinarii, gabellae, im-  
positiones, foagna, et similia, si sint in-  
ducti tales redditus extraordinarii justa  
de causa, scilicet pro defensione patriae,  
nec eo modo defendatur quo possit et de-  
bet, nec redditus ad illum usum, sed in  
alium convertantur, tunc tales redditus  
ordinarii juste possent denegari, imo jure  
scripto, super dictamine rectae rationis  
fundato, merito a regimine tamquam  
indignus foret deponendus. Et si in  
regimine totius regni, sic negligeret,  
omnino deponendus: et liceret populo  
alium sibi principem eligere si in parte  
regni solum hoc negligeret, liceret

populo illius loci alium sibi principem  
eligere, maxime quando talis esset  
princeps qui superiorem non recog-  
nosceret in terris."

<sup>1</sup> Id id. id: "Si autem dominus  
velit ad aleas ludere, vel ultra vires in  
voluptatibus, vestibus, hospitibus, cas-  
tris non necessariis ad tuitionem  
reipublicae aedificandis expendere, non  
debet propterea a subditis aliquid  
extorquere, quodsi fecerit, ad restitu-  
tionem tenetur. . . . Si sit rex,  
potest auctoritate sua propria pro  
utilitate boni communis de novo tallias  
imponere, compensata subditorum  
facultate. . . . Quod debet intelli-  
gi, nisi facultates sufficientes regi vel prin-  
cipi pro defensione reipublicae. Si  
autem illae talliae nullo modo sint ad  
utilitatem boni communis, nec rex,  
nec princeps potest eas imponere.  
Quod, si imposuerit, subditi non  
tenentur obedire, quia potestatis suae  
limites exiit. Unde ergo, in tali  
causa, si ad hoc regi non sufficienter  
facultates, potest a subditis auxilium  
moderatum implorare."

to depose the king who neglects his duty, or abuses his authority, is stated again very dogmatically in a later chapter, and is there brought into relation to the principle that it was from the people that the king had received his authority. If the emperor or king be guilty of destruction of the kingdom, or of damnable negligence, or of tyranny, or any other crime for which he deserves to be deposed, the people, from whom he received his authority, tacitly or expressly, are to depose him, and not the Pope, unless those who are responsible will not or cannot do this. He brushes aside the tradition that it was Pope Zacharias who had deposed Chlperic; the French at that time consulted him because, perhaps, they were not sure of their power, for at that time there was not yet the University of Paris, and there was not then in France the multitude of wise men that there is now.<sup>1</sup>

The greater part of the work is occupied with the discussion of the relations of the temporal and spiritual powers, and with this we are not here concerned.

We turn to a treatise written by Lupold of Babenburg about the year 1338. Every people, he says, who are without a king can by the "jus gentium" elect a king for themselves; and it is thus that the electors of the empire elect a king or emperor, as being the representatives of the princes and people of Germany, of Italy, and the other provinces of the kingdom and empire. They do this "vice omnium"; they are acting, not as individuals, but as a "collegium," and as representing the "universitas" of the princes and people of the empire.<sup>2</sup>

<sup>1</sup> Id., i. 163: "Ed ideo si imperator vel rex committit crimen dilapidationis vel destructionis imperii vel regni, aut damnabilis negligentiae imperii vel regni, vel tyrannidis, seu quodcumque aliud propter quod non merito deponi meruerit, Papa non deberet eum deponere, sed populus, a quo suam recepit potestatem, tacite vel expresse, nisi illi, ad quos spectat, nolent, aut non possent facere justitiae

complementum. Non obstat c. Alnus 15, q. 3 quia Galliae dubi forsan de propria potestate Papam tanquam sapientem duxerunt consulendum. Nondum, tunc temporis, vigeat studium Parisius, nec Francia tot prudentibus, prout nunc est adhuc, erat repleta."

<sup>2</sup> Lupold of Babenburg, 'De Jure Regni et Imperii Romani,' v (p 179). "Quilibet populus carens rege, potest sibi regem eligere de jure gentium, ex

Again, he says that some maintained that the translation of the empire received its authority, not from the Roman Church, but from the Roman people. Again, in another place, he cites the opinion of some great Jurists, who held that the Roman people could still make laws, especially during a vacancy of the empire, for the people was greater than the prince, and could, for just reason, depose the emperor. He is careful to explain that he means by the Roman people the whole people of the empire, and that this people included the whole community, the princes and nobles as well as the others.<sup>1</sup>

We can now consider the exact nature and importance of the contribution to this subject, made by Marsilius of Padua, in his treatise, 'Defensor Pacis.'

Marsilius is anxious to show that his treatment of political

quo jure regna condita sunt . . . Et principes electores ratione jam dictae institutionis, habent eligere regem seu imperatorem, representantes in hoc omnes principes et populum Germaniae, Italiae, et aliarum provinciarum et terrarum, regni et imperii, quasi vice omnium eligendo . . . vi (p 181). Hostiensis notat ext. de electione c. Venerabilem, in Glossa, haec alternatio. quod electio pertinet ad principes electores, non tamen ad collegium, sed tamquam ad singulares personas. Sed ego salva reverentia tanti viri, non credo hoc verum. Credo enim quod ad eos pertinet talis electio, tanquam ad collegium seu ad universitatem: cujus ratio est, si institutio principum electorum non esset facta, omnes principes et alii representantes populum subjectum Romano regno et imperio haberent eligere regem et imperatorem. Sed ipsi censentur eligere vice et auctoritate universitatis principum, et populi praedictorum "

<sup>1</sup> Id id, xii. (p 195): Some maintain "quod predicta translatio non ab ecclesia Romana, sed potius a populo Romano robur habuit et vigorem."

Id id, xvii (p 206) "Circa opposi-

tiones istas earumque solutiones, sciendum est quod quaedam solennis opinio magnorum legistorum, quae habet, quod populus Romani imperii posset hodie legem condere in absentia principis, vel vacante imperio: dicentium quod populus est major imperatore, ita quod ex causa justa possit imperatorem deponere . . . Et respondent ad l. fin. c. de legibus (Cod. i. 14, 12) in qua lege dicitur soli imperatori concessum esse leges condere, quod id quod dicitur ibi, soli, dicatur ad exclusionem inferiorum, non ad exclusionem populi, qui major est principe secundum eos. Et sic intelligo populum Romani imperii, connumeratis principibus electoribus ac etiam aliis principibus, comitibus et baronibus regni et imperii Romanorum. Nam appellatione populi continentur etiam patritii et senatores "

Cf. Engelbert of Admont. 'De Ortu et Fine Romani Imperii.' (Ed Offenbach, 1610), xi (p 34) "Quod patet ex eo quod quamvis aliquis juste adeptus sit regnum, si non bene regit, aut intolerabilis est in regendo, malitia ipsius juste deditur, et de regno deponitur."

theory is related to the Aristotelian "Politics." He therefore begins with a discussion of the origin of civil society, which is taken directly from Aristotle,<sup>1</sup> and he states the purpose and end of this also in the terms of Aristotle; the end of the state is the good life.<sup>2</sup>

He cites from Aristotle the description of the various forms of government: the good forms, monarchy, aristocracy and the Commonwealth; and the corrupt forms.<sup>3</sup> It is, however, when he comes to the discussion of the place of law in the State, and its source, that his discussion begins to have a substantial importance; we have already, however, discussed this part of his work in the first chapter, and we are here concerned with his very important statements with regard to the ruler or "Principans." (If we may conjecture, we should say that he generally uses the term "Principans" instead of the more usual term "Princeps," because he does not conceive of the ruler as being necessarily one man, and this may possibly be due to the circumstance that he is thinking of an Italian city, at least as much as of a northern monarchy.)

Marsilius sets out very emphatically the principle that the "Principans" derives his authority, not at all from his personal qualities, but solely from the election of the legislator—that is, the "civium universitas," and that the correction and, if necessary, the deposition of the ruler belongs to the same authority.<sup>4</sup> Marsilius appeals to Aristotle as con-

<sup>1</sup> Marsilius of Padua, 'Defensor Pacis,' i. 3.

<sup>2</sup> Id, i. 1, 4.

<sup>3</sup> Id, i. 8.

<sup>4</sup> Id. id, i. 15, 1: "Consequenter autem dictis restat ostendere principantis factivam causam, per quam videlicet alium vel aliquibus datur auctoritas principatus, qui per electionem statuitur. Hac enim auctoritate fit princeps secundum actum, non per legum scientiam, prudentiam, aut moralem virtutem, licet sint hae qualitates principantis perfecti. Contingit enim has multos habere, qui tamen

auctoritate carentes, non sunt principes nisi forte propinqua potentia.

2. Ad quaesitum ergo redeuntes, dicamus secundum veritatem et sententiam Aristotelis 3<sup>o</sup> Politice Cap. 6<sup>o</sup> potestatem factivam institutionis principatus seu electionis ipsius ad legislatorem seu civium universitatem, quemadmodum ad eandem legislationem diximus pertinere, 12<sup>o</sup> huius principatus quoque correptionem quamlibet, etiam depositionem, si expediens fuerit propter commune conferens, eidem similiter convenire."

Cf i 16.

firming his judgment, but it really seems much more probable that his principle that it is the *universitas* which is the source of the authority of the ruler, is founded upon Roman Law and upon the general mediæval conception of the source of the authority of the ruler, which we have considered in former volumes.<sup>1</sup>

Marsilius goes on to discuss the nature of the functions of the "*Pars Principans*" as compared with those of the "*universitas*." It is the legislator, that is the "*civium universitas*," which is the primary source of the order of the State; the "*Pars Principans*" is the secondary: it is instrumental and executive under the terms of the authority entrusted to it by the legislator, and in accordance with the law which controls its actions and dispositions. It is the legislator who determines who are to administer the various offices in the State, but the exercise of these is to be directed and controlled by the "*Principans*," for this can be more conveniently done by one person or a few, than by the whole community.<sup>2</sup>

Marsilius is obviously making the distinction, familiar to us, but perhaps implied rather than explicit in mediæval constitutions, between the executive and the legislative functions, and he is clear that the executive functions are delegated by and subordinate to the legislative. The explicit distinction is important, but it must be remembered that it

<sup>1</sup> Cf. vol. i. pp. 240-252; vol. iii. pp. 150-153; vol. v. pp. 86-90.

<sup>2</sup> Marsilius, '*Defensor Pacis*,' i. 15, 4: "Huius ergo partis efficiente monstrato, habitum est dicere, secundum proposita frequenter a nobis, causam effectivam, instituentem et determinantem reliqua officiorum seu partium civitatis. Hanc autem primam dicimus legislatorem, secundariam vero quasi instrumentalem seu executivam dicimus principantem per auctoritatem huius a legislatore sibi concessam, secundum formam illi traditam ab eodem, legem videlicet, secundum quam semper agere ac disponere debet,

quantum potest, actus civiles, quemadmodum ostensum est capitulo precedente. Quamvis enim legislator, tanquam prima causa et appropriata, determinare debeat, quos qualia in civitate oporteat officia exercere, talium tamen executionem, sicuti et ceterorum legalium, præcipit, et si oporteat cohibet pars principans. Fit enim per ipsum convenientius executio legalium quam per universam civium multitudinem, quoniam in hoc sufficit unus aut pauci principantes, in quo frustra occuparetur universa communitas, que etiam ab aliis operibus necessariis turbaretur."

is implicit in the whole nature of mediæval political theory and constitutions.

He adds, in a later chapter, that in any one state or kingdom there must be one only "*principatus*," that is, one "*Principans*"; but whether this is to be one person or one body of persons, seems to him indifferent.<sup>1</sup>

In the same chapter Marsilius refers to the question whether there should be one supreme authority for the whole world, but says the question is not relevant to his present inquiry.<sup>2</sup>

Finally, Marsilius turns to the discussion of the question what is to be done if the "*principans*" should transgress against the law or wellbeing of the state. He lays down very explicitly the principle that it is for the legislator (*i.e.*, the "*universitas*") to deal with this, either itself or by such persons as it may appoint for the purpose. While the case is being considered, the authority of the "*Principans*" should be suspended and put into the hands of those who are to act as judges. He is careful to observe that the transgression of the "*Principans*," which is thus to be judged, may be against some provision of the law, but it may also be of a kind not provided for by the law; and the judgment should therefore be in accordance with the law, if possible, but if this is not possible, then it is to be determined by the "*sententia*" of the legislator.<sup>3</sup>

<sup>1</sup> *Id. id.*, i. 17, 1: "In civitate unica seu regno unico esse oportet unicum tantummodo principatum, aut si plures numero vel specie, sicut in magnis civitatibus expedire videtur et maxime in regno sumpto secundum primam significationem, oportet inter ipsos unicum numero esse supremum omnium, ad quem et per quem reliqui reduceantur et regulentur, et contingentes in ipsis errores per ipsum eam corrigantur."

Cf. the whole of this chapter.

<sup>2</sup> *Id. id.*, 17, 10.

<sup>3</sup> *Id. id.*, i. 18, 3: "Verum quia principans homo existens, habet intellectum et appetitum, potentes recipere formas alias, ut falsam extimationem

aut perversum desiderium vel utrumque, secundum quas contingit ipsum agere contraria eorum, quæ lege determinata sunt, propterea secundum has actiones redditur principans mensurabilis ab aliquo habente auctoritatem mensurandi seu regulandi secundum legem aut ejus actiones legem transgressas; alioquin despoticus fieret quilibet principatus, et civium vita servilis et insufficientis; quod est inconveniens fugiendum, ut ex determinatis a nobis apparuit, 5<sup>o</sup> et 11<sup>o</sup> huius.

Debet autem iudicium, præceptum, et executio cuiuscumque correptionis principantis iuxta illius demeritum seu transgressionem fieri per legislatorem,

The position of Marsilius is plain and dogmatic, but again we must not make the mistake of thinking that it was new and revolutionary. We cannot recapitulate our treatment of these questions in earlier volumes, where we have, as we think, made it sufficiently clear that the normal mediæval tradition was, not only that the prince was bound by the law, and that he could not take any action against either the persons or the property of the subjects, except by process of law, but that in the last resort the community was entitled to take legal action against him and, if necessary, depose him. This was not the judgment only of writers like Manegold or John of Salisbury, who may be thought to represent an extreme or merely theoretical position, but also of so careful and measured a political thinker as St Thomas Aquinas.<sup>1</sup>

We turn to the political theory of William of Occam. He conceived of the authority of the emperor as being derived from God, but through men (*per homines*).<sup>2</sup> What does he then consider to be the nature of this authority? In one important passage he draws out the same distinction, which we have already seen in some writers of the thirteenth century; the distinction that is between the king who rules according to his own will and not according to the laws of the community, and the king who rules according to the law.<sup>3</sup> Like these writers, Occam draws a very sharp contrast between these.

vel per aliquem aut aliquos legislatoris auctoritate statutos ad hoc, ut demonstratum est 12° et 15° huius. Convenit etiam pro tempore aliquo, corrigendi principantis officium suspendere ad illum maxime aut illos, qui de ipsius transgressione debuissent iudicare, ne propter tunc pluralitatem principatus contingeret in communitate schisma, concitatio et pugna, et quoniam non corrigitur in quantum principans sed tanquam subditus transgressor legis.

Secundum hæc itaque ingredientibus ad quesitas dubitationes dicamus, quod excessus principantis vel gravis est aut modicus, adhuc vel est de possibilibus

evenire frequenter, aut raro tantummodo. Amplius vel est de lege determinatis aut non . . . . .

Si quidem lege determinatus, secundum legem corrigendus, si vero non, secundum legislatoris sententiam; et leges debet determinari, quantum possibile fuerit, ut ostensum est a nobis 11° huius."

<sup>1</sup> Cf. vol. III part I. chap. 4, part II. chaps 5 and 6, vol V. part I: chaps. 7 and 8

<sup>2</sup> Occam, 'Dialogus,' Pars Tertia, Tractatus Secundus, I. 26 (p 899).

<sup>3</sup> Cf. vol. V. part I chap 6.

The first governs according to his own will, and is not bound by human law or custom, but only by natural law. Such a king does not swear to keep the human laws and customs: he need only swear to observe the natural law and to pursue the common good. The second is bound to obey the laws and customs made by men, and must swear that he will do this. It is not very clear from this passage whether Occam intends to give a preference to the one form of kingship or the other; but it is important to observe that he doubts whether in his time there was any monarchy of the first kind.<sup>1</sup>

Occam is here discussing the nature of monarchy in general. Another part of the 'Dialogus' is entitled "De Iuribus Romani Imperii": he is here discussing the question of the political authority of the emperor, and the treatment is somewhat complex. The emperor, he says, and every king in his kingdom, is "solutus legibus," and is not bound to judge according to the law. The emperor is above all positive law, but not above "natural equity."<sup>2</sup> So far, Occam might

<sup>1</sup> Occam, 'Dialogus,' Pars Tertia, Primus Tractatus, 2, 6 (p.794) "Ille dicitur principare et regnare secundum voluntatem suam, et non secundum legem, qui regnat propter commune bonum omnium et nullis legibus humanis pure positivis, vel consuetudinibus alligatur, sed est supra huiusmodi leges, licet legibus naturalibus astringatur. Et ideo talis rex non habet jurare et promittere se servaturum quascunque leges vel consuetudines humanas introductas, licet expediens sit ipsum jurare quod leges naturales pro utilitate communi servabit, et quod in omnibus quae spectant ad principatum assumptum, commune bonum intendat, non privatum. . . . Et talis principatus regalis dicitur secundum legem, quia, licet unus principetur, modo tamen principatur secundum voluntatem, sed quibusdam legibus et consuetudinibus, humanis introductis astringitur, quas tenetur servare, et ipsas se servaturum jurare vel promittere obligatur, et quanto plures

tales leges et consuetudines servare tenetur, tanto magis recedit a memorato principatu regali; et ideo forte his diebus non est in universo orbe talis principatus scilicet primus regalis . . . . Ex predictis colligi potest, quod principatus regali, praesertim potissimo, non solum tyrannus proprie dicta, sed etiam principatus despoticus aliquo modo opponitur, vel est principatus ita disparatus ut nullus unus principatus possit esse regalis et despoticus respectu eorundem quod tamen aliquis dominetur regaliter, et aliquis despotice, inconveniens non videtur."

<sup>2</sup> Id id, Pars Tertia, Tractatus Secundus, I. 15 (p 884) "Quia enim imperator in imperio mundi, et rex in regno suo, solutus est legibus, nec tenetur de necessitate iudicare secundum leges, quemadmodum iudices inferiores secundum leges de necessitate iudicare tenentur. . . . 16 (p 886) Ita Imperator quia est supra positiva jura non est super aequitatem naturalem."

seem to mean that the emperor is one of those who govern according to his own will, and not according to the laws or customs of the community. We must, however, observe that this does not give us a complete account of Occam's conception of the power of the emperor. A little further on, the question is raised whether men must obey the emperor in all lawful things (in omnibus licitis). The "Discipulus" asks whether men must obey the emperor in everything; the "Magister" replies that we must not obey him in unlawful or unjust things, and that men are only bound to obey the emperor in matters which belong to the temporal rule. The disciple asks whether this means that a man must obey the emperor rather than his immediate lord, and the master answers that he must do so, for the emperor is the immediate lord of all men in temporal things. The disciple urges that this would have "duo inconvenientes"; first, that if all men are bound to obedience, they would all be slaves; and, secondly, that those who follow their immediate lord in war against the emperor would be guilty of "laesae majestatis." The answer to both points is very significant. It does not follow, the "Magister" in the first place answers, from what has been said, that the subjects are bound to obey the emperor in all things, but only in those things which belong to the rule of the people; and, therefore, if the emperor should command anything which is contrary to the utility of the people, they are not bound to obey. Subjects are not under the same obligation as slaves: slaves would have to surrender all their goods at the command of the lord, but freemen are not under that obligation; the emperor cannot command this, except for the common utility or good, and this utility must be necessary and manifest. In the second place, he says, it is true that the man who follows his lord in an unjust war against the emperor is guilty of "laesa majestas."<sup>1</sup>

<sup>1</sup> Id. id., Pars Tertia, Tractatus Secundus, n. 20 (p. 917): "Discipulus. Quaesivimus, . . . utrum sibi omnes teneantur in omnibus obedire. Magister. Respondetur quod in illicitis et

iniustis nullus debet sibi obedire. Discipulus: Numquid in omnibus licitis omnes sibi debent obedire, ita ut peccent qui sibi recusaverint in licito quocunque obedire. Magister.

The treatment of these questions by Occam is as interesting as it is complex; the necessity of obedience is at first stated very sharply, but it appears that Occam leaves a large amount of discretion to the subject to judge of what the emperor may legitimately require, and especially this passage suggests a reference to the questions of property and taxation, and to the very complex conditions of the Feudal Law with regard to the relations of vassal and lord.

The question of the relation to private property is further developed in a survey of different opinions. There are some, Occam says, who maintain that the emperor is not "dominus omnium rerum temporalium," others that he is; but there is also a third opinion that he is not lord of all property in such a sense that he can do what he likes with it, but he is lord in a certain sense, for he may use it for the public utility when he sees that this is to be preferred to the private. He may not do this arbitrarily, but only on account of the guilt of the owner, or for some common purpose, and he has, therefore, no absolute rights over property in general.<sup>1</sup>

In his quae spectant ad regimen populi temporalis . . . . .

Discipulus: Numquid in hujusmodi quilibet tenetur magis obedire imperatori, quam cuilibet alteri, puta regi suo, aut duci, aut marchioni, aut alteri domino suo immediato . . . . .

Magister: Respondetur quod . . . imperator est dominus in temporalibus omnium immediatus, ita ut in his quae spectant ad regnum mortalium, magis sit obediendum imperatori quam cuicunque domino inferiori . . . . .

Magister: Ad primum dicitur: quod non sequitur ex predictis, quia, sicut dictum est prius, subditi imperatoris non in omnibus tenentur sibi obedire: sed in his tantum quae spectant ad regimen populi; hoc est, in his quae sunt necessaria ad regendum juste et utiliter populum sibi subditum, et ideo si praeciperet aliquid, quod est contra utilitatem populi sibi subjecto, non tenerentur sibi obedire. . . . sed in multis tenentur sibi obedire servi, in

quibus non tenentur liberi, nam servi ad solum praeceptum imperatoris omnia bona quae tenent, tenentur sibi dimittere alique hoc quod utilitatem communem praetendant, sed ad hoc liberi non tenentur, nec imperator potest eis hoc praecipere absque utilitate boni communis, imo, etiam neque absque manifesta utilitate et necessitate. . . . Ad secundum dicitur, quod quicumque venit cum quocunque domino suo ad bellum iniustum contra imperatorem incidit in crimen laesae majestatis."

<sup>1</sup> Id. id., n. 23 (p. 920): "Est una opinio, quod imperator non est dominus omnium rerum temporalium, quae etiam minime spectant ad ecclesiam, ut ad libitum suum liceat sibi vel valeat, de omnibus hujusmodi rebus quod voluerit ordinare; est tamen dominus quodammodo omnium pro eo, quod omnibus hujusmodi rebus, quocunque contradicente, potest uti et eas applicare ad utilitatem com-

This section of the 'Dialogus' ends with the question whether the emperor has "plenitudo potestatis" in temporal things. He gives reasons for the view that he has, but other reasons against it. The emperor can only make law for the public good, not for his private convenience, for the Imperial Power is only established for the public good, and does not extend to things that do not concern this. The emperor is not bound by his own laws, but he is bound by the "jus gentium."<sup>1</sup>

We must, however, turn to another work of Occam before we endeavour to sum up his position: this is the work entitled 'Octo Questiones super potestate et dignitate Papali.' It is chiefly concerned with the position and authority of the Pope, but frequently refers to that of the emperor, and in some important passages it seems to be dealing rather with the general principles of royal authority than with the empire in particular.

We begin by observing an important general statement. The king is superior in the kingdom, but in some cases ("in casu") he is inferior in the kingdom, for in cases of necessity he may be deposed and held prisoner, and this by "jus naturale," for by this law violence may be resisted by violence. The words are strong, but they receive an additional significance when we observe that Occam goes on to say that if the emperor commits some great crime, such as the destruction of the empire, or is guilty of extreme negligence, the Romans, or those to whom the Romans have entrusted their power, ought to depose him.<sup>2</sup>

munem, quodcumque viderit communem utilitatem esse praeferendam utilitati privatae. . . . Rerum etiam spectantium ad alios habet dominium ex causa et pro communi utilitate populi, et propter delictum possidentium potest ab eis auferre, et sibi appropriare, vel aliis donare. Quia tamen hoc non potest pro suo arbitrio voluntatis, sed pro culpa possidentium, vel ex causa, scilicet, pro utilitate communi; ideo non habet in eis dominium ita pingue sicut in rebus

primis, quas potuit, sicut placuerit, sibi alienare ad libitum."

<sup>1</sup> Id. id. id., ii. 26-28.

<sup>2</sup> Id.: 'Octo Questiones,' ii. 7 (p. 340): "Rex enim superior est toto regno; et tamen in casu est inferior regno: quia in casu necessitatis potest regem deponere et in castro retinere, hoc enim habetur ex jure naturali, sicut ex jure naturali habetur quod vim vi repellere licet."

II. 8: "Et ideo si Imperator committat crimen dilapidationis vel des-

In another "Question" he deals with the nature of the authority of the ruler in more general terms; terms the more significant because Occam begins by setting out his opinion that the best form of government is the monarchy. This does not mean that this authority should be absolute. The "principans" should not have that "plenitudo potestatis" which in an earlier "question" he had discussed—that is, that he could take from his subjects what he might will, for this would mean that his subjects were his slaves.<sup>1</sup>

In another "Question" he returns to the subject of the origin and nature of the power of the emperor, and discusses the question of the transference of the empire from the Greeks to Charlemagne. He argues that this was not done by the Pope, but by the Roman people: it was to them that from the beginning the "Imperium" belonged, and it was from them that the emperor received it, for they transferred their authority to him for the common good; but they did not give him authority to rule despotically, nor did they abdicate their power of disposing of the empire in certain cases (casualiter). Had they done this, they would have ceased to be free, and would have made themselves slaves, and the emperor would have possessed a despotic and not a royal authority.<sup>2</sup>

structionis imperii aut damnabilis negligentiae in periculum imperii tyrannidis, vel quodcumque aliud deponere dignissimum, Romani vel illi in quos suam potestatem Romani dederunt, debent ipsum deponere."

<sup>1</sup> Id. id., iii. 5 (p. 350): Secundo ad optimum principatum tam generalem respectu cunctorum mortalium, quam specialem respectu quorundam, secundum opinionem prescriptam requiritur quod princeps sit una persona . . . qua propter secundum philosophos principatus regalis, quo una persona refulget, tam principatum aristocraticum, quam politicum, quorum utriusque praesident plures, superat et praeexcellit. . . .

Ex isto secundum opinionem praefatam videtur principatum optimo repugnare, quod principans illam habeat

plenitudinem potestatis, quae descripta est supra q. i. cap. 6. ut scilicet de jure, si voluerit, omnia possit percipere et imponere subditis, quae nec juri naturali indispensabili nec juri divino, ad quod omnes catholici obligantur, obviant vel repugnat; nam omnes subditi, habenti hujusmodi plenitudinem potestatis super eos, sunt servi ipsius, secundum strictissimam significationem vocabuli servi. Nam hac potestate nullus dominus super servos potest habere majorem de jure, ergo optimo principatum repugnat, quod omnes subditi sint servi, ergo etiam repugnat, quod habeat hujusmodi plenitudinem potestatis."

<sup>2</sup> Id. id., iv. 8 (p. 367): "Hic (the contention that the Pope transferred the Empire from the Greeks to Charle-

It is interesting to compare the position of Occam with that of Marsilius, for there are obvious differences between them. Marsilius sets out in broad terms, which are related both to the general theory and to the constitutional practice of the Middle Ages, that the community itself is the ultimate source of all law and all authority, and remains the legislator, and that the ruler (*principans*) as he receives his authority from the community, so also remains subject to its authority and judgment.

Occam appears to us to represent something more of the tradition of the Civilians. Like them, he recognises frankly that it is the community from which all authority ultimately comes, but he conceives of the community as having transferred its authority to the ruler, including the legislative power, and he does not seem to think that the community had retained the power of legislation. On the other hand, he does dogmatically assert that the power of the ruler is not unlimited or absolute; he can only exercise his authority for the public good, and the subject is not bound to obey when the ruler transgresses against this; and he is very emphatic in his assertion that the people may in the last resort depose the ruler. The Roman people had always retained the right "*disponendi de imperio*." We seem here to find again a parallel to that rather curious position of Vacarius<sup>1</sup> that the Roman people cannot legislate unless they first depose the emperor, and thus resume the right of making laws. The formal terms of the conception of the nature of political authority in Marsilius and in Occam seem, at first sight, far apart, but the final results are not very different. The authority of the ruler is a limited authority, not an absolute one;

*magne*) diversimode respondetur. Uno modo, quod illa translatio non fuit a Papa, sed a Romanis, quorum ab initio fuit imperium, et a quibus Imperator primo accepit imperium; qui omnem suam potestatem regendi, propter bonum commune transtulerunt in Imperatorem; non tamen in ipsum potestatem dominandi seu regendi despotice, nec a se abdicaverunt

omnem potestatem casualiter disponendi de imperio. Si enim hoc fecissent, servos se fecissent Imperatoris strictissime accipiendo vocabulum servi, et revera nullatenus liberi remansissent: et per consequens Imperator non habuisset principatum regalem, sed pure despoticum."

<sup>1</sup> Cf. p. 23.

the community is the source of authority and retains the power of restraining it.

There is another writer of the fourteenth century whose political theory we must examine—that is Wycliffe. We are not here concerned with his theological opinions or influence, but only with such political theories as are set out in the treatises '*De Civili Dominio*,' '*De Dominio Divino*,' and '*De Officio Regis*.'<sup>1</sup> We have endeavoured to put these together, but it must be remembered that Wycliffe is one of the most complicated of thinkers and writers, and it is difficult to feel entire confidence that we have done full justice to his conceptions.

For the sake of simplicity we begin, not, as he does himself, with the analysis and discussion of the nature of "*Dominium*," but with the discussion of the origin and purpose of government. We begin with a phrase, incidental indeed, but significant. "*Civile dominium*" (by which Wycliffe here means civil government) was created by the "*Ritus Gentium*," and coercive authority was accepted by the custom and consent of the people as being approved by reason, for, as St Paul says in Romans xiii. 4, the ruler bears the sword not without a cause.<sup>2</sup> And again, civil law was introduced by men on account of sin, with respect to the goods of the body and of fortune.<sup>3</sup> These are, of course, traditional mediæval conceptions, and lest we should misunderstand them, it is well to observe that Wycliffe also says in the next chapter that we must not think that because the civil law was instituted by men on account of sin, it does not derive its authority from God.<sup>4</sup>

<sup>1</sup> We wish to express our great obligations to the editions of the '*De Civili Dominio*' and '*De Dominio Divino*' by Dr R. Lane Poole, and we would refer to his Preface to the '*De Dominio Divino*' for the discussion of the subjects and dates of both works.

<sup>2</sup> Wycliffe, '*De Civili Dominio*,' i. 11 (p. 75): "Ecce primo, quod civile dominium est ritu gentium introductum, et potestas coactiva ex consue-

tudine et consensu acceptata est a populo racionabiliter commendata, quia Romans xiii. 4 quod non sine causa portat gladium."

<sup>3</sup> Id. id., i. 18 (p. 125): "Jus autem civile est jus occasione peccati humanitus adinventum ad justificandam rempublicam coactive quoad bona corporis et fortune."

<sup>4</sup> Id. id., i. 19 (p. 133): "Nec erodit aliquis quod lex civilis, que oc-

Having thus recognised that Wycliffe repeats the normal patristic and mediæval conceptions about the origin of government as being a Divine remedy for sin, we can inquire what were Wycliffe's views about the best form of government and its conditions. He deals with this subject at length in the 'De Civili Dominio.'

He first raises the question whether it is better to be governed according to the law of God by judges, or according to a civil law by kings. The first he calls an aristocracy, the second is monarchical or royal; his conclusion is that it is probably better, in view of man's sinful nature, to be governed by kings.<sup>1</sup> In the next chapter he asks whether the Christian man should obey the tyrant, and seems to say that the Christian man should do so; and he cites the example of Christ as having obeyed Herod and Pilate and the chief priests.<sup>2</sup>

He then discusses the relative advantages and disadvantages of hereditary and elective governments, but arrives at no certain conclusion.<sup>3</sup> The only observation Wycliffe makes, which might be thought to have some importance, is that the continuity of the hereditary succession might encourage tyranny, while the possibility of deposition would act as a check upon tyranny.<sup>4</sup> Those words, if pressed, might seem to mean that Wycliffe recognised the possibility of the deposition of an elective, but not of an hereditary ruler. In the thirtieth chapter, Wycliffe raises a difficulty which applies both to hereditary and elective kingship, and that is that there can

casione peccati est humanitus instituta, non sit a Deo principaliter ordinata, quia aliter non poterit esse justa nisi civiliter ordinantes et adinvenientes legem hujusmodi forent organa Dei principaliter ordinantis."

Cf. Wycliffe, 'De Officio Regis,' xi.

<sup>1</sup> Id., 'De Civili Dominio,' i. 26, p. 185

<sup>2</sup> Id. id., i. 28 (p. 199). "Sed tereio laicus dubitatur, si Christianus debet potentatibus tyrannizantibus obedire, et videtur quod sic, nam Salvator obedivit quoad bona corporis, Herodi, Pilato, et principibus sacerdotum, cum

tamen facillime potuisset restitisse, sed omnis Christi accio est nostra instructio, ergo nos debemus eciam tyrannizantibus quoad bona fortune minus valencia obedire Et hinc dicitur 1 Peter ii 18. 'Servi subditi estote in omni timore dominis, non tantum bonis et modestis, sed eciam discolis.'" Cf. i. 37, p. 271.

<sup>3</sup> Id. id., i. 29.

<sup>4</sup> Id. id., i. 29 (p. 208). "Item certitudo regis regnandi pro se et suis heredibus est ut plurimum occasio tyrannizandi ubi frenum foret regis deposicio post delictum."

be no true "dominium" without "caritas"; and he argues that this is illustrated by the fact that the Christian Church would not suffer any unbaptised person to rule in the church, for he is in mortal sin.<sup>1</sup> We shall come back to this question presently.

We have so far been dealing with the political conceptions of Wycliffe as expressed in the treatise 'De Civili Dominio,' but we must also take account of these as they appear in his work, 'De Officio Regis.' In this work he says clearly that political authority was made necessary by sin, and that, in his opinion, monarchy was the best form of government.<sup>2</sup> He also sets out in clear terms that the authority of the ruler is founded on the election of the community, and that this was the case both in England and in other kingdoms.<sup>3</sup>

<sup>1</sup> Id. id., i. 30 (p. 212): "Et patet ex sententia Aristotelis, tereio Politicorum, Capitulo 28 recitata, quod virtus super excellens in rege est precipua causa regnandi civiliter. Ipsa enim per se sufficit ad regnandum ewangelice, et est sufficiens cum approbacione populi ad regnandum civiliter unde sicut titulus acquirendi non per se sufficit (ex 21 Capitulo), sed oportet praecipue superaddere titulum caritatis, sic indubie nec successio hereditaria, nec popularis electio per se sufficit.

De successione hereditaria sic probatur. non est possibile creaturam aliquam dominari sine titulo caritatis (ex 22 Capitulo), nullus post lapsum succedit ex traduce sine interruptione caritatis (ut patet, de originali peccato incompossibili caritati), ergo nemo post lapsum sic procedit continuando dominium: oportet ergo inniti alteri titulo pro habendo dominio Confirmatur: Sit Petrus primogenitus regis, cujus ambo parentes sint mortui, nondum baptisatus, qui ex lege humana ex Christianismo debet jure hereditario succedere parentibus in regno; et patet, cum Petrus sit infidelis in mortali peccato, caret vero dominio, eciam

juxta jura civilia non correcta, et habebit post baptismum, ergo acquiret verum titulum, et cum nullus quem non habet sufficiat, nullus est signandus nisi titulus partis gratie baptismatis, ergo istum oportet addere ad lineam naturalis propagacionis, manentis continue cum mortali. Cum ergo ecclesia Christiana non smeret de lege civili talem regnare intra ecclesiam, patet quod omne peccatum mortale actualo excludit dominium: peccatum quidem originale est minimum mortali, mitissime puniendum"

<sup>2</sup> Wycliffe, 'De Officio Regis,' xi. (pp. 246 248)

<sup>3</sup> Id. id., xi. (p. 249). "Sed tereio . . . conceditur quod continue in humano genere viante est unum caput vel capitaneus per quem oportet residuum regulari, qui est totum genus capitaneorum, quibus deus ad hoc excellenter dona sua distribuit Sed non oportet continue esse unam personam simplicem ante electionem vel auctoritatem humanam, ad hoc a domino ordnatam. In civitate autem auctoritat ad hoc humana electio sed non in priore regimine ewangelico vel divino. . . . Sed limitate loquendo de communitate politica videtur mihi quod ratio dictat

So far the position of Wycliffe is normal, but it is different with his conception of the extent of the royal authority and the relation of the subjects to this. In one set of passages he asserts the necessity of obedience to the king, as the Vicar of God, whether he is just or unjust. He begins the treatise by citing the First Epistle of Peter (ii. 13-17) as requiring obedience to kings for the Lord's sake, and St Paul's words, "Let every soul be subject to the higher powers, for there is no power but of God" (Rom., xiii. 1). For the king is the Vicar of God. And he even applies to the relation of subjects and kings, St Peter's words: "Servants, be in subjection to your masters with all fear, not only to the good and gentle but also to the froward"<sup>1</sup> (1 Peter, ii. 18).

He draws out his conclusion in very precise terms. The authority, even of perverse rulers, is from God. We must indeed distinguish between the case where the injury which is inflicted affects us only personally, and that where the ruler's action is against God. In the first place, we must patiently submit, in the second we must resist even to death, but in patience and submission. The man who goes beyond this and resists by force or fraud, is guilty of a great sin.<sup>2</sup>

He admits, indeed, that it might be argued that such evil rulers are not really kings, for they have not "dominium" (we shall discuss the meaning which Wycliffe attaches to this

ut ipsi faciant sibi caput, nedum unum genus in religione politica, sed quod quilibet populus appropriat sibi simplex caput, ut nos Anglice habemus unum regem benedictum, cui secundum doctrinam evangelii detectam xxxiii. c. debemus impendere obsequium seculare. Et ita est de regnis aliis, majoribus et minoribus, usque ad imperium."

<sup>1</sup> Id. id., i. pp. 1-6.

<sup>2</sup> Id. id., i. (p. 8): "Unde quod perversorum potestas non sit nisi a Deo patet Job. ii. . . . Sed quia contingit prepositum abuti sua potestate ideo secundum glossam est taliter distinguendum. Vel illata est injuria quo ad causam propriam, vel pure quoad

causam Dei. In primo casu post exhortationem evangelicam patientia est optima medicina. Si pure in causa Dei, Christianus debet, post correptionem evangelicam, preposito suo usque ad mortem, si oportet, confidenter et obedienter resistere. Et sic utrobique innitendum est paciencie, committendo humiliter Deo judicium injuriam vindicandi. Et qui excedit hanc regulam resistit dampnabiliter potestati et Dei ordinationi, ut faciunt hii qui rebellant precipue, id est affectione commodi temporalis personalis. . . . (p. 9): Ex quibus colligitur quod peccat graviter qui resistit regalie principum vi vel dolo,"

word presently), but he brushes this argument aside and says that we must honour even perverse kings, for their power has been given them by God.<sup>1</sup> He even extends this to tyrants; they are indeed kings only in name, but they have a "potestas informis" to rule, although their "potestas" is not "dominium."<sup>2</sup>

It is true that in one place he approaches the conception of the nature of the royal authority in a different manner. That is, when he discusses the functions or duty of the king. Wycliffe's words are indeed very general, but he says that the first duty of the king is to provide just laws for the kingdom, for Aristotle had said that law was more necessary for a community than a king<sup>3</sup>; and he maintains that the king transgresses against God and his people if he violates the law; he has indeed the right to dispense with it in some cases, but only when this is reasonably required. Aristotle had said that wise philosophers maintained that the king should obey the law.<sup>4</sup>

<sup>1</sup> Id. id., i. (p. 16): "Et iterum videtur quod non remanet in eis status dignitatis vel potestas regalis, quia non remanet eis dominium et per consequens non remanet eis quod sint reges . . . (p. 17): Et patet quod reges discoli sunt racione honorandi . . . secundo quia habent potestatem eis collatam a Deo ad proficiendum suae ecclesiae, et sic ad adiuvandum Deum potestative, licet potestate sua dampnabiliter abutantur."

<sup>2</sup> Id. id., i. (p. 17): "Sed ulterius patet ex saepe dictis quod tales non remanent reges nisi equivoce, licet habent potestatem regalem abusivam, et sic realiter habent potestatem et dignitatem consequentem secundum quam regunt, licet demeritorie. Et sic tyranni, eiam presciti qui solum nominatenus sunt reges vel domini, habent potestatem informem ad regendum et dominandum, sed illa potestas non est dominium."

<sup>3</sup> Id. id., iii. (p. 55): "Stat autem regimen regni in paucarum et justarum legum institutione, in illarum sagaci

et acuta execucione, et generaliter in status ac juris cujuscunq; legis sui defensione. Oportet enim regnum cum vivit civiliter non solum rege sed lege taliter regulari, in tantum quod Aristotelis videtur dicere quod lex est necessarior communitati quam rex."

<sup>4</sup> Id. id. id. (p. 57): "Rex igitur qui debet scire legem suam et ejus executionem esse justam et racionabilem, impediendo ipsam facit contra Deum et populum proprium qui exinde haberet justicie complementum. Quamvis autem rex dispensare potest in casu cum executione legis tamquam superior lege sua, tamen nunquam nisi quando dispensabilitatis ratio hoc requirit. . . . Ideo dicit Aristoteles ubi supra quod sapientes pilosophi et divinitus loquentes dixerunt quod in primis decet regiam majestatem obtemperare legalibus institutis, non in ficta apparencia sed in facti evidencia, ut cognoscant omnes ipsum timere Deum excelsum et esse subjectum Divinae potencie."

In a later chapter, however, Wycliffe contrasts the conception that the king is subject to his own law, with that which he attributes to Aristotle, that the king as the maker of law is above law. Subjection to law may be understood in two ways: as due to the authority of law itself, or as due to a higher law. The first is called compulsory subjection, the second a voluntary. The king is subject to his law, in virtue of the authority of the Divine law, but not in virtue of the authority of his own law. The king, therefore, as head of the kingdom, serves his own law voluntarily, while the subjects must be compelled to obey it.<sup>1</sup>

It would seem, then, that there is no contradiction between Wycliffe's judgment about the relation of the king to the law, and his judgment that the king is the Vicar of God, and that his subjects must submit to him whether his actions are just or unjust. The king should indeed govern justly and according to law, but Wycliffe does not allow any legal right in the community as against the king.

We must now, however, examine the meaning of the term "dominium" in these treatises. As we have seen, in the 'De Civili Dominio,' i. 30, Wycliffe says that if a man lacks "caritas," and is in mortal sin, he cannot have "dominium"; and in the 'De Officio Regis,' i., that wicked

<sup>1</sup> Id. id., v. (p. 93): "Sed secundo dicitur per hoc quod videtur regem esse subjectum legi proprie, cum sit precipua pars regni et inferior sacerdoti, regulatus per legem propriam, que est rege prestancior. Oppositum tamen videtur ex hoc quod nemo rationabiliter statueret legem ad tollendam ejus libertatem. Oportet ergo quod legis conditor sit supra legem, ut dicit Aristoteles de Rege, 3<sup>o</sup> Politicorum. Hic oportet notare quomodo lex cum sit ratio vel veritas supra hominum potestatem, obligat omnem hominem, etiam Christum humanitus, licet secundum divinitatem sit supra omnem legem, quae non est Deus, ut alias exposui.

Sed lex contracta per civilitatem connotat supra talom veritatem ordinationem et promulgationem humanam ad civile dominium regulandum, et sic est rex principalis conditor legis suae. Oportet secundo notare quomodo dupliciter potest intelligi legi subieccio, scilicet debita ex pura ligacione ejusdem legis, vel debita ex obligacione legis superioris. Prima subieccio dicitur coacta, et secunda voluntaria. Primo modo omnis Christianus subieccitur legi Christi et secundo modo ipse Christus humanitus subieccitur suae legi. Ex istis patet tercio quod rex subieccitur legi proprie, imperio legis divinae, sed non imperio legis proprie."

men are not really kings, for they have not "dominium." What does Wycliffe mean by "dominium"? It must first be observed that he sometimes uses it with reference to political authority, sometimes to property.

Wycliffe begins the 'De Civili Dominio' by laying down the general principles that all human "ius" presupposes as its cause (presupponit causaliter) the divine "ius," and, therefore, all "dominium" which is "justum ad homines" presupposes a "dominium" which is "justum quoad deum"; but the man who is in mortal sin has not a "dominium" which is "justum quoad deum," and therefore "simpliciter" he has not "justum dominium." He confirms this by an appeal to the words of St Augustine: "Fideli homini totus mundus divitiarum est, infideli autem nec obolus." And he affirms again, in the next chapter, that God does not grant his gifts to anyone who is in mortal sin.<sup>1</sup>

This sounds as if it were a drastic criticism of property as it exists in the world, but we must observe that Wycliffe is careful to distinguish various senses of the conception of property. It is necessary, he says, to make some distinctions about "habicio" (property) and "justicia." There are three senses in which the word "habicio" may be used: "natural," "civil," and "evangelical." In the first sense sinners may possess natural goods, although they do this unjustly; in the second sense, "habent potentatus seculi bona fortunae, aut fortuita"; but in the third and most exalted sense,

<sup>1</sup> Id., 'De Civili Dominio,' i. 1 (p. 2): "Omne jus humanum presupponit causaliter jus divinum. . . . Ergo omne dominium justum ad hominem presupponit justum dominium quoad Deum. Sed quilibet existens in peccato mortali caret, ut sic, justo dominio quoad Deum; et ergo et simpliciter, justo dominio . . . (p. 5). Quod si quaeris sanctorum testimonium, ecce magni Augustini sententia, Epist. 37. Ad Macedonum de tyrannis, plane docet istam sententiam: 'Ideo, inquit,' si prudenter intueamur quod scriptum est, Fideli homini totus mundus divi-

tiarum est, infideli autem nec obolus; nonne omnes qui sibi videntur gaudere licite conquisitis, eisque uti nesciunt, aliena possidere convincimus?"

Id., i. 2 (p. 8): "Non est possibile hominem juste simpliciter habere aliquod bonum sibi adiacens, nisi Deus donando id sibi praestiterit (ut patet tractatu tercio de Dominio Divino); sed Deus non praestat alicui, dum est in mortali peccato, aliquod donum suum: ergo nullus existens in mortali peccato habet protunc juste simpliciter aliquod bonum."

only those who are in "charity" or "grace" possess anything.<sup>1</sup>

Wycliffe develops these distinctions and their consequences at length, and especially brings out clearly the principle that the unjust (or unrighteous) man cannot properly be said to possess anything, for he abuses, he does not use, what he has, and he cites with approval some words of St Jerome, that the avaricious man does not really possess that which he has, any more than that which he has not; and again, that, as "grace" is lacking to the unrighteous man, he has not "dominium"; and again, "grace" is needed for the true use of things, and, therefore, it is required for all true "dominium."<sup>2</sup> His whole conclusion is expressed in the last words of a later chapter. The unrighteous man has not "dominium," although he has "bona naturalia modo improprio."<sup>3</sup>

The meaning of Wycliffe's conception of "dominium" is further elucidated when he goes on to maintain that the righteous man is lord of the whole "sensible" world, and that he should not be disturbed because he has not civil "dominium" in these things, for this might rather injure than benefit

<sup>1</sup> Id. id., i. 3 (p. 17): "Hic oportet distinguere de habicione atque justicia. Quamvis enim secundum Aristotelem et auctorem 'Sex principiorum' multiplices sunt modi, tres tamen sufficient pro presenti: scilicet, habicio naturalis, civilis, ac evangelica. . . . Primo modo habendi, habent peccatores bona naturalia, et tamen non juste simpliciter (ut patet superius) sed injuste: secundo modo habendi, secundum utrumque membrum equivocum, habent potentatus seculi bona fortunæ aut fortuita. Sed tercio modo habendi, excellentissimo possibili, quoad genus, habent solum existentes in caritate vel gracia quidquid habent."

<sup>2</sup> Id. id., i. 3 (p. 20): "Sic injusto deest quidquid habuit, dum non tunc utitur sed abutitur quocumque quis occupat: hinc vere et philosophice dicit Ieronimus (Capitulo ultimo, Epis-

tola ad Paulinum): 'Avaro,' inquit, 'deest tam quod habet quam quod non habet.' Et patet in principali argumento quod non sequitur quod injustus sit univoce dominus cum iusto, licet univoce habeat bona naturalia cum illo; set dominium dicit distincte perfeccionem secundam fundatam in gracia, quæ cum deest injusto, et verum dominium sibi deest . . . p. 25. Sic inquam gracia requiritur ad usum, et per consequens ad omne verum dominium."

<sup>3</sup> Id. id., i. 6 (p. 46): "Sed loquendo de habitudine que foret dominium, quia non existit (licet deceptis appareat ipsum esse), concedendum est simpliciter quod injustus non habet dominium, licet habeat bona naturalia, modo improprio, ut est dictum: et patet conclusio de carencia domini peccatoris."

him.<sup>1</sup> His meaning is perhaps best illustrated by his comment on the saying of Christ: There is no man that has left house or brothers, &c., for my sake and for the gospel's sake, but he shall receive a thousandfold now in this time, &c. This, Wycliffe says, must be interpreted spiritually.<sup>2</sup>

It is from this standpoint that we must understand Wycliffe's treatment of the community of goods. His meaning is only understood when we observe his mode of stating it. Every man, he says, ought to be in grace, and if he is in grace, he is lord of the world and all that it contains; therefore every man ought to be lord of all (universitatis); but this would be impossible with a multitude of men, unless they had all in common, therefore all things ought to be common.<sup>3</sup> Christ, in confirmation of this, rejected (individual) property, and had all temporal things in common with his disciples; and after his ascension, all things were common to his disciples.<sup>4</sup>

That he does not mean by this that individual property was to be rejected in the world as it actually is, is evident from his account in another chapter of the origin of 'Dominium Civile.' In his judgment 'Dominium Civile' was instituted

<sup>1</sup> Id. id., i. 7 (p. 47): "Consequenter ad dicta restat ostendere quod quilibet justus dominatur toti mundi sensibili . . . nec turbetur justus quod non habet civile dominium in hiis bonis, quia revere non proficeret sed noceret."

<sup>2</sup> Id. id., i. 7 (p. 51): "Nec dubium quin ista sit conclusio veritatis, quod omnis relinquens universitatem temporalium, propter Christum in affectione debita debite preponendum, habet ex adiectione consequenti omnia illa melius quam esset possibile habere illa amore prepostero; unde Marc, x. 29, 30 sic testatur: 'Amen dico vobis, nemo est qui dimisit domum aut fratres, etc. . . . qui non accipiet cencies tantum nunc in tempore hoc domos, etc. . . . (p. 52). Unde quod spiritualiter debet textus Marci intelligi, patet ex hoc quod nemo ambigit quin non consequatur virum evangelicum

ex tali commutatione, sequendo Christum cencies tantum de fratribus, etc."

<sup>3</sup> Id. id., i. 14 (p. 96): "Pro cuius intellectu sunt tria dicenda per ordinem: primo quod omnia bona Dei debent esse communia. Probat sic: omnis homo debet esse in gracia, et si est in gracia est dominus mundi cum suis contentis, ergo omnis homo debet esse dominus universitatis: quod non stare cum multitudine hominum, nisi omnes illi deberent habere omnia in communi; ergo omnia debent esse communia."

<sup>4</sup> Id. id., i. 14 (p. 96): "In cuius confirmationem Veritas cum suis discipulis aufugit proprietatem sed habuit temporalia in communi (ut patet posterius), et post ejus ascensionem erant eius discipulis omnia communia, 'dividebatur enim singulis pro ut cuiusque opus erat' (Acts v. 35)."

by man on account of sin<sup>1</sup>; and a little later he says that, assuming the fall of the human race, it was necessary to establish human laws and ordinances, lest a man should take of the goods of fortune whatever he might wish.<sup>2</sup>

It is therefore, we think, clear that when Wycliffe says of the man who is in mortal sin, or is not in "grace" or "charity," that he has not "dominium," he means that he has neither political authority nor property in the full and proper spiritual sense, but he does not mean that he cannot have these in the ordinary or legal sense. Political authority and private property are institutions which men have been compelled to create by the fall, by the corruption and vice of human nature, as it actually is. They are therefore to be regarded as conditions of man's sinfulness.

It is interesting to observe that at first sight Wycliffe's doctrine of "dominium," as belonging only to men in a state of grace, seems closely parallel to the principles set out early in the fourteenth century by two extreme papalists, Egidius Colonna and James of Viterbo. Egidius maintained that no one could hold political authority, or private property, who was an infidel or outside of the communion of the Church. James of Viterbo mitigated Egidius' political doctrine, but held that no one could hold private property, "secundum ius divinum," who was not subject to the Spiritual Power.<sup>3</sup> The contention of Egidius was extreme and revolutionary in character; it was intended to support the most extreme doctrine of the supremacy of the Spiritual over the Temporal Power, even in Temporal things; while the doctrine of Wycliffe had no such revolutionary character.

It is evident that Wycliffe's treatment of "dominium" is in principle closely related to that of Richard Fitz Ralph, the Archbishop of Armagh, in his treatise 'De Pauperie

<sup>1</sup> Id. id., i. 18 (p. 127): "Ideo satis signanter dicitur quod dominium civile occasione peccati humanitas institutum."

<sup>2</sup> Id. id., i. 18 (p. 128): "Unde, supposito lapsu humani generis et cecitate proclivi bonis sensibilibus

precipue innitendi, necesse fuit leges vel ordinationes humanas statuere, ne quilibet lapsus de bonis fortunae caperet quantumcunque voluntas indebite inclinaret."

<sup>3</sup> Cf. vol. v. pp. 402-417.

Salvatoris.' This treatise was probably written between 1350 and 1356, and arose out of the work of a commission appointed by Pope Clement VI. to inquire into the disputes as to the nature of the poverty of our Lord.<sup>1</sup> The Archbishop, finding the discussion protracted and inconclusive, prepared a treatise on the whole subject, which includes a detailed discussion of the meaning of "dominium." He lays down the general principle that no one can be said to have "istud dominium" unless he is purged from sin and has received grace<sup>2</sup>; but this does not mean that the sinner has lost his natural "titulus" to the use of things<sup>3</sup>; and in later passages Richard says that the right to the use of things needed to be safeguarded by "positive" law, and defines the "dominium positivum" as the right of a man to possess and to use rationally those things which are subjected to him by "positive" law.<sup>4</sup>

This seems to be substantially the same position as that of Wycliffe. It appears to us that their conceptions of "dominium" added little or nothing to the mediæval theory of political authority and of private property, that is that neither of these belonged to the state of innocence, but that they were the results of the fall, and remedies for it.

<sup>1</sup> Cf. Wycliffe: 'De Dominio Divino.' Ed. R. L. Poole. Preface, p. xxxv.

<sup>2</sup> Richard of Armagh: 'De Pauperie Salvatoris,' ii. 8 (p. 348). (Ed. R. L. Poole, as above.) "Unde nullus de stirpe ipsius primi parentis seminalis filius, donec a peccato mundetur et gratiam gratificantem reciperet, istud dominium potest recipere seu habere."

<sup>3</sup> Id. id., ii. 21 (p. 363): "Verum est tamen quod, perdito isto originali dominio per peccatum. . . . Nihilominus tamen materialis causa domini ipsius remanet in peccante, quoniam quantumcunque homo delinquit semper in ymagine pertransit (intelligo, creatoris): ymago vero cum indigencia corporali (ut superius est expressum) est causa quasi materialis istius originalis domini: et ob hoc quidam titulus naturalis licet deformis ad usum

rerum remanet in peccante, quamvis dominium per amissionem sui formalis principii amittatur."

<sup>4</sup> Id. id., ii. 25 (p. 369): "Unde primogenitus Adam, Cayn ex hac cupiditate invidia stimulatus justum Abel fratrem suum occidit: propter quem et alios similes tunc futuros lex positiva necessaria extitit. . . . Ut alii viam vite sequentes bonis propter eos creatis liberius uti possent." Id. id., iv. 3 (p. 440): "Johannes: Jam potero ut illa michi dominia positiva que in primi libri principio nominasti in genere michi describas. Ricardus: Omnium dominorum adventiciorum generalis descriptio patet esse rationalis creature mortalis jus sive radicalis auctoritas acquisita civiliter possidendi res illi lege positiva subjectas et eis plene utendi, conformiter rationi."

We have felt ourselves compelled to give a considerable space to the discussion of Wycliffe's political conceptions, because there has been much controversy about his real meaning.

As we have just said, it seems to us that his conception of "dominium" had little real significance, at least in political theory, and there is nothing new in his conception of the source of political authority. He evidently accepted the normal principle of the Middle Ages, that political authority was derived ultimately from God, but immediately from the community. When, however, we turn to his conception of the nature of this authority we find that Wycliffe reasserted that conception of the duty of absolute obedience to the prince, and of the wickedness of resistance, which, as we have often pointed out, was dogmatically stated by Gregory the Great, but had practically disappeared in the Middle Ages, being asserted only by a few writers like Gregory of Catino in the eleventh century.<sup>1</sup> Wycliffe in the 'De Officio Regis' states this dogmatically and without qualification.<sup>2</sup> He held, no doubt, that the prince ought to obey the law, but, like many of the civilians, when they interpreted the "Digna Vox" of 'Cod.' i. 14, 4, he thought that the obedience of the prince should be voluntary and was not compulsory.

We shall have much to say in later chapters of this volume about the development of the conception of the "Divine Right"; in the meantime it is obviously important to observe it in Wycliffe.

It is evident that the writers with whom we have dealt in this chapter approach the question of the nature of the authority of the ruler or prince from different points of view, and that they differ to a considerable extent in their judgment upon particular questions. If, however, we omit Wycliffe, whose work indeed cannot well be brought into line with that of the others, they seem clearly to agree with each other, and

<sup>1</sup> Cf. vol. i. p. 192, vol. iii. part 1.      <sup>2</sup> Cf. pp. 53-56.  
chap. 4.

with the normal character of mediæval political thought, in holding that the authority of the prince was derived from the community, that it was limited by the law, and that, in the last resort, the community could resume the authority which it had given, and depose the prince who was incompetent or who wilfully and persistently disregarded the law.



of 1351 the Cortes demanded that no man should be killed or taken prisoner without an inquiry, according to "fuero" and law; and the king, Pedro I., assented and promised to instruct his officers that they were not to kill or injure anyone without "razon" and law.<sup>1</sup> This promise was emphatically renewed by Henry II. at the Cortes of Toro in 1371. The "merynos mayores" and others are not to kill or imprison except by the judgment of the *alcaldes*, as was ordered by King Alfonso in the Cortes of Madrid,<sup>2</sup> and in another clause a similar provision was demanded by the Cortes and granted by the king, with regard to a man's property.<sup>3</sup> A similar condition was imposed by the Cortes of Madrid in 1391 upon the Regency appointed for the minority of Henry III.<sup>4</sup>

It is hardly necessary to argue that the same principle was continually maintained in England. Bishop Stubbs has dealt with the matter carefully in his *Constitutional History of England*, and we only cite one or two of the passages in the *Rolls of Parliament* to which he refers, in order to illustrate the mode in which the subject was treated.<sup>5</sup>

tal carta o por tal aluala, que non seean muertos nin lisiardos nin despechados, nin tomado ninguna cosa del suyo, fasta que sean anto oydos e librados por fuero o por derecho."

<sup>1</sup>Id., ii. 1, 21: "Nin maten, nin manden prender los omes non aviendo y pesquiassa que sea fecha con fuero e con derecho contra ellos, o querella, o acusacion cierta por que deuan ser presos." (The king replies): "Tengo por bien e mando a los mis adelantados e merynos, e alcalles e a los otros oficiales que non prenden nin lisen, nin tormenten, nin maten a ninguno ssin razon e ssin derecho."

<sup>2</sup>Id., ii. 13, 19: "Otro si quelos merynos mayores et los merynos que por si posieren en el caso dicho es de ssuso que non maten, nin ssuelten, nin prendan los omes nin los cohechen nin los manden prender nin tomar nin coherchan, sinon por juizio delos alcalles, a segunt dicho que todo esto

esta ordenado por el Rey Don Alfonso nuestro Padre, en las Cortes que fizo en Madrit."

<sup>3</sup>Id., ii. 14, 26: "Alo que nos pedieron por merced que non mandassemos prender nin matar nin lisiar nin despechar nin tomar a ninguno, ninguna cosa dolo suyo, sin ser ante llamados e oydos e vencidos por fuero e por derecho, por querella nin por querellas que nos fuessen dadas segunt que esto estaua ordenado por el re Don Alfonso nuestro Padre, que Dios perdona, en las cortes que fizo en Valladolid despues que fue de hedat."

A esto respondemos que es grande nuestro servicio et que nos plaze.

<sup>4</sup>Id., ii. 39, 9: "Otro si non daran cartas para matar nin lisiar nin deterrar a ningund ome, mas que sea jugdado por sus alcalles."

<sup>5</sup>'Rolls of Parliament,' ii. 228, 239, 270, 280; Statutes, i. 382. Stubbs, 'Constitutional History of England,' ed. 1877. vol. ii. p. 607.

The truth is that there was nothing new in this. We have pointed out in previous volumes that the principle that the authority of the king was limited by the law with respect to the property and person of his subjects was part of the normal conception of the Middle Ages,<sup>1</sup> and the constitutional practice of the fourteenth century corresponds with this. That does not, of course, mean that the legal principles were not frequently violated by the rulers; on the contrary, it was often their violation or neglect which was the occasion of their affirmation.

The question of the limitation of the royal authority with regard to private property leads us to another and equally important aspect of the constitutional practice of the fourteenth century, and that is to the question of taxation. This subject is, however, so closely related to the development of representative institutions that we have thought it better to postpone our discussion of it to a later chapter (VI.), where we deal with it in detail. Here we need only say that it seems to us clear that the limitation of the authority of the king with regard to taxation was an essential part of the constitutional tradition and practice both of France and of Castile in the fourteenth century.

We find some examples of the continuance of what we have called the contractual conception of the relation of the ruler and his subjects in the fourteenth century. We have dealt with this in earlier volumes, and have pointed out that this was really implied in the whole feudal structure of society.<sup>2</sup> The first of these is to be found in the detailed statement of the conditions under which the inhabitants of Dauphiné were to accept the Dauphin on his accession. Charles V. of France in 1367 issued a charter confirming the privileges and liberties of the people of Dauphiné, in terms which are significant and important. When the new Dauphin or his successor comes to assume the rule of Dauphiné, before he can compel any individual or

<sup>1</sup> Cf. especially vol. iii. part i.      <sup>2</sup> Cf. vol. iii. part i. chaps. 2 and 4; chap. 4; vol. v. part i. chap. 7.      part ii. chap. 6.

"communitas" to do him homage or "recognition" he must swear that he will maintain inviolably all the franchises, liberties, and privileges which are mentioned in this document. The barons, nobles, and "communitates" of Dauphiné are not bound to obey either him or any of his officials until he has taken the oath in a public form and manner.<sup>1</sup> As though this were not sufficiently drastic, the next clause adds that all the "baillis," the judges, the procurators and "castellani" of Dauphiné must in like manner swear that they will maintain and observe all these liberties, &c., and if any of them refuse to do this no man need obey them. If any of them should violate these oaths, he is to be punished as a perjurer, and in addition must repay any expenses which the nobles, or communities, or individual persons have incurred in the measures they have taken against him.<sup>2</sup>

<sup>1</sup> Recueil, vol. v., No. 411, 52 (p. 291): "Quandocunque . . . novus Delphinus vel successor ejus, veniet ad successionem vel regimen Delphinatus, antequam ad homagia seu recognitiones feudorum recipienda seu recipiendas quovismodo procedat, et antequam aliter compellere possit aliquem singularem personam vel Universitatem ad praestandum et faciendum sibi homagia, fidelitates seu recognitiones, jurare debet primitus. . . . Servare, custodire, et attendere inviolabiliter praemissas omnes et singulas declarationes, franchises, libertates, ac gratias et privilegia supra scripta, in omnibus et singulis clausulis et capitalis eorundem: et si ita esset, quod in principio regiminis, ut praedicitur . . . praedictum sacramentum facere recusaret, eo casu, barones, nobiles et universitates quicunque Delphinatus et cujuslibet ejus partis, et aliarum terrarum suarum, eidem novo Domino successoris vel officialibus suis, obedire munimo teneantur, impune, donec praedictum sacramentum praestiterit et fecerit publice et per publicum instrumentum."

<sup>2</sup> Id. id. id., 53 (p. 291): "Con-

cessit, decrevit, et declaravit supra dictus dominus Delphinus, quod omnes et singuli ballivi, iudices, procuratores et castellani Delphinatus . . . teneantur et debeant, ac efficaciter sint astricti jurare ad sancta dei Evangelia, praemissas libertates, franchises, immunitates et declarationes omnes et singulas . . . tenaciter custodire et inviolabiliter observare: et si, modo debito requisiti, quilibet eorum dictum sacramentum facere et praestare publice recusarent, impune non pareatur cuilibet recusanti: et si, quod absit, aliquis ex dictis officialibus praedictis, libertates privilegia, concessionem vel declarationes in toto vel in parte quomodolibet violaret aut infringeret quoquomodo, ubi convictus erit dictus officialis de violatione praedicta, teneatur et debeat expensas factas per barones, banneretes, vavassores, nobiles, universitates, seu singulares personas, persequentes dictum officialem de dicta violatione resarcire et solvere; et ad hoc, per suum superiorem viriliter compellatur; et nihilominus, idem officialis violator dictarum libertatum, de periurio puniatur."

An almost precisely similar conception of the mutual obligations of ruler and subject is to be found in the Charter in which Charles VI. in 1381 confirmed the privileges which had been granted to the people of Briançon by the Dauphin Humbert II., and among other things it is provided that the Dauphin on his first visit to Briançon after his succession was to swear to observe all these privileges, and that the men of the "communities" were not under any obligation to do homage to him until he had done this. The officials of the Dauphin were to take the same oath, and until they had done this the people were not bound to obey them.<sup>1</sup>

The terms of these documents illustrate very clearly the contractual conception of the relations of prince and subjects, and it should be observed that this applies not merely to the relations between the prince and his nobles, but also to those between him and the communities or "Universitates."

We find a similar principle expressed in the proceedings of the Castilian Cortes, not indeed with reference to the king himself, but with regard to the regents or council of regency who were appointed to administer the kingdom during the minority of the king. At the Cortes of Burgos in 1315 the "Tutores" (guardians or regents) confirm the "fueros" and liberties granted by former kings, and declare that if they violate these they will cease to be "Tutores" and will forfeit all claim to obedience, and that the Cortes may appoint other "Tutores."<sup>2</sup> At the Cortes of Valladolid in 1322 we find

<sup>1</sup> 'Ordonnances,' vol. viii. p. 719, 16: "Et quod non teneantur homines ipsarum universitatum ipsis nobis dominis futuris homagia praestare, donec ipsi domini quilibet, videlicet, in adventu suo, haec omnia juraverint et ratificaverint observanciam praedictorum."

<sup>2</sup> 'Cortes,' vol. i., 39, 55: "Otrossi nos otorgamos todos vuestros fueros o franquezas e libertades e buenos usos e costumbres e privilegios e cartas que avedes del imperador e del buen rey Don Alfonso . . .

Et ssi todos tres (the three guardians of the king) non vos lo guardassemos como dicho es, que iamos non sseamos tutores del ro, nin nos coiades en las villas, nin nos rrecudades con las rentas del re, nin nos obedezcades como a tutores, et que podades tomar otro tutor qual quisieredes, que entendieredes que conplira mas para este ffecho, et que scades quitos del pleito e de la postura e del omenaje et dela jura que nos ffiziestes, ssalvo ssi nos los tutores o qual quier de nos a quien estas cossas fuieren affrontadas o mostradas, como dicho es, mostra-

the guardian of that time declaring that if any Alcalde or Alcaldes "que andodieren en la casa del Rey o en la mia casa" (that is, presumably, of the household of the king or the guardian) should incur any penalty, they were not to escape, even though they pleaded that they had acted under the orders of the guardian, and even though the guardian himself confirmed this.<sup>1</sup> He also adds a clause similar to that of the Cortes of Burgos, that he confirms all their liberties, &c., that all "Cartas" contrary to these are to be neglected, and that if he does not carry out this promise they are not to obey him and can elect another guardian.<sup>2</sup>

These examples of a contractual conception of the nature of political authority are in themselves no doubt of small importance, but when we put them alongside of the more general principle of the limitation of the authority of the ruler, they are not wholly insignificant.

We must, however, now go on to observe a more drastic conception still with regard to the limitation of royal authority as represented in the theory and actual practice of the fourteenth century, and that is the conception that as the authority of the king was derived from the community, so also in the last resort the community could deprive him of that authority and depose him.

In Volume V. of this work we have pointed out that mediæval society not only assumed the limitation of the rights of the king, but also developed various methods of enforcing these limitations. The right to resist illegal action on his part, the determination of questions between the vassal and the king as feudal lord by the Court of the Vassals, the right to withdraw allegiance from a king who refuses to accept the judgment of the court, such were some of the practical forms which were recognised in the Middle Ages for this purpose. But

remus escusa derecha porque non pudemos ffazer daquellos que el derecho pone, que el que la mostrare por ssi quel vala."

<sup>1</sup> 'Cortes,' vol. i., 43, 12: "Et quel alcalde o los alcalles que andodieren

en Casa del Rey, o en la mia, que non ssean escusados della pena, si onella cayeren, maguer diga que gelo yo mandé, et maguer yo digo que yo gelo mandé."

<sup>2</sup> 'Cortes,' vol. i., 43, 104.

the resources of the mediæval community were not conceived of as limited to these methods; even such careful and moderate political thinkers as S. Thomas Aquinas were clear that in the last resort the ruler who persisted in unjust and illegal actions could rightfully be deposed, and the principle found a practical illustration in the last years of the thirteenth century in the deposition of the Emperor Adolf—a deposition which, as it was contended, was effected by due process of law.<sup>1</sup>

It is, then, with the recollection both of the theory and the historical circumstances of the thirteenth century, and of the principles represented in the political and legal literature of the fourteenth century, that we must approach the consideration of the deposition of Richard II. of England. It is no doubt true that his deposition was the work in the main of a baronial faction, and that their motives had probably little, if anything, to do with the merits of the constitutional principles alleged. But this does not destroy the importance of the terms and forms of his deposition as expressing what was alleged to be the constitutional tradition of the English community as represented in Parliament.

It was represented to Parliament that Richard had resigned the Crown, and the first proceeding of Parliament was to accept the resignation;<sup>2</sup> but not satisfied with this, it was agreed that a statement of the principal charges against Richard should be read to the people. This begins with a statement of the terms of the oath which, as they said, Richard had taken at his coronation. By this he promised to maintain justice and the just laws and customs which the "vulgus" should have chosen.<sup>3</sup> (The word "vulgus" should be com-

<sup>1</sup> Cf. vol. v. part i. chaps. 7, 8.

<sup>2</sup> 'Rolls of Parliament,' vol. iii. (p. 417), 13, 14. Cf. for an excellent criticism of the circumstances of the alleged resignation 'The Deposition of Richard II.,' by Miss M. V. Clarke of Somerville College, and V. H. Galbraith of Balliol College, Oxford, reprinted from 'The Bulletin of the Rylands Library,' vol. 14, No. 1, Jan. 1930.

<sup>3</sup> 'Rolls of Parliament,' vol. iii. (p. 417), 17: "Facies fieri in omnibus iudicis tuis equam et rectam iusticiam et discretionem in misericordia et veritate, secundum vires tuas . . . concedis justas leges et consuetudines esse tenendas et promittis per te eas esse protegendas, et ad honorem Dei corroborandas quas vulgus eligeret, secundum vires tuas."

pared with the terms of the coronation oath of Edward II. and III., which we have already cited, "les leys et les costumes droituriers lesquels la communaute de votre Reiaume aura esleu").

We need not enumerate all the charges; it is, for our purpose, specially important to notice some of them, and these may be divided into two groups. The first group is concerned with the relation of the king to the law, and the administration of justice. It was alleged that the king, desiring not to maintain the just laws and customs of the kingdom, but to act according to his own will, frequently, when the laws of the kingdom had been set forth and declared to him by the Justices and others of his Council, said in express terms, and with a severe countenance, that the laws were in his mouth and in his heart, and that he could, by himself and alone, alter and make the laws of his kingdom. It was further alleged that the king, led astray by this opinion, had refused to allow justice to be done to many of his subjects, and by threats and terror had forced them to withdraw from the pursuit of justice.<sup>1</sup>

He was charged with having frequently declared, in the presence of various lords and others, that the life and property of his subjects were his and at his disposal "absque aliqua forisfactura"; this was wholly contrary to the laws and customs of the kingdom.<sup>2</sup> It was alleged that, in spite of the

<sup>1</sup> Id. id. (p. 419), 33: "Item, idem rex nolens justas leges et consuetudines regni sui servare seu protegere, sed secundum sue arbitrium voluntatis facere quicquid desiderii ejus occurrerit, quandoque et frequentius, quando sibi expositae et declaratae fuerant leges regni sui per justiciarios et alios de concilio suo, ut secundum leges illas petentibus justiciam exhiberet. Dixit expresse, vultu austero et protervo, quod leges sue erant in ore suo, et aliquoties in pectore suo; et quod ipse solus posset mutare et condere leges regni sui. Et opinione illa seductus, quam pluribus de ligis suis justiciam fieri non permisit; sed per minas et terrores quam plures a prosecutione communis justicie cessare coegit."

<sup>2</sup> Id. id. (p. 420), 43: "Item licet terrae et tenementa, bona et catalla cujuscunque liberi hominis, per leges regni ab omnibus retroactis temporibus usitatas, capi non debeant nisi fuerint forisfacta: nihilominus dictus rex proponens et satagens leges hujus modi enervare, in praesentia quam plurimum dominorum et aliorum de communitate regni, frequenter dixit et affirmavit, 'quod vita cujuscunque ligei sui, ac ipsius terrae, tenementa,

bona et catalla sunt sua ad voluntatem suam, absque aliqua forisfactura. Quod est omnino contra leges et consuetudines regni sui supradicti.'

<sup>1</sup> Id. id. id., 44: "Item quum statutum fuerit et ordinatum, ac etiam confirmatum, 'Quod nullus liber homo capiatur etc., nec quod aliquo modo destruat, nec quod rex super eum ibit, nec super eum mittet, nisi per legale iudicium parium suorum vel per legem terrae'; tamen de voluntate, mandato, et ordinatione dicti regis, quamplures ligum suorum . . . fuerant capti et imprisonati, et

provisions of Magna Carta, 39, which declared that the king could not seize or imprison any free man except "per legale iudicium parium suorum vel per legem terrae," many men had been seized and brought before the marshal or constable in a military court, on the ground that they had said something "ad vituperium scandalum seu dedecus" of the king's person; and that they could only defend themselves by trial of battle.<sup>1</sup> It was alleged that he caused a number of the judges to come to him at Shrewsbury, and had compelled them by various threats to answer certain questions concerning the law of the country against their will, and otherwise than they would have done if they had been free and uncoerced.<sup>2</sup>

The second group of charges was concerned with the Parliament and the king's relations to it. The first of these was the allegation that at the last Parliament the king, with the intention of oppressing his people, had by subtle means procured an arrangement that, with the consent of estates, the power of Parliament should be given to certain persons to deal with some petitions which had not been dealt with; and that, under colour of this, these persons had, by the will of the king, dealt with other general matters concerning that Parliament. This was, it was alleged, a grave prejudice to the position of Parliament and the good of the kingdom, and a dangerous precedent. The king had also, in order to give colour and authority to these doings, caused various changes

ducti coram Constabulario et Marescalco in Curia militari."

<sup>2</sup> Id. id. (p. 418), 19: "Item, idem rex nuper apud Salopiam coram se et aliis sibi faventibus venire fecit quamplures et majorem partem justiciarorum cameraliter, et eos per minas et terrores varias ac etiam metus qui possent cadere in constantes, induxit, fecit et compulit, singillatim ad respondendum certis questionibus pro parte ipsius regis factis ibidem, tangentibus leges regni sui, praeter et contra voluntatem eorum, et aliter quam respondissent si fuissent in libertate sua et non coacti."

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<sup>1</sup> Id. id. id., 44: "Item quum statutum fuerit et ordinatum, ac etiam confirmatum, 'Quod nullus liber homo capiatur etc., nec quod aliquo modo destruat, nec quod rex super eum ibit, nec super eum mittet, nisi per legale iudicium parium suorum vel per legem terrae'; tamen de voluntate, mandato, et ordinatione dicti regis, quamplures ligum suorum . . . fuerant capti et imprisonati, et

ducti coram Constabulario et Marescalco in Curia militari."

<sup>2</sup> Id. id. (p. 418), 19: "Item, idem rex nuper apud Salopiam coram se et aliis sibi faventibus venire fecit quamplures et majorem partem justiciarorum cameraliter, et eos per minas et terrores varias ac etiam metus qui possent cadere in constantes, induxit, fecit et compulit, singillatim ad respondendum certis questionibus pro parte ipsius regis factis ibidem, tangentibus leges regni sui, praeter et contra voluntatem eorum, et aliter quam respondissent si fuissent in libertate sua et non coacti."

and omissions to be made in the Rolls of Parliament.<sup>1</sup> It was also alleged that while certain statutes had been made in Parliament which were binding unless they were revoked by the authority of another Parliament, the king had procured the presentation and acceptance of a petition to Parliament from the "Communitates Regni," that the king should be as free as any of his ancestors.<sup>2</sup> Finally, it was alleged that kings had interfered with the freedom of election and had directed the sheriffs to secure the return of persons nominated by himself.<sup>3</sup> It was on the ground of these and other charges against Richard, which were accepted by Parliament as notoriously true and as being sufficient to justify his deposition, that they decided to proceed to this, and appointed a Commission to carry it out.<sup>4</sup>

<sup>1</sup> Id. id. (p. 418), 25: "Item in Parlamento ultimo celebrato apud Salopiam, idem rex proponens opprimere populum suum, procuravit subtiliter et fecit concedi, quod potestas parliamenti de consensu omnium Statuum regni sui remaneret apud quasdam certas personas, ad terminandum, dissoluto parlamento, certas petitiones in eodem parlamento porrectas, protunc minimo expeditas. Cujus concessionis colore personae sic deputatae processerint ad alia generaliter parliamentum illud tangentia; et hoc de voluntate regis; in derogationem status parliamenti, et in magnum incommodum totius regni, et perniciosum exemplum. Et ut super factis eorum hujusmodi aliquem colorem et auctoritatem viderentur habere, rex fecit Rotulos Parliamenti pro voto suo mutari et deleri, contra effectum concessionis predictae."

<sup>2</sup> Id. id. (p. 419), 34: "Item, quod postquam in parlamento suo certa statuta erant edita, quae semper ligarent donec auctoritate alicujus alterius parliamenti fuerint specialiter revocata, idem Rex procuravit subtiliter talem petitionem in parlamento suo pro parte communitatis regni sui

porrigi, et sibi concedi in genere, quod posset esso adeo liber sicut aliquis progenitorum suorum extitit ante eum."

<sup>3</sup> Id. id. (p. 420), 36: "Item licet de statuto et consuetudinibus regni sui in convocacione cujuslibet Parliamenti, populus suus in singulis comitatibus regni deberet esse liber ad eligendum et deputandum milites pro hujusmodi comitatibus ad interessendum Parlamento et ad exponendum eorum gravamina et ad prosequendum pro remediis superinde prout eis videbitur expedire; tamen praefatus Rex, . . . direxit mandata sua frequentius Vicecomitatibus suis, ut certas personas per ipsum Regem nominatas ut Milites comitatum venire faciant ad Parliamentum sua."

<sup>4</sup> Id. id. (p. 422), 51: "Et quoniam videbatur omnibus Statibus illis superinde singillatim ac etiam communiter interrogatis quod illae cause criminum et defectuum erant satis sufficientes et notoriae ad deponendum eundem regem, attentam etiam sua confessione super ipsius insufficientia et aliis in dicta renuntiatione et cessione contentis patenter emissa, omnes Status predicti unanimiter concesserunt ut ex

The Commission, sitting as a Tribunal, after reciting his offences and his recognition of his incompetence for the rule and government of the kingdom, formally deposed him.<sup>1</sup>

It will, we hope, be clearly understood that we are not here discussing the truth of these charges: we are here only concerned with the constitutional conceptions and the principles of political authority which are implied in these, and in the formal act of deposition. When we consider them from this standpoint, it is obvious that they have a very great significance. In the first place, the charges against Richard bring out very clearly the repudiation of the conception that the king was, by himself, the source of the law, and that he was above it. The law is conceived of clearly as something which draws its authority from the community, and not from the king alone; he is not above it, but under it. The rights of his subjects are protected by the law, and the king could not be permitted to violate them. In the second place, they illustrate very clearly the development in England of the importance of the organised representation of the country in Parliament and of the relation of this to the royal authority.

The circumstances of the deposition of Richard II. are indeed for us important, primarily as illustrating in a highly dramatic fashion the principle of the fourteenth century, as well as of the Middle Ages, that the authority of the ruler was a limited and conditional authority, limited by the law, and conditional upon conformity to the law.

habundanti ad depositionem domini regis procederetur, pro majore securitate et tranquillitate populi ac regni commode faciendam."

<sup>1</sup> Id. id., 52: "Nos Joannes Episcopus Assavensis . . . pro pares et proceres regni Angliae spirituales et temporales, et ejusdem regni communitates, omnes status ejusdem regni representantes,

Commissarii ad infra scripta specialiter deputati, pro tribunali sedentes. . . ipsum Ricardum . . . merito deponendum pronunciamus, decernimus et declaramus et ipsum simili cautela deponimus per nostram diffinitivam sententiam in hiis scriptis omnibus et singulis."

## CHAPTER V.

THE THEORY OF THE CIVILIANS WITH REGARD TO  
THE NATURE OF THE AUTHORITY OF THE RULER.

WE have, in a previous chapter, considered the opinion of the civilians on the subject of the source of law, how far they conceived of the legislative authority as having been transferred to the prince in such a sense that the people now possessed no legislative authority, how far they conceived of this as still belonging at least to their custom. As we have said, they seem to us a little uncertain about the whole matter, but this uncertainty seems to us to be intelligible enough when we remember that they were endeavouring to apply the text of the Roman law itself to the very different conditions of the fourteenth century. If they have doubts as to the legislative authority of the people of the empire they have no doubts as to the legislative authority of the community in the cities of Italy, and with respect to constitutional conditions they are much more concerned with those of the Italian city than with those of the empire or the Northern National States. We must now consider their theory of the nature of the authority of the ruler or prince as distinct from the question of his legislative power.

We may conveniently begin by observing some aspects of the theory of government in the treatise of Bartolus entitled 'De Regimine Civitatis.' He begins by enumerating the various forms of good and bad government as given by Aristotle, and then asks which is the best of the good governments. This, he says, had been treated by Aristotle, but more clearly by Egidius Romanus in his treatise 'De Regimine Principum,'

and he gives his opinion that the best form of government was the monarchy—that is, the government by one man. He points out, however, the distinction between the king who governs according to the laws and the king who makes the law as he will; the first does not hold the "regalia" which belong to the State which he rules, or to some superior; the "regimen regis" is properly that of the second, to whom all things belong.<sup>1</sup>

He asks, then, whether it is good to be governed by a king, and cites, first, the description by Samuel (1 Sam. viii) of the oppressive nature of the king's government, and next, the different terms in which it is described in Deuteronomy, and contends that Samuel described, not what the monarchy ought to be, but what might happen if the king became a tyrant. The proper character of the kingship is that which is described in Deuteronomy xvi., in which the subjects are not the slaves but the brothers of the king.<sup>2</sup> It would appear, however, that Bartolus felt that this did not give a sufficiently clear notion of what was the extent of the king's rights, and he therefore adds a brief but significant sentence. The king has the right to demand whatever is necessary for the royal expenses, "omnia tributa, vectigalia et census publicos." He can for sufficient reason impose "collectas," for kings have all power.<sup>3</sup>

<sup>1</sup> Bartolus, 'De Regimine Civitatis': "Præmitto quod non omne regimen ipsius unius dicitur regimen regis. Nam, quandoque est unus qui regit, et tantum est iudex, ut præsides provinciarum et proconsules. . . . Isti enim habent iudicare secundum leges et tenent statum regium, s. competentem ministris: nec ad eos competunt regalia, sed ad civitates quas regunt, vel ad alium superiorem vel fiscum. . . . Quandoque unus regit civitatem vel provinciam, qui facit leges prout vult; omnia ad eum pertinent et istud dicitur regimen regis."

<sup>2</sup> Id. id., 11: "Apparet ergo quod subditi non sunt servi regis, sed fratres, et sic quod in precedente

auctoritate (i.e., Samuel viii.) dictum est, non de vero rege sed tyranno intellexit. . . . Debet ergo bonus rex esse fidelis, Christianus, justus, non pomposus, nec subditorum gravator, non luxuriosus, non avarus, nec superbus."

<sup>3</sup> Id. id., 12: "Sed licet ibi ponatur quod rex facere debeat, et qualis in se debeat esse, non tamen ibi ponitur quid a subditis posset exigere.

Resp: Quod expensas majestatis regiae congruentes facere debeat, s. hoc habemus expressum 10 col. quæ sunt regalia, c. 1., ubi dicitur quod ad regem pertinent omnia tributa, vectigalia et census publici, quæ ibi specialiter nominantur, et quod ad regem

He returns then to the question whether it is good for a "civitas" or "people" to be governed by a king, and, as we understand him, he thinks that this is the best form of government, and he also thinks that this was the opinion of Aristotle as well as of Egidius Romanus. He observes, however, that we must consider not only what is good, but also what is likely to happen, for the king or his descendants may become tyrants.<sup>1</sup>

This leads him to a discussion of the best form of government in relation to the different magnitude of different States. The small State or city is, he thinks, best governed by the multitude or whole people. The second grade of State in magnitude—and he gives as examples Florence and Venice—is best governed by a small number of men, that is, by the wealthy and honourable men. The third or great State should be governed by a king, and he cites, as illustrating his view, the statement of Pomponius in the 'Digest' (i. 2, 2), that when the Roman Empire grew and conquered many provinces, the government was put into the hands of one ruler. He adds, however, that in such a great multitude there will be many good men, and the ruler should take counsel with them.<sup>2</sup> This monarchy, Bartolus

etiam pertinet ex causa necessaria ponere collectas, ut ibi dicitur, et etiam jure Digestorum probatur, quia reges habeant omnem potestatem ut ff. de origine jur. l. 2. § in initio. ('Dig.,' i. 2, 2)."

<sup>1</sup> Id. id., 13: "Viso ergo quid sit vis regis, redeamus ad questionem, an expediat civitati vel populo regi per regem, prout bonus est habens dictas condiciones, optimum regimen est regnum regis per rationes s. factas. Et ita intelligo dictum Arist. et Egidii. Si vero consideramus illud quod evenire potest, quia rex quandoque vertitur in tyrannum, ipse vel descendentes ab eo, tunc dico quod consideratio debemus quid evenire potest, quando illud de quo agitur ad hoc naturaliter et universaliter tendit."

<sup>2</sup> Id. id., 15: "Hoc praemisso, facio

triplicem divisionem civitatum seu populorum, nam aliqua est civitas seu gens magna in primo gradu magnitudinis. Quaedam est civitas seu gens major, et sic in secundo gradu magnitudinis. Quaedam est civitas, seu gens maxima, et sic in tertio gradu magnitudinis.

16. Si loquamur de gente seu populo in primo gradu, tunc dico quod non expedit illi regi per regem . . . nec expedit tali populo regi per paucos . . . expedit autem huic populo . . . regi per multitudinem, quod vocatur regimen ad populum. . . .

19. Quod autem dico, per multitudinem, intelligo, exceptis vilissimis. . . item ab isto regimine possunt excludi aliqui magnates, qui sunt ita potentes quod alios opprimerent. . . .

20. Secundo est videndum de gente

says, may be either hereditary or elective, but the elective method is alone proper for the universal monarchy—that is, the Empire.<sup>1</sup> It is interesting to notice that while he has a great reverence for the empire, he admits that since it ceased to be held by Italians it had fallen in their esteem.<sup>2</sup> Bartolus is clear that monarchy is not adapted to the small or even to the moderately large State. He evidently thinks that it is not suited to Italy; the question of the relation of the city State to the Empire does not here seem to be in his mind.

We must, however, be careful to observe that, like Egidius,<sup>3</sup> he very sharply distinguishes the true king from the tyrant. The monarchy which he thinks to be good is absolute, but it is directed to the common good of the community, while the tyrant pursues his own advantage. And here we can see that his judgment is quickened by his sense of the Italian conditions.

For to Bartolus tyranny is not only a corrupt form of government, but it is the worst of all corrupt governments. The government of a few, or of the multitude, is corrupt when they pursue their own advantage, but it is not so far removed from a government for the common good as that of

seu populo majori et in secundo gradu magnitudinis, tunc istos non expedit regi per unum regem . . . nec expedit regi per multitudinem, esset enim valde difficile et periculosum tantam multitudinem congregari. Sed istis expedit regi per paucos, hoc est, per divites et bonos homines illius civitatis. . . . Sic enim regitur civitas Venetiarum, sic civitas Florentiae. . . .

Tertio videndum est de gente vel populo maximo, qui est in tertio gradu magnitudinis. Hoc autem fieri posset contingere, in civitate una per se, sed si esset civitas quae multis aliis civitatibus et provinciis dominaretur, huic genti bonum est regi per uno. Hoc probatur ff. De Orig. Jur. l. III. §. Novissime ('Dig.,' i. 2, 2), ubi, aucto multum imperio Romano et

captis multis provinciis, deventum fuit ad unum s. ad principem. Hoc etiam probant omnes rationes, factae per dictum fratrum Egidium, hic cessant rationes in oppositum. In tanta enim multitudine, de necessitate enim sunt multi boni, per quos oportebit se regem consulere et in justitiae via se ponere; et sic de facto communiter videmus quod tanto melius gens vel populus regitur, quanto sub majore rege regitur."

<sup>1</sup> Id. id., 23.

<sup>2</sup> Id. id., 25: "Et ideo imperium Romanorum postquam fuit ab Italicis separatam, semper decrevit in oculis nostris, hoc tamen absque Dei iudicio occulto factum non est."

<sup>3</sup> Cf. vol. v. p. 76.

the one man.<sup>1</sup> We may put it in concrete terms, the Italian oligarchy or democracy was not so really corrupt and evil a thing as the Italian tyranny. Bartolus adds that the corrupt oligarchy or democracy tends to develop into a tyranny, as they had seen in their own day, for "Italy is full of tyrants."<sup>2</sup>

This treatment of tyranny by Bartolus is of importance, and we must consider it not only in the 'De Regimine Civitatis,' but also in another treatise, entitled 'De Tyranno.'

We have just seen that Bartolus derives from Egidius Colonna and Aristotle the conception of the tyrant as one who governs for his own profit and not for the good of the community. In the treatise, 'De Tyranno,' he derives from S. Isidore, directly or indirectly, the description of the tyrant as that wicked king who exercises a cruel rule over his subjects;<sup>3</sup> from S. Gregory the Great he takes his description of the tyrant as one who governs the commonwealth but not lawfully (*non jure*),<sup>4</sup> and he applies this to the case of the King or Emperor of the Romans; if any man seeks to obtain that place unjustly he is properly called a tyrant.<sup>5</sup>

<sup>1</sup> Id. id., 27: "Quaero enim de malis modis regendi, quisquis sit deterior: in hoc omnes philosophi dicunt, quod tyrannus est pessimus principatus, tenet enim ultimum gradum malitiae. Item predictus Egidius in dicto libro, dicit enim ut dictum est, regimen ideo dicitur bonum, quia per illud maxime tenditur ad bonum commune. Sed per tyrannum maxime ab intentione communis boni receditur, unde tyrannus pessimus principatus; unde si dominantur plures, quia divites vel boni creduntur, vel si dominetur multitudo, quamquam illi regentes tendant ad proprium, et non a Deo est, et sic est regimen malorum vel populi perversi; tamen non tantum receditur ab intentione communis boni, quia ex eo quod plures sunt, aliquid sapit de natura communis boni. Sed si unus est tyrannus etiam recedit a communi bono. Praeterea, sicut virtus unita in bonum est melior, ita

unita in deterius est deterior. Tyrannus autem est pessimus, hoc autem est ita manifestum quod demonstrationem non eget."

<sup>2</sup> Id. id., 29: "Item advertendum est quod regimen plurium malorum, vel regnum populi perversi non diu durat, sed de facili in tyrannidem unius deducitur, hoc enim de facto saepius vidimus. Hoc etiam permissio divina est, quum scriptum sit, 'Qui regnare facit hypocritam propter peccata populi'; et quia hodie Italia est plena tyrannis."

<sup>3</sup> Bartolus, 'De Tyranno,' l.

<sup>4</sup> Id. id., 2: "Proprie tyrannus is dicitur qui communi reipublicae non jure principatur."

<sup>5</sup> Id. id., 3: "Sicut enim rex, seu imperator Romanorum est justus et verus et universalis: ita si quis illum locum vult injuste obtinere, appellatur proprie tyrannus."

In another place Bartolus says: "The tyrant may be either 'manifest' or 'veiled,'" but, what is more important, he may be a tyrant, "ex defectu tituli" or "ex parte exercitus." The distinction is important, though it was not new; Aquinas had pointed it out in his commentary on the "Sentences."<sup>1</sup> When he comes to the question of tyranny "ex parte exercitus," he first says in general terms that the tyrant is he who does tyrannical things—that is, things directed to his own advantage and not that of the community,<sup>2</sup> and then cites from a work, which he attributes to Plutarch, 'De Regimine Principum,' an enumeration of such actions.<sup>3</sup>

What is the remedy against the tyrant. If he has a superior, it is for the superior to depose him; but Bartolus interpolates the observation that there may be occasions when the emperor or Pope may maintain such tyrants in their position for some grave and sufficient reason.<sup>4</sup> In another work he seems clearly to indicate that the tyrant may rightfully be deposed, and he cites a passage from Aquinas, to which we have often referred, that it is not sedition to resist the tyrant.<sup>5</sup>

It is not easy from all this to form any very clear view as to the judgment of Bartolus with regard to the nature of the authority of the ruler. He is clear that monarchy

<sup>1</sup> Id. id., 12: "Nam quidam est tyrannus manifestus, quidam quandoque velatus et tacitus. Item esse quem tyrannum manifeste contingit, quandoque ex parte exercitus, quandoque ex defectu tituli." Cf. vol. v., p. 91 (S. Thomas Aquinas, 'Commentary on the "Sentences,"' II., D. 44, 2, 2).

<sup>2</sup> Id. id., 27: "Octavo quaero de tyranno ex parte exercitii licet habeat justum titulum, minus proprie dicatur tyrannus. . . . Dico quod iste tyrannus ex parte ejus qui opera tyrannica facit, hic ex opere ejus non cedit ad bonum commune, sed ad proprium ipsius tyranni."

<sup>3</sup> Id. id., 28, 29.

<sup>4</sup> Id. id., 34.

<sup>5</sup> Id., 'De Guelfis et Gebellinis,' 9:

"Ad utilitatem publicam licitum est (i.e., tyrannum deponere), et si perveniret ad actum ita quod rumor vel tumultus irrepserit in civitate, non incidit in legem C. de seditione, quia licet faciat, ut dictum est; pro hoc induco Thomas de Aquino in 2, 2, Q. 42, ad 2 in fi: ('Summa Theologica,' 2, 2, Q. 42, 2), ubi sic ait. 'Regnum tyrannicum non est justum, quia non ordinatur ad bonum commune, sed ad bonum privatum regentis, et ideo perturbatio hujus regni non habet rationem seditionis, nisi forte, quando sic inordinate perturbaretur tyranni regnum, quod multitudo subjecta majus damnum pateretur ex perturbatione sequente, quam ex tyranni regimine.'"

Cf. vol. v. p. 92.

is not proper to the Italian city, but he seems to incline to the view, which he may have derived from Egidius Romanus, that it is suited to the great monarchies, that is to Northern and Western Europe; his hatred of the tyrant may be interpreted as related to these as well as to Italy.

We turn from Bartolus to his great contemporary Baldus. He says in one place, but merely incidentally, that a good king is better than a good law.<sup>1</sup> In another place he says that the emperor is called a king because he rules others, and is ruled by no one, though he rules himself by the advice of the wise men. All kings have supreme jurisdiction in their kingdom, and there is no appeal from their judgment, for their judgments are accepted as law; their "bene placitum" is subject to no law.<sup>2</sup>

We may compare a passage in his Commentary on the Code in which he discusses the question whether the prince is bound by the law. Baldus says that the passage in the Code on which he is commenting means that he should live according to the law "de debito honestatis," but this must not be taken too precisely. The supreme and absolute power of the prince is not under the law; the words of the Code must therefore be taken as referring to the ordinary power of the prince, not to his absolute power. While the emperor's authority is derived from the "lex regia," it must be borne in mind that this "lex regia" was promulgated by the divine will (nutu divino), and therefore the empire is said to be immediately from God. It should be

<sup>1</sup> Baldus, 'Commentary on Digest' (fol. 10, v.): "Et melius est bonus rex quam bona lex."

<sup>2</sup> Id. id.: 'Proemium' (fol. 2, v.): "Item nota quod imperator Caesar dicitur Rex . . . et a nemine regitur . . . Consilio tamen prudentum se regit et gubernat. . . . Item nota quod hoc est commune jus omnium regum quod a regia maiestatis sententia non appellatur; nimirum quia ejus definitiva sententia in regno suo pro

lege habetur, et sic nemo posset in melius commutare. Item in regno suo habet supremam jurisdictionem . . . cum manu omnia gubernet . . . beneplacitum nulli legi subiaceat . . . Etiam si unus rex teneat in feudum regnum suum alio rege. Nam eo ipso quod intitulatur rex, habet supremam potestatem in subditos, nec enim minor est rex praefecto praetorio. a cujus sententia non appellatur."

observed, however, that after all this Baldus adds that he is a good ruler who desires that God and the laws should rule, and this is why the emperor says that he subjects his "principatus" to the laws.<sup>1</sup>

In a work of Jason de Mayno, an important civilian of the fifteenth century ('Comm. on Digest,' i. 4. 1), we have found an important reference to Baldus as having said that the Pope and the Prince can do anything "supra ius, et contra ius, et extra ius." Unfortunately Jason gives no indication of the place from which he cites this.

What are we to understand by all this? Baldus thinks that a good prince is better than a good law; he admits, and indeed is clear, that a good prince should normally respect the law, but he is also clear that he is not, strictly speaking, under the law, and he suggests an important distinction between the ordinary and the absolute power of the prince.

We might then incline to the conclusion that the theory of monarchy of these great civilians of the fourteenth century was very different from that of the normal theoretical and constitutional tradition of the Middle Ages and of the fourteenth century, but before we draw such a conclusion we must remember some other aspects of their theory which we have already considered. We have already dealt with their discussion of the question whether indeed the prince was the sole source of law, and have seen that with respect to the custom of the people they are at least hesitating and uncertain,<sup>2</sup> and we must remember that other question

<sup>1</sup> Id. id., 'Commentary on Code,' i. 14, 4 (fol. 55, v.): "Princeps debet vivere secundum leges, quia ex lege eiusdem pendit auctoritas. Intellige quod istud verbum debet intelligi de debito honestatis quae summa debet esse in principe, sed non intelligitur preciso; quia suprema et absoluta potestas principis non est sub lege, unde lex ista habet respectum ad potestatem ordinariam, non ad potestatem absolutam . . . nota quod im-

perator dicit se esse legibus alligatum, et hoc ex benignitate non ex necessitate. Secundo, nota, quod auctoritas imperatoris pendit ex lege regia, quae fuit nutu Divino promulgata et ideo imperium dicitur esse immediatum a Deo . . . Quarto nota quod ille bene principatur qui vult principari Deum et leges, unde dicit imperator se submittere principatum suum legibus."

<sup>2</sup> Confer p. 16.

of the legal or quasi-legal relation of the prince to his subjects—that is, the conception that the prince may enter into relations with his subjects which are of a contractual nature, and that these are binding both on himself and on his successors. We have already discussed this question,<sup>1</sup> and here therefore we only cite again the words in which Baldus gives his interpretation of the passage in which Cynus had dealt with it. Cynus had said (but it is not really clear whether it is the opinion of Cynus or of Guido de Suza) that if the emperor had made peace or a “capitulum” with his subjects for the public good, this was binding even on his successor.<sup>2</sup> As we have pointed out, this is clearly related (by Baldus) to feudal principles.

There is yet another very important limitation upon the authority of the prince which is discussed by these civilians. Cynus says, very dogmatically, that the prince cannot lawfully (de jure) take away a man’s private property without cause. He can undoubtedly do so “de facto,” and his order should be obeyed, for it must always be supposed that he is acting for some just reason; but it cannot be doubted that he commits a sin if he does it without cause.<sup>3</sup> Jac. Butrigarius sets out a somewhat curious view that the emperor can take away any man’s property for proper reasons (ex causa), but not without reason; but this is not due to a defect of authority, but because he had said that he would not do it.<sup>4</sup>

<sup>1</sup> Confer pp. 15, 20.

<sup>2</sup> Baldus, ‘Commentary on Code,’ i., 14, 4 (fol. 55, v.): “Dominus Cynus dicit quod si istud pactum habet in se justitiam naturalem et equitatem, quod istud pactum est servandum, si imperator facit pacem vel capitulum cum subjectis, propter generale et publicum bonum, quod ista non debeant infringi per successorem, nisi ex parte subditorum intervenisset dolus vel fraus.”

<sup>3</sup> Cynus, ‘Commentary on Code,’ Rubric i., 19 (fol. 36, 3) (Code, i., 19, 7): “Secundo casu, scilicet, quando vult mihi tollere dominium rei meae, sine aliqua causa de mundo; si quaeritur

utrum possit de facto? Non est dubium. Sed utrum possit de jure et de potestate sibi per jura concessa, in veritate non potest. . . . Sed tamen, quantum ad observantiam qualiter cunque scribat, debet servari, nam semper rescriptum suum supponimus ex justa causa interpositum. Et talis presumptio est violenta in persona principis; ut supra dixi in proxima questione. Negari tamen non potest quod, si mihi rem meam auferat sine causa, quod ipse peccat.

<sup>4</sup> Jacobus Butrigarius, ‘Thesaurus Legum,’ i., 14, 3, 12: “Item opp: quod imperator non possit quem

Bartolus, referring to some statement of Jo. Butrigarius that the prince could take away a man’s property without cause, says flatly that this is not true. The prince cannot take away a man’s property unjustly, for the prince holds his jurisdiction from God. God gave him jurisdiction, but not the power of taking away what belonged to another man without reason.<sup>1</sup>

Baldus cites the “Gloss” as saying that the prince cannot by his rescript take away a man’s property without proper cause.<sup>2</sup> He seems to imply in this passage that private property belongs to the “jus gentium,” but in commenting on the ‘Digest’ he says that it really belongs to the “jus naturale,” meaning by this that law which properly belongs to human nature.<sup>3</sup> When he deals with property under feudal law he is even more explicit. He asks whether the emperor can deprive a vassal of his fief without a definitely proved offence, and he cites the “Gloss” as saying that this is not “reason,” for good and natural laws bind the prince and natural law is stronger than the “Principatus.”<sup>4</sup> And in another place he

privare de dominio rei suae. . . . Potest ex causa, ut hic, favore publicae utilitatis, sine causa non posset ut ibi; imo puto quod ubicunque princeps non errat in facto, et refert ibi contra jus aliquod, quod valeat rescriptum; nam quod ipso non possit aliquem privare re sua, non est ex defectu potestatis suae, sed ideo quia dixit se nolle hoc facere.”

<sup>1</sup> Bartolus, ‘Commentary on Code,’ i., 25, 6, 2: “Dominus Jo. But. dicebat simpliciter quod princeps potest auferre mihi dominium rei meae sine aliqua causa. Nam ejus potestas, et potestas istarum legum, quae hoc prohibent, procedit a pari potentia: ergo sicut potest istas leges tollere, eodem modo possit dare alteri dominium rei meae sine causa.”

Quod puto non esse verum, nam princeps non potest facere unam legem quae continet unum inhonestum vel injustum: nam est contra substantiam legis. Nam est lex sanctio sancta, jubens honesta et prohibens contraria,

ut l. 11, ff. De Leg. Eodem modo, si vellet auferre mihi dominium rei meae injuste, non posset, quia princeps habet jurisdictionem a Deo. . . . Sed Deus dedit ei jurisdictionem, non potestatem auferendi alienum indebite.”

<sup>2</sup> Baldus, ‘Commentary on Code,’ i., 19 (fol. 68, 2): “Tertio querunt doctores nunquid imperator potest rescribere contra jus gentium. Gl: videtur dicere quod non: unde per rescriptum principis non potest alicui sine causa auferri dominium; sed cum aliquo bene potest.”

<sup>3</sup> Id., ‘Commentary on Digest,’ i., 1, 5 (fol. 11, 2): “Opponitur tertio, dicitur hic quod dominia sunt distincta de jure gentium. Contra, imo, de jure naturali. . . . Sol: Hic ponitur jus naturale pro jure propriae nature humane, i.e., pro jure gentium vel pro lege Mosaica.”

<sup>4</sup> Id., ‘Super Feudis’ (fol. 9, 2): “Quaero numquid imperator posset disvestire vassallum sine convicta

even deals with this in relation to taxation, and, while he seems to think that the prince has the right to impose a "collecta" on his subjects and that they are bound by "natural obligation" to pay this if it is useful for the service and necessity of the commonwealth, they are not bound by "natural obligation" to do this if the tax is levied merely by the arbitrary will of the prince.<sup>1</sup>

Joannes Faber, an important French civilian, in one passage says that the prince can take away a man's property for some definite cause, but the person to whom he may give it has not a just title before God unless there was a just cause—*i.e.*, for the action of the prince.<sup>2</sup> Finally, Angelo de Perusia, a civilian of the later part of the fourteenth century, says plainly that the prince cannot take away a man's property without cause, and he refers for a full discussion to the passage of Cynus just quoted.<sup>3</sup>

It may possibly appear that this is not a sufficiently important point to deal with so fully, but that is a mistake. For it will be evident, on a little reflection, that the principle of the civilians is clearly related to, if not identical with, the more precisely stated principle that the king cannot proceed against a man's property except by process of law.<sup>4</sup>

We return to one very important question: What did the

culpa? Respondit glossa quod non est ratio: quia bonae et naturales consuetudines ligant principem, quia potentius est jus naturale quam principatus."

<sup>1</sup> Id., 'Commentary on Digest,' i. 1, 5 (fol. 11, v.): "Decimo quaeritur si princeps imponit subditis collectam; utrum ex hoc oritur obligatio naturalis; et dic quod si concernit reipublicae utilitatem et necessitatem, quod tunc sic . . . sed solius principis effrenatam voluntatem, tunc non oritur obligatio naturalis."

<sup>2</sup> Joannes Faber, 'In Quatuor Libros Institutionum' i., 2 (fol. 8): "Quid si (princeps) rescribat in possessorio. . . Dico ergo quod princeps ex causa

possit tollere dominium, dum tamen faciat ex certa scientia. . . Caveat tamen de conscientia, ut forte sciens et recipiens non habeat justum titulum quoad Deum: nisi subisset causa vera justa: et princeps male informatus debet revocare, facta informatione."

<sup>3</sup> Angelo de Perusia, 'Super Codicem,' 'De rei vindicatione,' Lex xii. (fol. 62): "In tex. ibi, ex nostro rescripto; et sic patet per principem non auferri alteri dominium per rescriptum, cum sit de jure gentium, nulla causa subsistente, alias secus; ut plene disputatur per Cynum in l. Rescripta, s. si contra jus vel uti. pub."

<sup>4</sup> Cf. chap. 4. For the opinions of the earlier civilians, see vol. ii. p. 72

civilians of the fourteenth century think about the right of the community to depose the ruler? Bartolus in his commentary on the 'Digest' raises the question whether the Roman people can revoke the authority which they had given to the emperor, and he says that two of his predecessors among the civilians, William of Cuneo and Cynus of Pistoia, maintained that they could do this,<sup>1</sup> and in his treatise 'De Guelfis et Gebellinis,' which we have already cited, he asserts that it is lawful for a proper cause to depose a tyrant.<sup>2</sup>

Baldus discusses the subject, but his own conclusion is, at least technically, adverse. He asks whether the subjects may expel their king on account of his intolerable injustice and tyranny, for an evil king is a tyrant. His answer is first in the affirmative, but then he says that the truth is the opposite, for subjects cannot derogate from the right of the superior. They may, in fact, expel him, but the superior does not lose his "dignitas."<sup>3</sup> Joannes Faber is confident in his assertion that the people could depose the emperor. The emperor receives his jurisdiction from the people, and it is reasonable to hold that the people have the power to revoke it; besides,

<sup>1</sup> Bartolus, 'Commentary on Digest,' i. 3, 8: "Quaero numquid Romanus populus possit revocare potestatem imperatoris, et videtur quod sic. . . Gulielmus de Cuneo tenet quod populus Romanus posset revocare, maxime quum primus imperator, cui fuit data illa potestas, non potuit quaerere successoris, nam creatio imperatoris non est ex successione, sed ex electione. Nam iste non est de casibus, in quibus quaeritur per alium jus. . . Imo dicit plus quod possit eum degradare, Gl: C. i. De invest inter do: et vass: quod ita allegat hic etiam Cynus. Item dicitur quod hic equiparatur imperatori."

<sup>2</sup> 'De Guelfis et Gebellinis,' 9 (cf. p. 84). We wish to refer our readers again to Professor Ercole's 'Da Bartolo all' Althusio' for a very full and interest-

ing discussion of the treatment of Tyranny in Bartolus, and also in Coluccio Salutati's 'Tractatus de Tyranno,' which belongs to the last years of the fourteenth century.

<sup>3</sup> Baldus, 'Commentary on Digest' (fol. 10, v.): "Secundo queritur an regem propter suas iniusticias intolerabiles, et facientem tyrannica, subditi possent expellere, et videtur quod sic . . . cum malus rex tyrannus sit. Item unusquisque potest suam salutem tueri. . . Item a quo removetur effectus nominis debet removere ipsum nomen et dignitas, nam reatus omnem honorem excludit. . . Contrarium est verum, quia subditi non possunt derogare juri superioris. Unde licet de facto expellant, tamen superior non amittit dignitatem suam."

he says, it is known that this had been done in former times. He adds, however, that this is a dangerous thing to do.<sup>1</sup>

<sup>1</sup> Joannes Faber, 'In quatuor libros Institutionum,' i. 2 (fol. 6): "Sed an populus potest imperatorem deponere. Videtur quod sic, quia quum ad populum pertinet ejus creatio ut hic . . . et depositio seu restoratio . . . praeterea quum mandatū jurisdictionis sit revocabile de sui natura . . . et imperator jurisdictionem et potestatem habet a populo, ut hic

concordatur, videtur quod populus revocare potest. Praeterea constat hoc factum fuisse antiquis temporibus." (He gives various arguments against this, but concludes) "sed tamen satis possit dici quod populus ex causa posset eum destruere, ut in contrariis, ff. De Excusa, tuto l. sed et reprobari. Hoc tamen attentum periculosum est."

## CHAPTER VI.

### THE DEVELOPMENT AND FUNCTIONS OF REPRESENTATIVE INSTITUTIONS.

WE have in the last volume given a short account of the beginnings of the system of representative assemblies in Western Europe in the twelfth and thirteenth centuries, and have pointed out that this was the natural and logical outcome of the character and principles of mediæval society, and above all of that principle which lies behind all the complex forms of mediæval civilisation, the principle that political authority is the expression of the character and life of the community. It is unfortunate that even well-informed persons should still sometimes seem unable to understand that mediæval society was not irrational, or should seek to find its real quality in what seem to them its unintelligible superstitions. At any rate, the representation of the community was evidently a highly rational expedient for obtaining some kind of method for the expression of the common judgment of the community—a judgment which was indeed liable to error and to confusion like that of any ruler, but which did impose some limitations upon the frequent stupidity or incapacity or caprice of the foolish ruler, and which also added greatly to the effectiveness and power of the capable ruler.

We have in this chapter to examine very briefly the development of this system in the fourteenth century, and to consider the purposes for which it was used: very briefly indeed, for we are not writing the constitutional history of the European countries, but, as we hope, with sufficient

detail to render it reasonably clear what were its most significant features in this century.

We begin with Spain, which, as we have pointed out, was the country in which the representative system was first developed. And we do this also in order once again to make it clear that the political civilisation of Western Europe in the Middle Ages was homogeneous, that, whatever may have been the cause of the later divergence of the political organisation of England from that of the Continental countries, the mediæval political systems were in their origin similar—we would almost say identical—and the ideas or principles they embodied were the same.

We have pointed out<sup>1</sup> that by the end of the thirteenth century the Cortes of Castile and Leon were meeting very frequently, and that they were regularly attended not only by the prelates and magnates, but by the representatives of cities. It is well therefore to begin by pointing out that this continued throughout the fourteenth century. It is clear that they had become a normal part of the machinery of government, and not only a normal but a very important part.

During the minorities of the kings, and they were frequent, the Cortes assumed almost the form of a permanent Council of Government. We have pointed out that at the Cortes of Palencia in 1313 the guardians of the king undertook to call together the Cortes every second year, and agreed that if they should fail to do this, the Cortes was to be summoned by the prelates and sixteen knights and "good men" whom the Cortes had appointed to act as counsellors of the guardians.<sup>2</sup> In 1315, at the Cortes of Burgos the guardians confirmed all the "liberties," &c., of the cities, and it is clearly laid down that if they did not carry out their obligations the Cortes were to elect others.<sup>3</sup> The Cortes of Valladolid in 1322 appointed Don Felipe as guardian of the king, and provided that there should always be with the king a council

<sup>1</sup> Cf. vol. v. pp. 134-136.

<sup>3</sup> 'Cortes of Castile,' vol. i. 39.

<sup>2</sup> 'Cortes of Castile and Leon,' i. 55.  
41 and 71. Cf. vol. v. p. 136.

of twenty-four "caualleros e omnes buenos," representing the people of Castile, Leon, Estremadura, and Andalusia, to hear and determine all matters brought before the king, and that all officials of the household of the king or his guardian should be punished for any offence which they might commit, even if they pleaded that they had acted under the order of the guardian.<sup>1</sup>

Alfonso XI. attained his majority in 1325, and held the Cortes at Valladolid. This was composed of the prelates, magnates, and procurators of the cities, &c. The Cortes demanded, and the king promised, that he would not take any action against the person or property of any one till he had been heard and examined according to "ffuero e derecho."<sup>2</sup>

The Cortes of Madrid in 1329 complained that various officials had violated their privileges, and desired that the king should appoint others, and they asked, and the king promised, that no illegal taxation, either particular or general, should be raised without consultation with the Cortes; they complained also that the Chancery was issuing illegal briefs (*cartas desafforadas*), which caused many imprisonments and deaths, and other violations of their "ffueros" and privileges, and they requested that instruction should be given to the officials of the cities that they should disregard such briefs.<sup>3</sup> The answer of the king to this was somewhat evasive,

<sup>1</sup> Id. id., 43, 4: "Et estos caualleros e omnes buenos que ssean en guardalo nostro sennor el Rey. Et que ssoan en oyer e librar todos los ffechos que veniesen ante el Rey. . . ."

12. Et que alcance o los alcalles que andodieren en casa del Rey o en la mia, que non sean excusados de la pena, si enella cayeren, maguer diga que gelo yo mandé, et maguer yo diga que yo gelo mandé."

<sup>2</sup> Id. id., 45, 26: "Otrossi alo que me pidieron por merced que non mande matar nin prender, nin lisiar, nin despechar, nin tomar aninguno ninguno cosa delo suyo, sin sser ante llamado e oydo e vencido por ffuero

e por derecho por querella nin por querellas que del den.

A esto respondo que tengo por bien de non mandar nin lisiar nin despechar nin tomar aninguno, ninguna cosa del suyo, sin sseer ante oydo e vencido por ffuero et por derecho. Otrossi de non mandar aningunos prender ssin guardar ssu ffuero e su derecho a cada uno, E juro delo guardar."

<sup>3</sup> Id. id., 47, 68: "Otrossi alo que me pidieron por merced que tenga por bien deles non echar nin mandar pagar pecho desafforado ninguno espectral nin general en todo la mia tierra ssin sser llamados primeramente a Cortes. A esto respondo que lo tengo por bien e que lo otorgo."

but, as we have seen, the matter was dealt with more decisively at the Cortes of Bribiesca in 1387.<sup>1</sup>

We do not, however, attempt here to give an account of all the important proceedings of the Cortes: what we are concerned to make clear is that the Cortes played an important part in all public affairs. There has been sometimes a tendency to think that these representative bodies had few functions except to provide the finance required by the ruler. This impression is curiously inconsistent with the varied character of the functions of the Cortes of Castile and Leon.

Not, of course, that their financial power was unimportant. From the beginning of the fourteenth century to the end it is clear that the Cortes constantly asserted that they, and they only, could grant the money required by the Crown beyond the normal and customary revenues. It was plainly asserted in the Cortes of Valladolid in 1307 that if any tax—*i.e.*, any special tax—was needed, the king (or regent) must ask for it, and that he could in no other way impose it,<sup>2</sup> and the king assented.

At the Cortes of Madrid in 1391 it was declared that the Council of Regency just appointed for the minority of Henry III. should have no power to raise any tax unless it had been authorised by the Cortes, or in a case of special urgency, by the procurators of the cities who had been placed in the Council of Regency.<sup>3</sup> In 1393 the Cortes of Madrid, after granting the king, who had just attained his majority, a tax of a "twentieth" for a year, demanded that he should

<sup>1</sup> Cf. p. 5.

<sup>2</sup> Id. id., 34, 6: "A esto digo que lo tengo por bien, pero si acaesciere que pecho aviese mester alguno, pedir gelo he, et in otra manera no echare pecho ninguno en ella tierra."

Cf. id. id., i. 47, 68 (Alfonso XI., 1329): "Otrossi alo que me pidieron por merced que tenga por bien delos non echar, nin mandar pagar desafforado ninguno especial nin general en toda la mi tierra, ssin sseer llamados

primoramente a Cortes.

A. esto respondo que lo tengo por bien e que lo otorgo."

<sup>3</sup> Id., ii. 39, 8: "Otrossi non echaran pecho ninguno mas delo que fuere otorgado por Cortes e par ayuntamiento del rregno; pero sy fuere caso muy necessario de guerra, que lo pueden fazer con consejo e otrogamiento delos procuradores delas cibdades e villas que estovieren enel Consejo."

take a solemn oath "in the hand" of one of the archbishops, that he would not impose any tax or loan upon the cities, or upon individuals, until he had called together the estates in Cortes, in accordance with the good and ancient custom; and that, if any royal briefs or commands with regard to taxation were granted (without the consent of Cortes), they were to be disobeyed without incurring any penalty.<sup>1</sup>

This constitutional authority of the Cortes over taxation is clear, but it is a complete mistake to suppose that this was the only important aspect of their position. We must again insist upon the point with which we have already dealt in Chapter I., that while in Castile, as elsewhere in Western Europe, the king was the proper person to make law, he could not do this alone but only with the consent of the prelates, magnates, and the representatives of the cities assembled in Cortes. The king could neither legislate alone, nor could the legislature of the king in Cortes be abrogated except in Cortes.<sup>2</sup> Even when, however, we have recognised the powers of the Cortes in legislation and taxation, we have not yet adequately appreciated its functions. The Cortes of Madrid, for instance, was summoned in 1329 by Alfonso VI. for the purpose of dealing with the various abuses which had been prevalent in the kingdom since the death of his father.<sup>3</sup> The Cortes constantly made representations to the king about ecclesiastical abuses, such as the interference of ecclesiastical

<sup>1</sup> Id., ii. 42 (p. 526): "Et finalmente lo que ende concluyamos es esto: acordemos de vos otorgar para este primero anno, para con los vuestros pechos e derechos ordinarios, la alcuala del mr. tres meajas, que es llamada veyntena. . . (p. 527). La tercera es que pues vos asi es e sera otorgado lo que abastare asaz para cumplir los vuestros menesteres. . . que nos prometades e jurades luego, en mano de uno delos dichos arçobispos, que non echaredes nin demandaredes mas mr. nin otra cosa alguna de alcualas nin de monedas, nin de servicio nin de enprestido, nin de otra

manera qual quier, alas dichas cibdades e villas e lugares, nin personas singulares dellas, ne de alguna dellas, por mesteres que digados que vos rrecreçen, amenos de ser primeramente llamados e ayuntados los tres estades que deuen venir a vuestras Cortes e ayuntamientos, segunt se deue fazer e es de buena costumbre antigua; e demos si algunas cartas o alcualas los fueren mostradas o mandamientos fechos de vuestra parte sobre ello, que sean obediçidas e non complidas, sin pena e sin error alguno."

<sup>2</sup> Cf. pp. 5. 6.

<sup>3</sup> Id., i. 47. Preface.

courts in cases which did not belong to them;<sup>1</sup> they protested against the presence of ecclesiastics in the Chancery on the ground that clerical officials could not be proceeded against like others,<sup>2</sup> and also against the abuse of excommunication.<sup>3</sup> They made representations to the king about combinations of men in various employments.<sup>4</sup> It was in Cortes that the king made ordinances about the coinage and about debts contracted in the depreciated currency.<sup>5</sup>

We have already pointed out the important position occupied by the Cortes during the minority of the king, and we have another very important example of this in the proceedings of the Cortes of Madrid in 1391, on the accession of Henry III., who was still under age. While in the cases we have mentioned before, they had appointed one of the princes of the royal house as guardian, they now determined that the government of the kingdom during Henry's minority should be entrusted to a Council to be appointed by a Commission of eleven nobles and thirteen procurators of the cities. To this Council they entrusted all the powers of government except certain points, such as the making war and peace; and the Cortes was careful to add that they could not impose any tax without the authority of the Cortes, or take proceedings against anyone without due process of law.<sup>6</sup>

<sup>1</sup> Id., i. 42, 2, and i. 54, 10.

<sup>2</sup> Id., i. 43, 5.

<sup>3</sup> Id., i. 47, 61.

<sup>4</sup> Id., ii. 1, 49.

<sup>5</sup> Id., ii. 27, 5.

<sup>6</sup> Id., ii. 39 (p. 485): "(The members of the Cortes) fueron llamados per cartas e mandamientos de nuestro Sennor el Rey, Don Enrique, que Dios mantenga, para ordenar el rregimiento del dicho Sennor Rey, e de los dichos sus rregnos . . . per rrazon dalla menor hedat del dicho Sennor Rey (they decide that the best course) era e es quel dicho Sennor Rey e los dichos sus rregnos, se rregiesen e gouernasen por Consejo, en la qual fuesen delos grandes del rregno . . . e otrosi delos vezinos delas çibdades e

villas. Et que para escojer quales e quantos fuesen del dicho consejo . . . que dauan e dieron todo su poder cumplido ahonze sennores e rricos omes e caualleros, e a treze delos dichos procuradores. . . . 1. Los del consejo ayan poder de fazer todos los cosas e cada una dellas que fueren a seruiçio del re, e provecho de sus rregnos, saluo las cosas que aqui se contienen, en quelos non dan poder. . . . 7. Otrossi non moueran guerra a ningund Rey vezino, sin consejo e mandamiento del rregno. . . . 8. Otrossi non echaran pecho ninguno mas delo que fuere otorgado por Cortes. . . . 9. Otrossi non daran cartas para matar, nin lisiar, nin desterrar a ningund ome, mas que sea judgado por sus alcalles."

This is important, but perhaps more significant still is the fact that in the second half of the century we find the Cortes demanding that there should be a certain number of citizens on the King's Council. In 1367 the Cortes of Burgos demanded that twelve good men of the cities should be chosen to serve with the King's Council for the special purpose of seeing that the customs and "fueros" of the cities of the kingdom should be better kept and maintained. The king, Henry II., assented.<sup>1</sup> At the Cortes of Toro in 1371 Henry II. announced that he would appoint certain good men of the cities to go through the provinces of the kingdom to report on the administration of law; and the king assented to the request of the same Cortes that he should appoint some prudent men of the cities to serve on his council.<sup>2</sup> The same demand was put forward to Juan I. by the Cortes of Burgos in 1379.<sup>3</sup>

The Cortes of Castile and Leon was in the fourteenth century not merely a body which the king might from time to time consult, to whom he might turn for advice in legislation, or for financial assistance in emergencies, but it represented the claim that the community as a whole should exercise some control over every aspect of the national affairs.

<sup>1</sup> Id., ii. 9, 6: "Otrossi alo que nos dixieron que porque los usos e las costumbres e ffueros delos çibdades e villas e logares de nuestros rregnos puedan ser mejor guardados e mantenidos, que nos pedion por merçed que mandasemos tomar doze omes bonos que ffuesen del nuestro consejo. (Two from Castile, two from Leon, two from Galicia, two from Toledo, two from Estremadura, and two from Andalusia). . . . A esto respondemus que nos plaze e lo tenemos por bien."

<sup>2</sup> Id., ii. 13, 24: "Tenemos por bien do ordenar, et ordenamos de dar omes bonos de çibdades o villas e logares quantos e quales la nuestra merçed fuere, para que anden per las Provinçias delos nuestros rregnos e

per totos los logares, a ver . . . como fazen complimiento de derecho alas partes."

Id., ii. 14, 13: "Alo que pedieron que fuese nuestra merçed que tomaremos e excogiesemos delos çibdadanos nuestros naturales delos çibdades e villas e logares delos nuestros rregnos, omes buenos entendidos e pertinesçientes que fuesen del nuestro consejo."

<sup>3</sup> Id. id., 22, 4: "Otrossi nos pedieron por merçed que quisiesemos tomar omes bonos delos çibdades e villas e logares delos nuestros rregnos, para que con los del nuestro consejo nos consejassen lo que cumple a nuestro seruiçio."

We must now examine the development of the States General and of the Provincial Estates in France, and, while this is not the same as that of the Castilian Cortes, it does also illustrate very clearly the growth and development of the representative element in government.

In the first place, the States General or analogous bodies met frequently. The proceedings of these meetings have not been preserved for us in the same form as those of Castile, and it is not possible always to say whether all these meetings can be described as technically meetings of the States General. This, however, is a question which belongs to the detailed constitutional history of France; for our purpose it is enough to observe that they have a representative character. We have in addition frequent references to the meetings of the representatives of particular provinces (Provincial Estates), and sometimes even of particular towns. It must be remembered that the kingdom of France was not unified in the same sense as that of Castile and Leon, or that of England.

When we now attempt to consider the powers and functions of the States General, we shall find that they were not unlike those of the Cortes in Spain—that is, that they were manifold, in some respects clear and determined, in others vague and undetermined; but the history of the fourteenth century shows very clearly that they were summoned not only to deal with taxation, but rather that any question of general national importance might and did come before them.

In the last volume we have dealt with the first meeting of the States General, which was called together by Philip the Fair in 1302 to deal with the situation produced by the conflict with Boniface VIII.,<sup>1</sup> and it is noticeable that their second meeting was also called to deal with a great ecclesiastical matter—that is, the question of the Templars.

It is important to observe the terms in which the summons to the “communitates” is expressed. Philip the Fair calls them to take part in what he calls the “sacred task,” and bids each of them to send two men who, in the name of the “com-

<sup>1</sup> Cf. vol. v. p. 139 and p. 388.

munities,” are to assist him in carrying out what was required.<sup>1</sup> At the end of the century again it was in the name and with the advice and consent of an assembly which was taken to represent the whole people, as well as of the Church of France, that Charles VI. renounced the allegiance of France to Pope Benedict XIII.<sup>2</sup>

We are not here concerned with the motives or the merits of these actions with regard either to the Templars or to Benedict XIII., but it is obviously highly significant that the Crown should have felt it to be proper and desirable that the whole community should, through its representatives, share the responsibility of the Crown. It is scarcely less significant that on some occasions at least during the great war with England the Crown summoned assemblies which had at least the character of States General to deliberate upon questions of war and peace. In 1359 the terms of peace demanded by England were laid before the Estates; they are reported as being indignant, as demanding the continuance of the war, and as offering a subsidy for the purpose.<sup>3</sup> In 1363 John I. issued an ordinance after a meeting of many prelates and clergy, the princes of the blood, many other nobles, and many of the good cities of the kingdom, assembled at Amiens, at which he had taken counsel with them on the business of the war.<sup>4</sup> And in 1385 it was with the advice of the

<sup>1</sup> ‘Documents relatifs aux États Généraux et Assemblées sous Philippe le Bel,’ No. 660 (ed. G. Picot): “Cujus operis sancti vos volumus esse participes, qui participes estis et fidelissimi zelatores fidei Christianae; vobisque precipimus quatinus de singulis villis predictis insignibus duos viros fidei fervore vigentes, Turonis, ad tres Septimanas instantis feste Paschalis, nobis mittere non tardetis, qui nobis assistant in premissis, communitatum vestrarum nomine, ad ea quae sint dictis negotiis opportuna.”

<sup>2</sup> ‘Recueil Général des Anciens Loix Françaises,’ vol. vi. p. 809: “Nos . . . convocavimus concilium prelatorum, capitulorum, nobilium,

universitatum, plurium sacre paginae, et utriusque iuris doctorum, religionis et aliorum procerum regni nostri . . . (p. 821). Nos ecclesia, clerus, et populus regni nostri ac Delphinatus, de predictorum consilio et assensu recedimus, nunciamusque auctoritate presencium recessisse” (i.e., from the obedience of Benedict XIII.).

<sup>3</sup> Id., vol. v. p. 55.

<sup>4</sup> Id., vol. v. No. 353 (p. 156): “Jehan, par la grace de Dieu, Roi de France; scavoir faisons à tous présents et à venir, què sur plusieurs requestes à nous faites par plusieurs prelaz et autres gens d’église, plusieurs nobles tant de nostre sang come autres, et

council, at which were present many princes of the blood, prelates, nobles, and citizens, that it was decided to send an army to Scotland.<sup>1</sup>

Again it is not unimportant to observe that it was with the counsel and advice of the cities that Charles IV. issued an ordinance in 1322 for the reform of the currency,<sup>2</sup> and Philip of Valois did the same in 1329 and 1332, with the advice of the prelates, barons, and cities.<sup>3</sup>

It is time, however, that we should turn to the question of taxation, for it is no doubt true that we find here one of the best illustrations of the principle of the limitation of the royal authority and of the development of the representative system. It is clear that normally the Crown procured the money which it required, over and above that which formed its normal revenue, by grants, either from particular provinces or towns or from assemblies which represented the whole country. This is well illustrated in a letter of Philip V. in 1318, in which he recognised that a grant of a fifteenth made to him by the nobles of Berri was made by their free will and liberality, and that neither he nor his successors could claim that it had conferred upon him any rights which they

plusieurs bonnes villes de notre royaume, qui darrainement ont été à Amiens à notre mandement, pour avoir avis et deliberacion avec eux sur le fuit de la guerre et provision de deffence de notre royaume, nous par la deliberacion de notre grant conseil avons ordonné et ordonnons en la matière qui s'ensuit."

<sup>1</sup> Id., vol. vii. p. 59: "Charles . . . comme par grand avis e meure deliberation de Conseil, ou quels estoient plusieurs de notre sang, prélatz, nobles, bourgeois et autres, ayons nageres ordonné une armée . . . pour passer et descendre au pays d'Écosse . . . nous avons de nouvel ordonné estre mis sus, cueillez e levé outre ce que dit est . . . certaines sommes de deniers."

<sup>2</sup> Id., vol. iii. p. 296: "Nous

voullons sur ce pourvenir convenablement, eu avis, et pleine délibération avec nos bonnes villes, lesquelles nous avons mandés sur ce, avec notre grand conseil, appelez à ce plusieurs sage conoissans e experts . . . avons ordonné et ordonnons en la manière qui s'ensuit."

<sup>3</sup> 'Ordonnances,' vol. ii. page 34: "Philippus . . . ordinamus, habita plenaria nostri magni concilii deliberatione, cum prelatibus, baronibus et communitatibus regni nostri, de faciendi bonam monetam."

'Recueil,' vol. iv. page 404: ". . . par deliberation de notre grand Conseil, mandâmes e feismes assemblez à Orlens, plusieurs de nos prelatz, barons, e bonnes villes, et autres saiges et cognoisseurs au fait des dites monoies."

did not possess before.<sup>1</sup> In 1349 Philip VI. says that he had asked the inhabitants of Paris for an aid and subsidy for the war with Edward III., and that they had liberally granted him for the period of one year an imposition on the merchandise sold in the city.<sup>2</sup>

In 1350 John I. asked for aid of the nobles, communes, and cities of Vermandois towards the expenses of the war with England, and says that they had of their good will granted him this.<sup>3</sup> In the case of a similar grant from Normandy in the same year there are some additional and important details; the prelates, barons, and communities had met in Paris, and had agreed in principle on the grant of an aid to the king, but the representatives of the communities were not clear that they had sufficient authority to grant the aid in the name of the cities, and they were therefore sent back to deliberate and consult with them, and to receive authority to make this aid and subsidy.<sup>4</sup> It is worth observing how

<sup>1</sup> 'Ordonnances,' vol. i. page 677: "Nous, voullons que leur dictes liberalités ne leur puisse, ne dois estre à euls, ne à leurs hoirs, préjudicials, ne domageus en temps à venir. Voullons, ordoanons, et leur octroions, que nous, ne nos successeurs, ne puissent dire que par cette grace, et ce service quils nous ont fait et donné, aucun droit nouvel, autre que nous n'avions avant cette grace, nous soit acquis contre euls, aux temps à venir, ne que nous, ne nos successeurs, pour raison de cette grace, leur doiens demander aucun service on aucune relevance, ausquels ils n'étaient tenuz à nous avant la dite grace."

<sup>2</sup> 'Recueil,' vol. iv. 154 (p. 559): "Philippe . . . Sçavoir faisons que euls consideranz les choses dessusdites, pour et en nom de subsidie, ont libéralement voulu et accordé pour toute leur communauté, entant comme il leur touche et appartient et puet toucher et appartenir: eus sur ce premierement bonne deliberation et advis, que pour l'espace d'un an entierement

accomply, soit levée, et à nous payée, une imposition ou assise sur toutes les marchandises et denrées qui serout vendues en notre dité ville de Paris."

Cf. id. id., p. 628, for Carcassonne and Narbonne, and p. 654 for Amiens.

<sup>3</sup> 'Recueil,' vol. iv. 168 (p. 631): "Lesquies (*i.e.*, the burden of the War) ne porriens souffrir, ne soustenir sans l'aide de nos subgiez, ayons pour ce, fait requérir par notre amé et feal conseiller l'evesque de Laon, nos bien amez les nobles, communes, eschevinages, et autres gens des villes de notre bailliage de Vermandois, que à ce nous voulsissent faire aide convenable; et de leur bonne volenté, ils nous ayent gracieusement octroïé et accordé en aide, pour le fait de nosdites guerres, une imposition de six deniers pour livre."

<sup>4</sup> Id. id. (p. 635): "Mais pour ce que lesdites comunautez n'estoient pas fondées pour le dit aide accorder au nom des dites villes, ils furent renvoyées aux dites villes, pour avoir collation, deliberation et avis aux

carefully guarded were the rights of the communities to tax themselves.

We do not for the moment deal with the important constitutional movements of the years from 1355 to 1358: these are so important that they need a separate treatment. It must not, however, be imagined that the victory of the Crown meant that it had established any constitutional right to impose taxation at its pleasure. In 1363 the estates of Beaucaire and Nîmes while continuing the gabelle on salt for the year, and promising that, if this should prove insufficient, they would with the king's authority impose other "impositions et gabelles," protest energetically that no royal justiciary, whatever his rank or dignity, should interfere in any way in raising these taxes, but only those who had been chosen by the representatives or those deputed by them; that if the king himself or his representative, or any of the royal officials, were to do this, all the impositions should fall to the ground, and the inhabitants should be free from them.<sup>1</sup>

In 1364 the king, Charles V., says that the burgesses of Paris were disposed to make him aids and subsidies for the conduct of the war.<sup>2</sup> In 1367 the prelates, barons, ecclesiastics, and communities of Dauphiné, in return for the confirmation of their liberties and franchises, made a

gens d'icelles, et pooir dudit aide et subside accorder et octroyer."

Cf. id. id. (p. 709) for Anjou and Maine. "Quo autrefois aide semblable ne puisse ostro levée esdiz pais au temps à venir, si ce n'estoit par l'accort et de l'assentement exprès des dits gens d'église, desdiz nobles et des dites communes."

<sup>1</sup> 'Recueil,' vol. v. 345, 40 (p. 142): "Quod nullus justitarius regius, cujus cunque status seu dignitatis existat, de dicta gabella et aliis impositionibus, nec etiam de dictis pecuniis inde levandis et exigendis, custodiendis seu erogandis, et in stipendiariis et aliis usibus necessariis convertendis, nec etiam super compotis audiendis particularium receptorum, se habeant

aliqua iter intromittere, nec etiam impedire; sed illi duntaxat qui per ipsos seu deputatos aut deputandos ab eis fuerint super hoc electi. . . . Quod si dominus noster Rex, seu ejus locumtenens, aut quivis alius justitarius et officialis cujuscunque conditionis et preeminentiæ existat, contrarium faceret, extunc omnis impositio et gabella ipso facto cessit, et quod ipsi et omnes habitantes et subditi in dicta senescallia, ad præmissorum observantiam minime teneantur, sed ab omnibus et singulis supra dictis oneribus sint quitti, liberi penitus et immunes, et quod impune possint desistere a predictis."

<sup>2</sup> 'Recueil,' vol. v. 364 (p. 212),

"gracious gift" of thirty thousand florins to the king and dauphin.<sup>1</sup> In the same year the nobles and cities of Artois, the "Boulenois," and S. Pol granted an aid to the king, but with the express condition that this was not to prejudice their liberties and freedom; and we find this particular grant constantly repeated to the end of the century.<sup>2</sup> In 1369 we find Charles V. promising the towns and other "lieux" of Ponthieu that for the future no aid or subsidy was to be imposed on them without their consent, and we find the same promise made to the towns of Crotoy and Rhodéz.<sup>3</sup> The 'Grand Chronique' refers to a meeting of estates in 1369, which voted a subsidy.<sup>4</sup> In 1372, Charles V. gave authority to the Bishop of Limoges to impose "tailles et subsides" in the diocese and viscounty of Limoges "se la plus saine partie d'icelle pais s'y accorde."<sup>5</sup>

In 1381 we come to the very important ordinance by which the regent, in the name of the king, Charles VI., during his minority, abolished the aids, &c., imposed in the time of his father and his predecessors since the time of Philip the Fair. This ordinance was issued after an assembly, held at Paris, of the ecclesiastics, nobles, and citizens of the towns of Languedoyl. It has been disputed whether the meeting was formally a States General or not,<sup>6</sup> but the question is not of much importance from our point of view. It cannot be doubted that it had a representative character; and it was these representatives who presented the complaints against the subsidies and subventions as having been contrary to their immunities, liberties, privileges, constitutions, and customs, and also against the ancient royal ordinances. The king therefore orders that all such aids, &c., of whatever kind they were, which had been imposed since the time of Philip the Fair, should be annulled and abolished; and he adds that the fact that they had been imposed should not be taken as having

<sup>1</sup> 'Recueil,' vol. v. 421 (p. 298).

<sup>2</sup> 'Ordonnances,' vol. v. p. 82.

<sup>3</sup> 'Ordonnances,' vol. v. pp. 82, 176, 257, 410.

<sup>4</sup> Cf. Picot: 'Histoire des États Généraux,' vol. i. p. 194. From the

'Grand Chronique,' vol. vi. p. 321.

<sup>5</sup> 'Ordonnances,' vol. v. p. 719.

<sup>6</sup> Cf. especially Picot: 'Histoire des États Généraux,' vol. i. p. 229, &c.

given either himself or his predecessors or his successors any new rights, or as having in any way prejudiced the immunities, liberties, customs, &c., of his people. He reserves only "noz rentes, yssües, travers, et prouffiz des vivres et denrées menées hors de notre royaume" and the "redevances" of the Genoese, Lombards, "Tresmontains," and other aliens.<sup>1</sup> It seems to us clear that this represents the admission by the regent that such taxation had been and was illegal, and he not only annulled it, but also emphatically assented to the

<sup>1</sup> 'Recueil,' vol. vi. 14 (p. 553): "Savoir faisons à tous présens et à venir, que comme à la la convocation et assemblée générale que nous avons fait faire et tenir à Paris, des gens d'église, nobles, bourgeois et habitants des bonnes villes de notre royaume de la Languedoyl, pour avoir advis sur la deffence et provision d'icellui, ils se fussent complains des aides, subsides et subvencions que feu notre très chier seigneur et père . . . faisait et avoit fait imposer et lever sur eulz, et aussi de plusieurs autres choses qu'ils disoient avoir esté faiz en leur préjudice du temps de notre dit seigneur et père et ses prédecesseurs, par leurs gens et officiers, contre leurs immunités, nobleces, franchises, libertez, privilèges, constitucions, usaiges et coustumes des pays, et contre les ordonnances anciennes; requerans leur être sur ce pourveu de remede convenable—nous voulans noz dictes gens et subgiez en leur dietes immunités, nobleces, franchises, libertez, privileges, constitucions, usaiges et coustumes anciennes remettre, ressaisir, restituer, maintenir et garder, et les relever à tout notre pouvoir, de tous griefs, charges, et oppressions quelconques . . . Voulons, ordonnons et octroyons de notre pleine puissance, certaine science et auctorité royale.

Que les aides, subsides, imposicions, et subvencions quelconques, de quelque nom ou condicion qui soient, et par quelque maniere ils aient esté imposez

sur nos dites gens et peuples, qui aient eu cours en notre dicte royaume du temps de notre dit seigneur et autres nos prédecesseurs, depuis le temps du roi Philippe le Bel notre prodecesseur, soient cassées, ostées et abolies, et ycelle ostons, cassons et abolissons, et mettons au néant du tout par la teneur de ces présentes;

Et voulons et decernons que par le cours que ycelles imposicions, subsides, et subvencions ont eu en notre dit royaume, nous, nos predecesseurs, successeurs, ou aucun de nous, ne en puissions avoir acquis aucun droit, ne aucun préjudice être engendrez à noz dictes gens et peuple, ne à leurs immunités, nobleces, franchises, libertez, privileges, constitucions, usaiges et coustumes dessus dictes, ne à aucune d'icelles en quelque maniere que ce soit. . . . .

Voulons et decernons que se à l'encontre de ce aucune chose a esté faiete depuis ycelui temps jusques à ores, nous, ne noz successeurs ne nous en puissions aidier aucunement, mais les mettons du tout au néant par ces mesmes presentes. . . .

(The King reserves) "nos rentes, ysséus, travers, et prouffiz des vivres et denrées menées hors de notre royaume, qui nous demeurent. . . . Et aussi sanz y comprendre les redevances des Gennevois, Lombars, et Tresmontains, et nez hors notre royaume, et de leur denrées."

Cf. 'Ordonnances,' vol. vi. p. 564.

principle that such illegal action should not be taken as a precedent. It is true that there is no statement of how such taxation could legally be imposed; but it is implied that it could only be made legally by the consent of those who were to pay the taxes, and that this implied some system of representation, either local or general.

It may be urged that this concession was only made in view of the particular circumstances of the regency, and there is probably some truth in this, but it must be observed that from this time down to the end of the century the references which we can find to taxation seem in almost all cases to imply that the Crown was careful to pay at least a formal deference to the principle of taxation by consent. In 1384 the "Universitates" of Briançon made of their free will a grant of 12,000 florins to the Dauphin.<sup>1</sup> In 1384 a letter of Charles VI. speaks of "certaines aides à nous accordées par les gens d'Église, nobles, bourgeois et habitans" of the province of Rouen.<sup>2</sup> In 1382, Juvenal des Ursins says that an assembly which had the nature of a "States General" had been called together at Compiègne, and had been asked to sanction an aid, but the representatives of the cities said that they had no power to act.<sup>3</sup> In 1383 the instructions to the royal officers about the levy of a new aid speak of this as having been imposed with the advice of several of the princes of the blood, prelates, nobles, and others.<sup>4</sup> Another ordinance of 1383 mentions that in the previous year the citizens of Paris had granted various aids.<sup>5</sup> In 1385 Charles VI. refers to a decision to make an expedition into Scotland, and says that this had been done by the advice and after long deliberation of his council, at which there were present several of the princes of the blood, prelates, nobles, citizens, and others, and that in view of this he had ordered the levy of a certain sum of money.<sup>6</sup> In 1388 we find a reference which might

<sup>1</sup> 'Ordonnances,' vol. vii. p. 719 (41).

Picot: vol. i. p. 235).

<sup>4</sup> 'Ordonnances,' vol. vi. p. 705.

<sup>5</sup> 'Recueil,' vol. vi. 41 (p. 570).

<sup>2</sup> Id., vi. p. 659.

<sup>6</sup> 'Ordonnances,' vol. vii. p. 759.

<sup>3</sup> Juvenal des Ursins, 'Histoire de Charles VI.' (ed. 1614, p. 25). Cf.

be interpreted in a contrary sense: a tax is imposed "par manière de taille," with the advice of some of the princes of the blood and the great council—no other persons are mentioned.<sup>1</sup> In 1393 Charles VI. writes to the Governor of Dauphiné instructing him to summon the assembly of the prelates, clergy, nobles, and "communes" of Dauphiné, and to request them to grant an aid, as they had done before when he was in Languedoc.<sup>2</sup> In 1395 we find an aid being levied for the marriage of the king's daughter to the King of England; there is no reference to any assembly as granting this, but this would have been one of the normal feudal dues, except that it was apparently not being levied on the nobles.<sup>3</sup> In the same year we find Charles appointing a Commission to call together the clergy, nobles, and other persons of Dauphiné, and instructing them to ask for an aid for the same purpose.<sup>4</sup> In 1398 Charles announces that he had determined to levy an aid on all the clergy, and that he had done this by the order of the princes and the great Council and the consent of the prelates and clergy.<sup>5</sup>

It would seem to be clear that throughout the fourteenth century it was assumed in France that the king had normally no arbitrary right of taxation, that if he needed money beyond the ordinary revenues of the Crown he had to ask for it, and that it could only properly be granted by the local or national community. It is also obvious, if only from the provisions of the Ordinance of 1381, that the kings had often exceeded their constitutional rights and had imposed and levied taxes by their own authority. It is possible that we can find an illustration of this in an ordinance issued by John I. in 1360 on his return from captivity in England, when with the advice of his Council, and no other body or persons are mentioned, he imposed a tax upon all sales throughout the Languedoyl.<sup>6</sup> We may perhaps conjecture that the Crown might have justified itself for its action under the terms of an ordinance of Louis X. addressed to Normandy in 1315. Louis recognised

<sup>1</sup> 'Recueil,' vol. vi. 207 (p. 630).

<sup>2</sup> Id., vol. vi. 185 (p. 734).

<sup>3</sup> Id., vol. vi. 214 (p. 759).

<sup>4</sup> 'Ordonnances,' vol. viii. (p. 67.)

<sup>5</sup> Id., vol. viii. p. 289.

<sup>6</sup> 'Recueil,' vol. v. 310 (p. 108, 9).

without reserve that he was not entitled to impose tallages, exactions, subventions, or impositions on the people of Normandy beyond the "redditus communes et servitia nobis debita," but he added an important qualification—that is, "nisi evidens utilitas vel emergens necessitas id exposcat."<sup>1</sup>

This does not, however, affect the fact that it was recognised in France throughout the fourteenth century as clearly as in England and Spain that taxes could not be imposed without the consent of the community.

We have not yet, however, exhausted the subject of the development of the representative system in France. We have still to observe that as in England and in Spain the representative bodies sometimes claimed a share in the control not only of taxation, but also of administration, as we should now call it.

We cannot here enter into any detailed discussion of what may be called the constitutional crisis in France of the years 1355-1358: this has indeed been described by many historians. We must, however, for our purpose draw attention to some aspects of it, and the first point to which we must draw attention is the claim of the Estates not merely to make grants to the Crown, but to control the expenditure of these grants. The first example we have found of this is in the proceedings of an assembly of the prelates, barons, and communities of Anjou and Maine in July 1355. After protesting that aids were not to be levied without their consent, they proceeded to appoint a Commission of two bishops, two nobles, and two burgesses, who were to appoint persons to collect the aid, and to whom the collectors were to render account; and, not satisfied with this, the money thus raised was appropriated to the defence of the country, and was only to be spent (distribuée et convertie) with the consent and advice of the six commissioners.<sup>2</sup>

These principles—control of levy, appropriation, and control of expenditure—are the first and most fundamental aspects of the regulations laid down by the great meeting of the

<sup>1</sup> 'Recueil,' vol. iii. 476, 5 (p. 50).

<sup>2</sup> 'Recueil,' vol. iv. 215, 1-4 (p. 709).

States General of the Languedoyl in December of the same year, 1355. They also granted taxation on a large scale for one year, and they laid down the same conditions. They appointed a Commission of nine, three from each estate, to superintend the levy, and they appropriated the money to the purposes of the war; in addition they provided that the estates should meet again on St Andrew's Day in the following year to consider how the money had been spent, and, if they thought proper, to grant a new aid. The king, in his reply to the estates, promised that he would appoint proper persons to deal with the money with the counsel of the Commission of nine elected by the estates, and that that Commission was to see the troops and only to pay the money for those who were actually present. Even this, however, did not represent the whole of the concessions made to the estates. The king assured them that no one should have power to call out the "arrière ban" of the kingdom except the king himself or his eldest son, and that he would do this with the advice of the members of the three estates, if he could conveniently meet them.<sup>1</sup>

The estates met again in March 1556, and, finding that the form of taxation authorised in 1555 had caused much discontent, imposed another.<sup>2</sup> They met again in October 1556, after the king had been taken prisoner by the English. They then complained of exactions and misappropriation of subsidies, and demanded the removal of the evil councillors of the Crown, and that the regent should appoint, with the advice of the estates, certain wise and notable men of the clergy, nobles, and burgesses, who should be constantly with him and advise him.<sup>3</sup>

The estates of Languedoc met in September 1355 and voted a subsidy. When they met again in February 1357

<sup>1</sup> 'Recueil,' iv. 221, 1-7, 19 (pp. 738, 757).

<sup>2</sup> 'Recueil,' vol. iv. 225 (p. 763).

<sup>3</sup> 'Recueil,' vol. iv. 232, 2 (p. 782): "Qu'il esleut par le conseil des Trois Estats aucuns grands, sages et notables du clergé, des nobles et bourgeois,

anciens, loyaux, et meurs, qui continuellement pres de lui fussent, et par qui il se conseillast, et que rien par les jeunes, simples et ignorants du faict du gouvernement d'un royaume et de la justice il ne ordonnast."

they determined that the money which was raised was to be held by four treasurers whom they elected, and that the treasurers themselves should pay the soldiers and should render account of the expenditure, not to the royal officer, but to the estates; and that the king and his "locum tenens" and his officers should have nothing to do with this. If they interfered, the treasurer of the estates was to notify the people, who would then be at liberty to refuse to pay the subsidy. They also determined that the subsidy was only to be renewed by the estates, which should meet to consider this.<sup>1</sup>

It is noticeable that in the letter of the Dauphin of March 1358 announcing his assumption of the office of regent, he says that he had done this after mature deliberation with the members of the Council and other prelates, barons, and citizens of the great cities. He does not describe this as a "States General," but it seems reasonable to say that it had some kind of representative character.<sup>2</sup>

In the States General which met at Compiègne in May 1358 it was laid down that the subsidies and aids were to be administered by persons elected by the estates, and that the regent was to act in important matters only with the advice of three members of the Council.<sup>3</sup> The estates of Languedoc at their meeting in July 1358, in granting a subsidy for the ransom of King John, laid down regulations of the same kind as in 1357.<sup>4</sup>

When the regent had gained the upper hand it is true that he annulled the condemnation and expulsion of the royal officials, which had been enacted by the earlier States General, but it should be observed that he was careful to state that this was done after careful deliberation, "en la

<sup>1</sup> 'Ordonnances,' vol. ii. p. 99, &c.

<sup>2</sup> 'Recueil,' vol. v. 268 (p. 1): "Comme par meure et grant delibération que nous avons eu avec les gens du Grant Conseil de Monseigneur et de nous, et plusieurs autres prelaz, barons, et bourgeois de bonnes villes du royaume de France, nous aions pris

pour l'évident nécessité et profit du dit royaume, le nom de Regent, et le gouvernement d'icelli, jusques à tant qu'il plaise à Dieu que Monseigneur puisse retourner en icelli. . . .

<sup>3</sup> 'Recueil,' vol. v. 272, 411 (pp. 9 and 14).

<sup>4</sup> 'Recueil,' vol. v. 276, 1-5 (p. 28).

grant chambre de parlement à Paris," at which there were present not only the princes, prelates, and nobles, but also men of the "great towns."<sup>1</sup>

It seems to us that it is a serious error to look upon the failure of the movements of 1355 to 1358 as implying that the representative system and its limitation of the arbitrary royal authority had ceased to be important in France. We shall presently consider its place in the fifteenth century in detail; for the moment we have seen enough to recognise that its history in the fourteenth century is not indeed the same as that in England and Spain, but that it is at least closely parallel to it.

It is not necessary to deal at length with the development of the representative system in England, for this has been fully treated by the constitutional historians like Bishop Stubbs, and, though it may be that some modification of this treatment is necessary in detail, its substantial correctness cannot be seriously impugned. It is only necessary from our point of view to put together a few illustrations of its character.

We cannot, it seems to us, do better than begin by citing again the famous phrase of the revocation of the Ordinances of 1310-11 in the Parliament of 1322. Those things which are to be established for the kingdom and the people are to be discussed, agreed upon, and determined in Parliament by our lord the king with the assent of the prelates, counts, barons, and the commonalty of the kingdom, as had been the former custom.<sup>2</sup> We do not feel that it is necessary to enter into any account of the complex antecedents of this statement, for it seems to us to be important primarily as laying down shortly but distinctly the general principle which lay behind the whole constitutional development of the country. If these words may be taken as a general statement of the con-

<sup>1</sup> 'Recueil,' vol. v. 291 (p. 58).

<sup>2</sup> 'Statutes of the Realm,' vol. 1. p. 189 (Edward II., 1322): "Mes les choses q'srout à establr, . . . pour l'estat du roialme et du peuple, soient

trestes, accordees, estables, en parlementz par nostre seigneur le roi, et par l'assent des prelatz, countes et barouns, et la communalte du roialme; auscent come ad este acustume cea enarere."

stitutional position of the representative assembly, we can also find some very significant illustrations of the tendency of Parliament to claim a certain control over the administration of government.

In May 1341 the Commons appointed a Commission to audit the accounts of the royal officers who had received money for the king, and they demanded that for the future any vacant office was to be filled by the king with the consent of the magnates, and that those appointed were to be sworn in Parliament to obey the laws; they even went so far as to demand that at the meeting of each Parliament these offices were to be taken "into the hand" of the king, and the Ministers were to be required to answer the complaints which might be made against them. If complaint was made against any Minister of any "misprision," "et de ce soit atteint en Parlement," he was to be deprived of his office and punished by the judgment of the peers.<sup>1</sup> It is true that Edward III. in October revoked his consent to these measures, and that Parliament in 1343 formally annulled them,<sup>2</sup> but the demand remains of great significance.

The proceedings of the Parliament of 1376 were of equal importance, as illustrating the tendencies of the times; for it proceeded to a formal examination of the conduct of some of the king's Ministers and agents; Lord Latimer, the Chamberlain, was condemned to imprisonment and to be fined at the king's discretion, and Parliament prayed the king to remove him from his office and from the Council; and Richard Lyons, one of the king's agents, was condemned to imprisonment and forfeiture.<sup>3</sup>

The Commons also demanded that the council of the king should be "afforced" with ten or twelve lords, prelates, and others, and that no important business should be done without the consent of all of these, or in the case of less important business, of at least four.<sup>4</sup>

<sup>1</sup> Stubbs, 'Constitutional History,' vol. II. pp. 387-391 (ed. 1877).

<sup>2</sup> 'Rolls of Parliament,' vol. II pp. 126, 289 (Edward III., 1341), Clause 38, Clause 41.

<sup>3</sup> Stubbs, 'Constitutional History,' vol. III. pp. 428 *seq.* (ed. 1877).

<sup>4</sup> 'Rolls of Parliament,' vol. II. p. 322 (Edward III., 1376), Clause 10: "Item les communes considerant les

It is not necessary to multiply illustrations of the development of the representative system in England, but it should be observed how closely parallel this was to what we have already considered in relation to Castile and France.

meschiefs la terre . . . pourquoi ils prient, que le Conseil, notre Seigneur le Roi, soit enforcez de Seigneurs de la Terre, Prelatz et autres, à demurrer continuellement tant que au nombre de dys ou xii. selonc la volonté du roi ; par manière tielle, que nulle gros besoigne y passe ou soit délivré sans l'assent et advis de touz : et autres meyndres besoignes par l'advis et assent de sys ou quatre au meyns, selonc ce que le cas requert. Issint au meins, que six ou quatre des tielx conseillers soient continuellement resi-

dentz du Conseil du Roi, et notre Seigneur le roi entendant la dite requeste estre honorables et bien profitables à luy et à tout son royaume, l'ad obtroie. Pourvez toutes voies, que chancellor, trésoror, et gardein de Prive Seal et tous autres officers du roi, purrant faire et exploiter les busoignes qui touchent leurs offices sanz la présence des ditz conseillers, les queux le roi ad assignez et assignera de temps en temps de tieux come luy plerra."

## CHAPTER VII.

### THE CONCEPTION OF POLITICAL UNITY IN EUROPE.

THE idea of a universal monarchy of the Western Christian world ceased to be effective in Europe generally after the break-up of the Carolingian empire ; and after the death of Frederick II. the empire was no longer even the greatest Power in Western Europe. There were, however, two countries, Italy and Germany, where the empire was still actually or potentially a power to be reckoned with, and in these countries at least the idea of a world monarchy still survived.

In Italy, after the death of Frederick, there was no effective central control over the city states outside of the Neapolitan kingdom, and internecine conflicts in the towns gave occasion, even before the close of the thirteenth century, to the rise of the tyrants. The majority of the cities, however, had not yet lost their freedom, the nobles had generally been deprived of power, and city life was still vigorous but turbulent. In the 'Purgatorio' Dante thus apostrophises Italy :—

"Ahi serva Italia, di dolore ostello,  
Nave senza nocchiere in gran tempesta,  
Non donna di provincie, ma bordello !

Ed ora in te non stanno senza guerra  
Li vivi tuoi, e l'un l'altro si rode  
Di quei che un muro ed una fossa scerra."

and he invites the German Emperor to come—

"Vieni, crudel, e vedi la pressura  
De' tuoi gentili, e cura lor magagne."

“Chè le città d'Italia tutte piene  
 Son di tiranni, ed un Marcel diventa  
 Ogni villan che parteggiando viene.”

Like Marsiglius of Padua a few years later, Dante attributes the blame for this largely to the Church:—

“Ahi gento, cho dovresti esser devota,  
 E lasciar seder Cesare in la sella,  
 Se bene intendi ciò che Dio ti nota!  
 Guarda come esta fiera e fatta fella,  
 Per non esser corretta dagli sproni,  
 Poi che ponesti mano alla predella.”<sup>1</sup>

Dante was himself a victim, and though in the ‘Convivio’ or in the ‘De Monarchia’ he may discuss Church and Empire as a philosopher, in the ‘Commedia’ he shows his burning sense of wrongs inflicted because there was no peace nor justice in the country in the absence of a strong ruler standing above and aloof from local jealousies.

Dante was by birth a member of a Guelf family which had suffered in the cause after the battle of Montaperti; not one of the great houses, but not to be despised, even by such a haughty Ghibelline as Farinata degli Uberti. At thirty-five years of age he was elected one of the Priors. The Pope, Boniface VIII., summoned Charles of Valois to support him, especially in Tuscany and the Romagna; and Charles, once admitted to Florence, despite his vows of impartial justice, allowed the extreme party of the Neri to oust the Bianchi. Dante was one of the excluded party, and with others of his former associates in the Government he was condemned to death, and went into exile. For a short time Dante joined with other exiles, Guelf and Ghibelline, in attempts to force his way back to Florence; but the attempts failed, and Dante, equally dissatisfied with both parties, ceased his efforts. Later on he refused to avail himself of opportunities for pardon, on account of the indignities involved in making his submission to the Florentine Government.<sup>2</sup> He enthusiastically welcomed

<sup>1</sup> Dante, ‘Purgatorio,’ vi.

<sup>2</sup> Epistola lx.

Henry VII. on his arrival in Italy in 1311,<sup>1</sup> and looked for the condign punishment of Florence,<sup>2</sup> but Henry died in 1313 without taking the city. There is in the ‘Commedia’ a magnificent testimony to Henry VII., for whom a throne is set apart in heaven, where—

“Sederà l'alma, che fia già agosta,  
 Dell'alto Enrico, ch' a drizzare Italia  
 Verrà in prima che ella sia disposta.”<sup>3</sup>

There is not a line in the ‘Commedia’ to indicate that Dante had abandoned hope of the “veltro,” the future emperor, who would come at a more opportune time to restore Dante's beloved Italy, the “giardino dell'impero.”

Dante was not a mere theorist, the false prophet of a dead empire. He had everything in his experience to open his eyes to the need of a strong ruler in Italy, to control a turbulent people. It is easy for us now looking back to see that the time for a world monarchy was over; but in Dante's lifetime the Papacy, in outward appearance at the height of its power, had been mastered by the ruler of France, and now that the papacy had been so much weakened by Philip the Fair it was difficult to set limits to the power of a renovated Roman empire. There was nothing intrinsically absurd in the vision of a great emperor ruling the world in temporal matters hand in hand with a reformed and chastened papacy governing in spiritual matters.

The earliest statement of Dante's political theories is contained in the ‘Convivio,’ and was probably written not later than 1308. The ‘Convivio’ is a fragment, and Dante wrote only four out of the fifteen books he had projected. In the last book of the ‘Convivio’ he discusses the question of what constitutes true nobility, and as he quotes and disagrees with the dictum on this subject of Frederick II., he digresses into the question of the nature of imperial authority. His two chapters on the subject contain in a condensed form some of his arguments in the ‘De Monarchia.’<sup>4</sup> Between

<sup>1</sup> Epistola v.

<sup>2</sup> ‘Paradiso,’ xxx.

<sup>3</sup> Epistola vi.

<sup>4</sup> Dante, ‘Convivio,’ iv. 8.

the 'Convivio' and the 'De Monarchia' come his letters to the kings and other rulers of Italy, to the Florentines, and to Henry VII., written in connection with Henry's expedition to Italy. The last of his political letters was addressed, to the Italian cardinals, some time (probably early) during the long interregnum between the death of Clement V. and the election of John XXII.

References to the empire and the papacy occur throughout the 'Commedia.' In the first canto of the 'Inferno,' Virgil, the poet of the empire, is sent to guide Dante through hell and purgatory, and it is not till they arrive at the terrestrial paradise that he leaves him in the charge of Beatrice. The thirtieth canto of the 'Paradiso' ends with the stern denunciation by Beatrice of Clement V. :—

“ E fia prefetto nel foro divino  
Allora tal, che palese e coperto  
Non anderà con lui per un cammino.  
Ma poco poi sarà de Dio sofferto  
Nel santo officio ; ch'ei sara' detruso  
La' dove Simon mago è per suo merto  
E farà quel d'Anagna entrar più giusto.”<sup>1</sup>

While Dante makes no attempt in the 'Commedia' to moderate his language in order to conciliate his opponents, there is a studied moderation in the 'De Monarchia,' which would fit in well with an attempt on his part, to write a defence of the empire and an assertion of its complete freedom, on the temporal side, from papal control, without exasperating the Curia.

According to Dante, man's end is twofold, in the first place happiness in this life, consisting in the unchecked development of his special "virtus." The other end of man is to secure the happiness of life eternal, to which man can only attain by the help of the divine light.<sup>2</sup> Inasmuch, however,

<sup>1</sup> 'Paradiso,' Canto xxx., 142-148.

<sup>2</sup> 'De Monarchia,' iii. 16: "Duos igitur fines Providentia illa inenarrabilis homini proposuit intendendos; beatitudinem scilicet huius vitæ, quæ in operatione propriæ virtutis consistit,

et per terrestrem Paradisum figuratur; et beatitudinem vitæ æternæ, quæ consistit in fruitione divini aspectus ad quam propria virtus ascendere non potest, nisi lumine divino adiuta, quæ per Paradisum coelestem intelligi datur."

as man's happiness in this life is in some measure ordered for immortal felicity the emperor, who provides for man's temporal welfare, should show Peter that reverence which is due from a first-born son to his father, so that illuminated by the light of paternal favour he may the better rule this world, to whose government he has been appointed by God, to whom are subject all things alike, temporal and spiritual.<sup>1</sup>

Dante points out that just as nature produces the thumb for one purpose and the whole hand for another and so on, in like manner we come finally to an end for which God has created the whole human race. Now the special capacity of man is apprehension by means of the potential ("possibilis") intellect, and to make this capacity operative, many men are needed, for the work could not be done by one man or by some limited association of men. The function proper to the human race is to put into operation the whole of this capacity, not only for speculation but also for action. And just as each individual requires peace and quietness if he is to attain to perfection in knowledge (prudentia) and in wisdom, so too it is peace that enables the human race as a whole best to achieve its almost divine work. Universal peace is thus the best of those things which are ordered for our happiness.

We have it on the authority of the great philosopher in his Politics, and we can also prove that when several things are ordered for one end, one of them must direct the others. This is true of the home, of the village, and so on, up to the kingdom, and it applies also to the whole human race, since it also is ordered to one end. It is therefore clear that a monarchy or empire is necessary for the wellbeing of the world.<sup>2</sup>

Dante gives other reasons for holding that the whole

<sup>1</sup> 'De Monarchia,' iii. 16: "Quæ quidem veritas ultimæ quæstionis non sic strictè recipienda est, ut Romanus princeps in aliquo Romano Pontifici non subiaceat; quum mortalis ista felicitas quodammodo ad immortalæ felicitatem ordinetur. Illa igitur reverentia Cæsar utatur ad Petrum, qua primo-

genitus filius debeat uti ad patrem; ut luce paternæ gratiæ illustratus, virtuosius orbem terræ irradiet, cui ab Illo solo præfectus est qui est omnium spiritualium et temporalium gubernator."

<sup>2</sup> 'De Monarchia,' i. 3-7.

human race should be under one ruler; as, for instance, that it is the purpose of God that every created being should be in the divine likeness, so far as his nature will permit, and that therefore the human race is best disposed when it is most like to God; and as the essence of unity ("vera ratio unius") is in the Deity, it is likest Him when it is most one, and this can only be when it is subject to one ruler ("princeps"). Wherever disputes occur a judge is required, and as disputes are possible, where there are rulers not subject to one another, it is necessary to have a third person with an ampler jurisdiction who includes both in his government. A monarch is necessary for the whole world. The world is best ordered when justice is most powerful, and this can only be when it is under a monarch, who is more powerful than any other ruler and can thus most effectively do justice. He is also free from greed, the chief enemy of justice, as there is nothing left for him to desire. He is also in closer connection in every respect with his subjects than any other ruler, for their relations with their subjects are only partial. Moreover, other rulers derive their power from the monarch, while the monarch has his power over the subjects directly and prior to all others. The monarch, therefore, being closer to his subjects than any other ruler will beyond all others seek their good. That the monarch has more power than anyone else to do justice is clear, for he can have no enemies.<sup>1</sup>

The human race is also at its best when it is most free, and this according to Dante is another argument in favour of monarchy, for it is under a monarch that it is most free. Freedom is the greatest gift conferred by God on man, and as only that is free which exists for its own sake, it can only be attained under a monarchy; for it is only under a monarchy that perverted forms of government can be corrected, and the monarch, who beyond all others loves mankind, although the master as regards the means, is the servant of all as regards the end of his government.<sup>2</sup> Dante is careful to explain that

<sup>1</sup> Id., i. 8, 10, 11.

<sup>2</sup> Id., i. 12 "Et humanum genus, potissime liberum, optime se habet. Hoc erit manifestum, si principum pateat libertatis. Propter quod sciendum est, quod primum principum

nations, kingdoms, and states have their own special conditions, which ought to be regulated by special laws. It is only as regards things which are common to all, that men should be governed by the one ruler.<sup>1</sup>

In concluding his arguments to show that a monarch is required for the wellbeing of the world, Dante sees them confirmed by the state of the world when the Son of God became man. At no other time since the fall of our first parents was the whole world at peace, as was the case under the perfect monarchy of "divus Augustus."<sup>2</sup>

nostrae libertatis est libertas arbitri, quam multi habent in ore, in intellectu vero pauci . . . iterum manifestum esse potest, quod haec libertas, sive principum hoc totius libertatis nostrae, est maximum donum humanae naturae a Deo collatum . . . quia per ipsum hic felicitamur ut homines, per ipsum alibi felicitamur ut Dei. Quod si ita est, quis erit qui humanum genus optime se habere non dicat, quum potissime hoc principio possit uti? Sed existens sub monarcha, est potissime liberum. Propter quod sciendum, quod illud est liberum quod sumet et non alterius gratia est . . . Genus humanum, solum imperante monarcha, sui et non alterius gratia est; tunc enim solum politicae diriguntur obliquae, democraticae scilicet, oligarchiae atque tyrannides, quae in servitutem cogunt genus humanum. . . . Hinc enim patet, quod quamvis consul sive Rex respectu viae sint domini aliorum; respectu autem termini, aliorum ministri sunt, et maxime Monarcha, qui minister omnium procul dubio habendus est."

<sup>1</sup> Id., i. 14: "Propter quod advertendum sane quod quum dicitur, humanum genus potest regi per unum supremum Principem, non sic intelligendum est, ut minima iudicia cuiuscumque municipi ab illo uno immediate prodire possint quum etiam leges municipales quandoque deficiant, et opus habeant directivo, ut patet per Philoso-

phum in quinto ad Nichomachum, *ἐπιεικειαν* commendantem. Habent namque nationes, regna et civitates inter se proprietates, quas legibus differentibus regulari oportet. . . . Sed sic intelligendum est, ut humanum genus secundum sua communia, quae omnibus competunt, ab eo regatur, et communi regula gubernetur ad pacem. Quam quidem regulam, sive legem, particulares principes ab eo recipere debent, tanquam intellectus practicus ad conclusionem operativam recipit maiorem propositionem ab intellectu speculativo . . . Et hoc non solum possibile est uni, sed necesse est ab uno procedere, ut omnis confusio de principibus universalibus auferatur"

<sup>2</sup> Id., i. 16: "Rationibus omnibus supra positus, experientia memorabilis attestatur, status videlicet illius mortalium, quem Dei Filius in salutem hominis hominem adsumpturus, vel expectavit, vel quum voluit ipse disposuit. Nam si a lapsu primorum parentum, qui diverticulum fuit totius nostrae deviationis, dispositiones hominum et tempore recolamus; non inveniemus nisi sub divo Augusto Monarcha, existente Monarcha perfecta, mundum undique fuisse quietum. . . . (Since then) O genus humanum! quantis procellis atque iacturis, quantisque naufragis agitari te necesse est, dum bellua multorum capitum factum, in diversa conaris."

Dante devotes the second book of the 'De Monarchia' to proving that the Roman people acquired lawfully the empire over all mankind. At one time, like many others, he believed that they had gained it unlawfully by violence. Later on the conviction was forced on him by most manifest signs that they owed the "imperium" to divine providence. He now deplored the grievous sight of kings and princes, agreeing only in this, to oppose their Lord and His anointed, the Roman Prince.<sup>1</sup> Dante accordingly sought to prove by divine authority, and by the light of human reason, that the Roman empire existed "de jure."<sup>2</sup> During its progress the Roman empire was supported by miracles which showed it was willed by God, and consequently that it was "de jure."<sup>3</sup> The Romans showed in their history their devotion to the common good of the Republic, and therefore to what was just; they gave the world universal peace and liberty, and it has been well said that the Roman empire sprang from the fount of religion ("de fonte nascitur pietatis"). He gives a number of instances of the devotion to the common good of Roman citizens, such as Cincinnatus, the Decii, Fabricius, and others.<sup>4</sup> Nature always acts with a view to its final goal, and this cannot be attained by one man working alone, but only by a multitude ordained for divers operations. There are not only individuals but also whole nations with an aptitude for government, while other nations are only fit to be subjects and to serve, and for such it is not only expedient but just that they should be ruled,

<sup>1</sup> Id., ii. 1: "Admirabar equidem aliquando, Romanum populum in Orbe terrarum sine ulla resistencia fuisse praefectum; quum tamen superficialiter intuens, illum nullo iure, sed armorum tantummodo violentia, obtinuisse arbitrabar. Sed postquam medullitus oculos mentis infixi, et per efficacissima signa divinam providentiam hoc effecisse cognovi, admiratione cedente, derisiva quaedam supervenit despectio, quum gentes noverim contra Romani populi praecminentiam fremuisse, quum videam populos vana

meditantes, ut ipse solebam, quum insuper doleam, Reges et Principes in hoc vitio concordantes, ut adversentur Domino suo, et unico suo Romano principi. Propter quod derisive, non sine dolore quodam, cum illo clamare possum pro populo glorioso et pro Caesare, qui pro Principe Coeli clamabat: 'Quare fremuerunt gentes, et populi meditati sunt inania.' "

<sup>2</sup> Id., ii. 1.

<sup>3</sup> Id., ii. 4.

<sup>4</sup> Id., ii. 5.

even under compulsion.<sup>1</sup> Now clearly the Romans were the people ordained by nature for command. That this was the judgment of God appears clear from the fact that it was the Roman people which prevailed when all were striving for the empire of the world. Dante appeals to history for evidence of this. Among other witnesses Luke, the scribe of Christ, writes that "there went out an edict from Augustus that the whole world should be enrolled," thus showing that the Romans at that time held universal sway.<sup>2</sup> This empire was acquired as in single combat by the ordeal of battle, and whatever is so acquired is rightly acquired, for it is obtained by divine judgment.<sup>3</sup>

The 'Commedia' breathes the same spirit in every reference to the empire, from the beginning of the 'Inferno' right through to the vision of the throne set apart for Henry VII. in the empyrean. Dante's guide through hell and purgatory is Virgil, the great poet of the empire. In limbo we find Caesar, "Cesare armato con gli occhi grifagni," and many of his great predecessors in Roman story.<sup>4</sup> Ulysses and Diomed groan in the flames for the horse, "che fe' la porta Ond' uscì de' Romani il gentil seme."<sup>5</sup> One of the lowest subdivisions of the 'Inferno' is named after the Trojan traitor Antenor,<sup>6</sup> and in the very lowest depths of all Judas Iscariot has as his fellow sufferers Brutus and Cassius, the murderers of Julius Caesar.<sup>7</sup>

In the 'Purgatorio' we have the magnificent lines, partly quoted above, in which Dante deplores the fate of Italy enslaved and full of woes, because it has no emperor to guide it, and he attacks the "German Albert" and his father Rudolf for neglecting Italy, the garden of the empire.<sup>8</sup>

In the sixteenth canto Dante places in the mouth of a Lombard (Marco Lombardo) a violent attack on the papacy for combining the temporal with the spiritual power.<sup>9</sup> In another canto we are told how the good Titus, with the help

<sup>1</sup> Id., ii. 7.

<sup>2</sup> Id., ii. 9.

<sup>3</sup> Id., ii. 10.

<sup>4</sup> 'Commedia,' Inferno, 4.

<sup>5</sup> Id. id., 26.

<sup>6</sup> Id. id., 32.

<sup>7</sup> Id. id., 34.

<sup>8</sup> Id., Purgatorio, vi. 76.

<sup>9</sup> Id. id., xvi. 46.

of the Deity, revenged the treachery of Judas.<sup>1</sup> Finally, in the earthly paradise, on the summit of the mountain of purgatory, we have the symbolical vision of Christ, under the form of a gryphon. We cannot enter into details of the vision and its symbolical meaning, but it shows how throughout this canto Dante has constantly in mind the empire and its importance to the world in connection with the divine scheme for its wellbeing.<sup>2</sup> The last canto of the 'Paradiso' shows no change in Dante's conception of the importance of the empire in the government of this world. One of the first human beings on whom Dante sets eyes in heaven is Constance:—

“Che del secondo vento di Suave  
genero il terzo, e l'ultima possanza,”

the wife of Henry VI. and the mother of Frederick II.<sup>3</sup> This is in the circle of the moon. In the next circle, that of Mercury, Justinian sets forth the praises of the Roman empire and of its great exploits, and tells how under Augustus it gave peace to the whole world, so that the gates of the temple of Janus were closed. He refers to the great crime done under Tiberius and to the vengeance on the Jews under Titus. He tells of Charlemagne and how he saved the Church from the Lombards. The Guelfs and Ghibellines sin alike, the one party by its opposition to the empire and the other by seeking to annex it to a faction; by their sins they are the cause of the ills of Italy.<sup>4</sup> In the sphere of Jupiter the spirits, before Dante leaves, form themselves into the shape of an eagle's head and neck (the Roman symbol),<sup>5</sup> and the eagle tells how Constantine now knows how grievously the world has suffered from his well-intentioned act (the donation).<sup>6</sup>

There is one more reference to the empire when Dante, still accompanied by Beatrice, has reached the empyrean, the heaven which is pure light, where he sees the whole company of heaven, and where there is neither far nor near. Beatrice points out to our poet the great throne reserved for

<sup>1</sup> Id. id., xxi.

<sup>2</sup> Id. id., xxxii.

<sup>3</sup> Id., 'Paradiso,' iii.

<sup>4</sup> Id. id., vi.

<sup>5</sup> Id. id., xviii.

<sup>6</sup> Id. id., xx.

the exalted Henry, who will come to govern Italy before it is ready for his rule. The Pope, on the other hand, his secret and open opponent, will shortly thereafter be thrust down where Simon Magus has his place.<sup>1</sup> Thus we find in the 'Commedia' from first to last the same exalted view of the empire as in the 'Convivio' and in 'De Monarchia,' and throughout it is the one government that can secure justice and liberty, and therewith peace.

But the emperor was to be no mere *fainéant*. In his letter to the Florentines he warns them of the dreadful consequences if they do not submit to the Roman Prince, and reminds them of the destruction by Frederick I. of Spoleto and Milan, and he prophesies that their city will be taken, the greater part of the inhabitants slain or made prisoners, and that they will endure the same sufferings for their perfidy as the glorious city of Saguntum bore voluntarily in its faithful struggle for liberty. The guardian of the Roman state, the "divus," and triumphant Henry has come thirsting not for his own but the public weal.<sup>2</sup>

Similarly in his letter addressed to the princes and rulers of Italy, Dante gives them the glorious news of the coming of Henry, who will release Italy from bondage and show mercy to all who seek it, while avenging the crimes of backsliders. He calls on them not only to arise, but to stand in awe, before one whose waters they drink, on whose seas they sail, and who possess whatever they hold, by virtue of his law. The Roman Prince is predestined by God.<sup>3</sup>

<sup>1</sup> Id. id., xxx. :

“In quel gran seggio, a che tu gli occhi  
tieni

Per la corona che gia' v'è su posta,  
Prima che tu a queste nozze ceni,  
Sederà l'alma, che fia giu agosa,  
Dell' alto Arrigo, ch'a drizzare  
Italia

Verrà in prima che ella sia disposta.  
La cieca cupidigia che vi ammalia,  
Sinùli' fatti v'ha al fantolino,  
Che muor di fame e caccia via la  
balia ;

E fia prefetto nel foro divino

Allora tal, che palese e coperto  
Non anderà con lui per un cammino.  
Ma poco poi sarà de Dio sofferto  
Nel santo officio ; ch'ei sarà  
detruso

La dove Simon mago è' per suo  
merto,

E farà quel d'Anagna entrar piu  
giuso.”

<sup>2</sup> Id., Ep. vi.

<sup>3</sup> Id., Ep. v.

Dante throughout his writings treats the empire of his time as one with the old Roman empire, divinely conferred on the Romans on account of their capacity for righteousness. Of Rome he says that he firmly holds that the very stones of its walls are worthy of reverence, and that the ground on which she is built is excellent beyond all that man can utter.<sup>1</sup> As regards the German electors, he looked on them as merely the heralds of the divine providence.<sup>2</sup>

Dante devotes the third book of the 'De Monarchia' to proving that the emperor receives his power directly from God, and that the Church is not qualified to exercise temporal power. There were three classes with whom he had to deal in proving that the emperor did not derive his power from the Church. First came the Pope and certain of the clergy and others, whom he believed to be moved entirely by zeal and not by pride. Next came those influenced by greed, and last of all the Decretalists, who maintained that the traditions of the Church were the foundations of the faith.<sup>3</sup> He contends that the temporal power does not derive its being, nor its authority, from the spiritual, though it operates more efficiently when aided by the light of grace imparted on earth by the blessing of the supreme Pontiff.<sup>4</sup> It is unnecessary to follow Dante in his answers to the ordinary arguments on behalf of the Church, such as that the sun represents the Church, and the moon, with its borrowed light, the empire.<sup>5</sup> As regards Constantine's donation, he does not dispute the historical fact, but maintains it was invalid, as no one has the right as holder of an office to do things inconsistent with that office ("contra illud officium"). Constantine had no power to make such a gift, and the Church had no authority to receive it, for it was inconsistent with the express commands in the Gospels that the Church should not possess gold and silver. This would not, however, prevent the emperor from granting a patrimony to the Church, so long as he retained "the superior dominion." The Pope might

<sup>1</sup> Id., 'Convivio,' iv. 5.

<sup>2</sup> Id., 'De Mon.,' iii. 16.

<sup>3</sup> Id. id., iii. 3.

<sup>4</sup> Id. id., iii. 4.

<sup>5</sup> Id. id., iii. 4. See also following chapters for other common arguments.

also receive gifts, not as a proprietor but as a steward on behalf of the poor.<sup>1</sup>

Thus Dante derives the temporal power directly from God and not, as we have already said, from the Church, which has not even the right to exercise such power, but the very last words of the 'De Monarchia' are a warning to the temporal ruler to show such reverence to Peter as is due from the first-born to his father, so that enlightened by this paternal grace he may better rule the world, over which he has been set by God, who is the supreme Ruler of all things, spiritual and temporal.<sup>2</sup>

Dante's conception of the need of a universal monarchy arose, no doubt, primarily from the lamentable political condition of Italy, the violent intestine quarrels in the cities, and the continual conflicts between these, but it also had reference to the need of some system of international peace for Europe. It has been contended by Professor Ercole in an important and learned work that, while Dante urges with such eloquence the need of the universal empire to give justice and peace to the world, he does not conceive of this authority as implying a continual interference with the internal laws and conditions of particular states; as indeed is indicated in a passage of the 'De Monarchia,' which we have cited.<sup>3</sup> Professor Ercole has also drawn attention to some very important passages in Engelbert of Admont's work, 'De Ortu et Fine Romani Imperii,' which seem to express the same conception.<sup>4</sup> He also points out that while Bartolus maintained the independence or autonomy of the great Italian cities as being "universitates superiorem non recognoscentes," when his position is more closely examined we find that he thought of the imperial authority as still continuing, not as exercising a direct control over those and other states, but as a supra-national power whose function it was to maintain justice and peace in the world.<sup>5</sup>

<sup>1</sup> Id. id., iii. 10.

<sup>2</sup> Id. id., iii. 16.

<sup>3</sup> F. Ercole, 'Da Bartolo all'

Althusio,' pp. 134-137.

<sup>4</sup> Id. id., pp. 131-134.

<sup>5</sup> Id. id., pp. 118-130.

Dante was not then alone in the fourteenth century in the conception of some system of authority and order which should give peace to the world, and it is this which gives some real interest to the work of Pierre Dubois' 'De Recuperatione Terrae Sanctae.' There is indeed in this much which is fantastic and much which merely expresses the national ambition of some Frenchmen; but at the same time there is not a little which is significant.<sup>1</sup>

Dubois had not indeed anything of the imaginative magnificence of the great poet: he was a man of pedestrian and even in some respects of confused mind, but, in some ways at least, his conceptions were perhaps nearer to the actual conditions of the time than those of Dante.

The nominal subject of the work is the recovery of the Holy Land from the infidel; but this is only a starting-point for the expression of the urgent need of peace among the Christian people, who were obedient to Rome.<sup>2</sup> Obedient, that is, in spiritual things, not in temporal, for, as in the controversial pamphlets of the conflict between Boniface VIII. and Philip the Fair, he denounces the attempt of Rome to assert a temporal authority over the French kingdom.<sup>3</sup>

We shall return presently to the question of the creation of a universal authority which should maintain peace among Christian people. In the meantime we must observe what Dubois says about the causes of the divisions and conflicts in Europe. The prelates of the Church and the Pope himself were, in Dubois' opinion, among the principal causes of these; and it is to the Pope that Dubois specially addresses himself. He begs him to consider how many and how great have been the wars in which he has been involved for the defence of the patrimony of St Peter.<sup>4</sup> He therefore suggests that the Pope should divest himself of the charge of his temporal dominions, and, while retaining the right to the revenues derived from them, should hand them over to some king

<sup>1</sup> For a careful discussion of the date and authorship of this work, we should refer to the edition by C. V. Langlois, and to R. Scholz, 'Die Publizistik zur Zeit Philipps des

Schönen und Bonifaz VIII.'

<sup>2</sup> P. Dubois' 'De Recuperatione Terrae Sanctae,' 3.

<sup>3</sup> Id. id., iii.

<sup>4</sup> Id. id., 33.

or prince to be held in a perpetual "amphiteosis." If he would do this he would not be the cause of war and of men's deaths, but would be able to give himself to prayer and contemplation and the care of spiritual things.<sup>1</sup> He proposes that the bishops and abbots should do the same, that they should resign their feudal domains and receive in their place a fixed revenue.<sup>2</sup>

This may seem very extravagant, but it should be remembered that a proposal of much the same kind had been made by Puschal II., in his negotiations about the Investiture question with the Emperor Henry V. in 1111, with regard to the feudal domain of the bishops; and it is clear that while the proposal was then repudiated by the bishops, there had been devoted churchmen like Gerhoh of Reichersberg who felt that there was much to commend such proposals.<sup>3</sup>

No doubt when Dubois speaks of the Pope surrendering his temporal dominions to some king, he was really thinking of the King of France, as indeed he makes plain in a later chapter.<sup>4</sup> It would seem that there is some evidence that such a proposal had actually been made by Philip III. to Pope Gregory X. in 1273,<sup>5</sup> and such a proposal is intelligible in view of the Angevin occupation of the Sicilian kingdoms, which were fiefs of the papacy.

We return to Dubois' proposals for the creation of some system for the establishment and maintenance of peace among the Catholic peoples of Europe. In order to do this he proposes that a Council should be called together, and that the

<sup>1</sup> Id. id., 40: "Que reformatio status propter has fines taliter devotissime postuletur, videlicet quod summus pontifex, qui circa maximam spiritualium curam plurimum est honoratus et occupatus, ita quod sine spiritualium prejudicio regimini suorum temporalium sufficienter vacare non posse creditur, inspectis que super fructibus, proventus et exitibus, impensis deductis, et honoribus solitis, ad ipsum porvenire sibi que remanere consueverunt, alieni magno regi seu principi, vel aliquibus, tradantur in

perpetuam amphiteosin."

<sup>2</sup> Id. id., 45 and 50.

<sup>3</sup> Cf. vol. iv. part iv. chap. 3.

<sup>4</sup> Id. id., 111: "Verisimile plurimum est, quod dominus papa, guerris sedatis secundum modos prescriptos, et regimine suorum temporalium, possessione et districtione, pro certa annua pensione perpetua domino regi Franciae commissis, per fratres suos et filios, prout expedire viderit, gubernandis poterit?"

<sup>5</sup> Cf. Note by M. Langlois on p. 48 of his edition.

king should invite the Pope to secure an agreement among the princes and prelates for the establishment of a Court to which the complaints of those who said that they had been injured might be referred. The Council should appoint a body of wise and competent men, who should in their turn appoint three clerical and three lay judges to inquire into and deal with these complaints. If either party were not satisfied with their decision the judges should transmit the case and their judgment to the supreme Pontiff, to be amended or confirmed by him.<sup>1</sup> Dubois also proposes that obedience to these judgments should be enforced by coercive measures, to be applied if necessary by the other states.<sup>2</sup>

These are far-reaching proposals, but they are not unintelligible under the conditions of those times. The conception of a General Council, which should represent all Christendom for spiritual purposes, was familiar to the Middle Ages, and was about to receive a great development in the fourteenth century; and it is therefore intelligible that men might conceive of such a Council as a body which could also be used for the settlement of political disputes. It is also true that both Innocent III. and Boniface VIII. had actually intervened in the disputes between England and France. But

<sup>1</sup> Id. id., 3: "Convocato concilio, propter ordinem salutis Terre Sanctae, summa regalis experientia petero poterit per dominum papam, principes et prelatos concordari et statui taliter quod quibuscunque dicentibus se passos iniurias secundum leges et consuetudines regnorum et regionum, per iudices in eis statutos, et ubi statuti non sunt, infrascripto modo statuendos, fiat celerius quam solitum est iusticiae complementum. Nullus catholicus currat ad arma, nullus sanguinem baptismatorum effundat."

Id. id., 12: "Responderi potest quod concilium statuatur arbitros religiosos ad alios eligendos viros prudentes et expertes ac fideles, qui iurati tres iudices prelatos et tres alios pro utraque parte, locupletos, et tales

quod sit verisimile ipsos non posse corrumpi amore, odio, timore, concupiscentia, vel alias; qui convenientes in loco ad hoc aptiore, iurati strictissime, datis antequam convenient articulos petitionum et defensorum singulorum, summarie et de pleno, rejectis primo superfluis et ineptis, testes et instrumenta recipiant, diligentissime examinent. . . . Si altera pars de ipsorum sententia non est contenta ipsi iudices pro omni lite processus cum sententia mittunt ad apostolicam sedem, per summum pontificem, pro tempore existentem, emendandas et mutandas, prout et si iustum fuerit; vel si non, salubriter ad perpetuam rei memoriam confirmandas et in cronicis sancte Romane ecclesie inregistrandas."

<sup>2</sup> Id. id., 4, 5.

certainly both Philip Augustus and Philip the Fair had very emphatically and successfully refused to allow any such official action on the part of the Pope; and it is certainly remarkable that Dubois, who had, as we have seen, repudiated very emphatically the real or supposed claim of Boniface VIII. to temporal superiority, should have been prepared to recognise the Papal See as the final arbitrator in international political disputes.<sup>1</sup>

It is difficult to judge what importance exactly we can attach to this work, but it seems reasonable to us that when we put it beside that of Dante and of Bartolus and of Engelbert of Admont, it receives a new significance. It seems clear to us that the general trend of mediæval society was towards the disintegration of political unity in the West and the development of the independent political societies of modern Europe; but the conception of a larger political unity was not wholly lost, and we in the modern world are only taking up again the necessary task of civilisation.

<sup>1</sup> Cf. vol. v. pp. 165-171; p. 387.

## CHAPTER VIII.

SUMMARY OF THE POLITICAL THEORY OF THE  
FOURTEENTH CENTURY.

WE have endeavoured to set out the political principles of Western Europe in the fourteenth century as expressed by the writers whom we may call political thinkers or theorists, as implied or expressed in constitutional documents and practice, and as set out by the Civilians. It is, we think, clear that the conceptions of the political thinkers were, speaking broadly, closely related to constitutional practice, while those of the Civilians were not, and that thus the latter had little influence on the development of political conceptions in the fourteenth century in Northern and Western Europe.

There was indeed no difference between the theorists and the Civilians on the question of the source of political authority; they were all agreed that political authority was derived from the community, from God indeed ultimately, but from God through the community. There is no trace in the Civilians, any more than in the other political writers, with the exception of Wycliffe, of that fantastic orientalism of Gregory the Great, which had practically died out in the Middle Ages, but was revived in the sixteenth and seventeenth centuries, the theory of what is traditionally called the Divine Right of Kings. The community, the *universitas*, the *populus* was the immediate source of all political authority.

There were, however, also profound differences between the Civilians and the political theorists and constitutional practice of Western Europe.

We have pointed out in previous volumes that, as it seems to us, the fundamental political conception of the Middle Ages was that of the supremacy of law, and that law was primarily the custom which expressed the habit of life of the community—habit and custom rather than deliberate will. This conception continues to have an important place in the fourteenth century. When, however, as perhaps in the ninth century, and certainly in the thirteenth, the rapid development of mediæval civilisation made something like direct legislation sometimes necessary, this was conceived of as expressing the consent and will of the whole community. This is the principle which was normally expressed in the fourteenth century in the constitutional methods of Western Europe and in the political theory.

It is here that we find the first important divergence between the Civilians and the normal mediæval conceptions and practice. The Civilians of the fourteenth century, as we have said, always and frankly recognised that the original lawgiver was the community, and that, whatever was the authority of the prince, it was from the community that he derived it, but they also, and naturally, for they were interpreting the "*Corpus Juris Civilis*," conceive of the community as having transferred its authority to the prince. To them therefore the prince had become the legislator, the source of law; and it is impossible to overrate the importance of the appearance of this conception, not indeed in relation to the fourteenth century, but to later periods.

We must not, however, imagine that the Civilians were thoroughgoing in their affirmation of this. As we have pointed out at length in earlier volumes, while some of the Civilians of the twelfth and thirteenth centuries held that the Roman people had transferred their authority to the emperor so completely that even their custom had ceased to have any legislative authority, others maintained that this was not so; the people had indeed given their authority to the prince, but they could resume it, and their custom still made and abrogated law.<sup>1</sup>

<sup>1</sup> Cf. vol. ii. part i. chap. 7; vol. v. part i. chap. 6, pp. 664-667.

In the fourteenth century, as far as we can judge, the most important Civilians, while refusing to allow that the people possessed the formal legislative authority, seem to allow that their custom still made and unmade law.<sup>1</sup>

The second divergence is equally, perhaps even more, important. The prince, no doubt, in the political constitution and theory of the Middle Ages, was the head of the community, and had his share, a very important one, in making the law; but his authority was a limited one. He was limited by the law, by the custom and habit of life of the community; the property and persons of the members of the community were not subject to his arbitrary authority, but were protected by the law. This principle evidently was generally maintained in the fourteenth century.

To the Civilians the prince was normally the source of the law, and, no doubt, mainly because he was the source of the law, he was thought of as being above it. They were indeed perplexed by an apparent inconsistency in the texts of the Roman law books. In some of these the prince was described as "legibus solutus." (We do not, of course, here or elsewhere, pretend to interpret the original meaning of these words.) In other places, and especially in the famous words of 'Cod. i., 14, 4,' the prince appears as saying that it was seemly that he should acknowledge that he was bound by the law: "Digna vox maiestate regnantis legibus alligatum se principem profiteri." (Again we are not interpreting the original meaning.) The Civilians were indeed perplexed, but, on the whole, they tended in the fourteenth century to the judgment, that while the prince was not formally bound by the law, he should habitually respect it. It is in this connection that the distinction, perhaps incidental rather than deliberate, made by Baldus between the ordinary and the absolute power of the prince is significant.

Here then we have a revolutionary conception intruded into the system of mediæval life and thought. It must, however, be observed that we find in the Civilians of the fourteenth century two principles which in a considerable measure modified

<sup>1</sup> Cf. pp. 16-19.

their tendency to think of the prince as possessing an authority unlimited by law. In the first place, they recognised that the prince might enter into contractual relations with his subjects, and that such contracts were binding upon him. As Baldus says, God had subjected the law to the prince but not contracts; by these he was bound. It appears to us from the context of many of these statements that their primary reference was to treaties which various emperors had made with cities in Italy, but the principle is stated in general terms, and sometimes is related to the contractual system of feudal law. The Civilians were also clear that the extra-legal powers of the prince do not entitle him to deal at his pleasure with private property; he cannot do this "de iure," whatever he might do "de facto."

There is, however, another aspect of the political theory of the fourteenth century where we find, rather unexpectedly, that some of the Civilians were in agreement with the theorists. This is the principle that in the last resort it was lawful for the community to resist and even to depose the unjust and tyrannical prince. This was affirmed by Marsilius of Padua, by William of Occam, by the author of the 'Somnium Viridarii,' and is cited as the opinion of great jurists by Leopold of Babenberg; and the century ended with the deposition of Richard II. There was indeed nothing new in this; as we hope we have made clear in former volumes, it was the normal principle of the Middle Ages that resistance to unlawful authority, and even the deposition of tyrannical princes, was legitimate.<sup>1</sup> It is, however, interesting to observe that some at least of the Civilians, notably Bartolus, Joannes Faber and Jacobus Butrigarius, seem clearly to maintain that in the last resort subjects might lawfully resist and even depose an unjust and tyrannical ruler.

We have dealt at some length with the political opinions of the Civilians, for we are in this volume concerned with the question how far we can trace in these centuries

<sup>1</sup> Cf. vol. v. part i. chaps. 7, 8.

the beginnings of that conception of the absolute authority of the prince which is characteristic of the seventeenth century. It is, however, evident that there is very little trace of this in the fourteenth century outside of the Civilians, and there is very little to indicate that these exercised any great practical influence on the political theory and institutions of the time outside of Italy.<sup>1</sup>

It seems to us that in the fourteenth century political theory continued to be very much the same as that of the thirteenth, while the constitutional forms and methods represented the more or less normal development of those which the political genius of the Middle Ages had slowly created.

<sup>1</sup> We wish, however, to draw the attention of students of Politics to the very interesting and important studies by Professor F. Ercole, primarily on Bartolus, but also on the relations between the political theories of Italian and French Civilians with regard to

the French King as possessing in his own country all the powers of the Emperor. These studies, originally published in various Reviews in 1915 and 1917, are now republished, along with others, in the volume entitled 'Da Bartolo all' Althusio.'

## PART II.

### FIFTEENTH CENTURY.

#### CHAPTER I.

##### THE SOURCE AND AUTHORITY OF LAW. CONSTITUTIONAL PRACTICE AND THEORY.

WE again begin with the consideration of this subject, for it seems to us clear that in the fourteenth century as in the Middle Ages the principle that the authority of law was derived from the community, and that the law was supreme, not only over subjects but over rulers, was still the foundation of all the normal political thought of Western Europe. We have now to enquire how far this principle continued to prevail in the fifteenth century.

It appears to us that some of the best illustrations of the constitutional conceptions of the fifteenth century are to be found in the proceedings of the Cortes of Castile and Leon.

Juan II. had, apparently, at the Cortes of Palencia in 1431, repudiated the constitutional provisions of the Cortes of Bribiesca (1387), by which laws were not to be annulled except by ordinances made in Cortes, and royal Briefs contrary to the laws were to be disregarded.<sup>1</sup> At Valladolid, however, in

<sup>1</sup> Cortes iii. 9, 19, p. 111 (Palencia, 1431): "Non embargantes qualesquier leyes fueres et derechos ordinamientos e constituciones . . . ca en quanto desto atanna yo lo abrogo e derogo, e especialmente las leyes que dizen quelas cartas dadas contra ley o fueno o derecho deuen ser obedesçidas e non conplidas, aunque contengan qualesquier clausulas derogatorias, e

1440, the Cortes asked the King to give orders that any Briefs issued in his name, which were contrary to the laws, should be disregarded, and the King assented.<sup>1</sup> A more detailed statement of this constitutional principle was made at Valladolid in 1442. The Cortes complained that the King (Juan II.) was permitting Briefs to be issued which contained "non obstante" clauses, and in which he appeared as issuing commands "of his certain knowledge and absolute royal power," and they request that such extravagant phrases should not appear in the royal Briefs, and that if they did so appear, the Briefs should be held as null and void, and that the secretary who inserted them should be deprived of his office. The King replied that the law made at Bribiesca should be observed, and that it was his will to command that in all cases between "partes e privadas personas" justice should be done according to law, notwithstanding any Briefs which contained abrogations or dispensations, general or particular, professing that they were issued "proprio motu," and with certain knowledge, and by the King's absolute power; and he ordered that none of his secretaries were to issue Briefs containing such extravagant phrases, on pain of losing their offices, and that if they did so, such Briefs should have no force.<sup>2</sup>

quelas leyes e fueros e derechos e ordinamientos non pueden ser reuocados salvo por Cortes.

Cf. p. 5.

<sup>1</sup> Cortes iii. 15, 14 (Valladolid, 1440): "Fazemos avuestra muy alta sennoria . . . dos peticiones . . . la secunda, que mande que en caso que sean dadas cartas o sobre cartas de vuestra altoza o se den de aqui adelante motu proprio o a instancia de otras personas quales quier en rreuocamiento o en quebrantamiento delas cosas sobre dichas por vuestra sennoria rrespondidas, o en algunt amenguamiento delas por primera e segunda o tercera jusion o mas, o con quales quier clausulas derogatorias que enellas se contengan, que sean obedescidas e non complidas sin

po na alguna delos quelas non cumplieren, e los que por virtud dellas fueron enplazados non sean tenudos de seguir los emplazamientos, e que por ello non incurran en pena alguna. . . . Aesto vos rrespondo . . . en caso que sean dadas mis cartas e sobre cartas . . . en rreuocamiento o en quebramiento delas cosas suso dichas por mi rrespondidas, o en algunt amenguamiento dellas por primera o segunda o tercera jusion e mas con quales quier clausulas derogatorias que en ella se contengan, que sean obedescidas e non complidas sin pena alguna delos quelas non cumplieren."

<sup>2</sup> Cortes iii. 16, 11 (Valladolid 1442): "Otrosy muy eccellente rrey e sennor por quanto enlas cartas que emanan de vuestra alteza se ponen muchas ex-

The same principle was affirmed in the Cortes at Valladolid in 1451<sup>1</sup>; and soon after the accession of Henry IV. we find the Cortes at Cordova in 1455 requesting that nothing should be done contrary to the laws and ordinances of the former kings, unless these had been revoked by the Cortes on the supplication of the representatives of the Kingdom.<sup>2</sup>

It is clear that the Cortes of Castile and Leon in the fifteenth

orbitancias de derecho, enlas quales se dize, non obstantes leyes e ordinamientos e otros derechos, que se cumpla e faga lo que vuestra sennoria manda, e quelo manda de cierta scioncia e sabiduria e poderio rreal absoluto, e que rrevoa e cassa e annulla las dichas leyes que contra aquello fazen o fazer pueden, por lo qual non aprouechan a vuestra merçet fazer leyes nin ordonanzas pues esta enpoderio del que ordena las dichas cartas rreuocar a quellas. Por ende muy virtuoso rrey e sennor, suplicamos avuestra sennoria que le plega quelas tales exorbitancias non se pongan enlas dichas cartas, e qual quier secretario o escrivano de camara quelas pusiere, por ese mesmo fecho sea falso e prinado del dicho officio, e quelas tales cartas non sean complidas e sean ningunas e de ningunt valor.

A esto vos rrespondo que mi merçet e voluntad es de mandar e mando que se guarde onesta parte la ley de Briuesca fecha por el Rey Don Juan mi avuelo . . . que fabla en esta rrazon, en qual quier cosa que sea o tanga entre partes e priuadas personas, non embargante que sobre ello se di segunda jusion nin otras quales quier cartas, e sobre cartas con quales quier penas e clausulas derogatorias o otras firmezas e abrogaciones ot derogaciones o dispensaciones generales o espeçiales, e aunque que se digan proçeder de mi proprio motu e çierta çciencia e poderio rreal absoluto, por que syn embargo de todo ello; toda via es mi merçet e voluntad quola justiça floresca, e sea guardado enteramente su derecho acada uno

e non rresçiba agrario nin perjuizio alguno en su justiça, para lo qual mando e ordeno que ningund mi segretorio o escrivano de camara non sea osado de poner enlas tales nin semejantes cartas exorbitancias nin clausulas derogatorias, nin abrogaciones nin derogaciones de leyes nin fueros nin derechos nin ordinamientos nin desta mi ley nin dela dicha ley de Briuesca, nin pongan enellas que proçeden nin las yo do de mi proprio motu, nin de mi çierta çciencia nin de mi poderio rreal absoluto . . . e el escrivano que firmare o librare contra esto qual quier carta o aluala o preuilegio que cayga enla pena dela dicha ley de Briuesca, que manda que pierda el officio e quela talo carta o alcuala o preuilegio en quanto ala tal exorbitacion o abrogacion o derogacion o otra qual quier cosa que contenga por donde se quite el derecho e justicia dela parte, non vala nin aya fuerça nin vigor alguno bien asy commo si nunca fuese dado nin ganado."

<sup>1</sup> Id., iii. 20, 13.

<sup>2</sup> Id., iii. 22, 21 (Cordova, 1455): "Suplicamos a vuestra merçed quelo plega mandar e ordinar que todas o quales quier leyes e ordenamientos quelos rreyes pasados dieren a vuestras çibdades e villas, que sean usadas e guardadas commo sy nuevamente fuesen ordenados, e que contra ellas non pueda ser alegado que en algund tiempo no fueren usadas e guardadas, salvo contra aquellas que fueren rrevocadas por cortes a suplicaciones delos procuradores del rreyno."

century maintained as strictly as those of the fourteenth, that the law was not the expression of the mere will of the King, but that, while it was the King's law, it required also the authority of the great men and of the representatives of the cities. The proper form of legislation is well illustrated in the first clause of the proceedings of the Cortes at Madrid in 1435. They refer to the laws and ordinances made by the King at Zamora, with the advice and consent of the great men of the Council, and of the procurators of the cities and villas of his kingdom.<sup>1</sup> We shall return to the nature and authority of the Cortes in a later chapter, but we think we have said enough to make clear the constitutional conception of the source and authority of law in Castile and Leon in the fifteenth century.

When we turn to the German Empire it is hardly necessary to say anything about the constitutional principles of legislation. We have, however, a very interesting and important general treatment of the source and nature of the authority of law by Cardinal Nicolas of Cusa, one of the most important thinkers of the fifteenth century.

In the Preface to the third Book of his treatise, 'De Concordantia Catholica,' he says that legislation belongs properly to those who are bound by the law, or to the greater part of them; for that which concerns all should be approved by all, and a man cannot excuse his disobedience to the law when he himself has made it. How much better it is that the Commonwealth should be ruled by laws than even by the best man or King; as Aristotle had said, when the laws are not supreme there is no "Politia." The Prince must therefore rule according to the laws, and is supreme only with respect to

<sup>1</sup> Id., iii. 12, 1 (Madrid, 1435): "Muy alto sennor, bien sabe vuestra alteza como en las leyes e ordinamientos que vuestra sennoria fizo en la cibdad de Çamora . . . con acuerdo e consejo delos grandes e muy honrrados sennores del vuestro muy alto consejo, e con los procuradores delas cibdades e

villas de vuestros rregnos que se acaesçieren enel dicho ayuntamiento, vuestra merced fizo e ordenó ciertas leyes e ordenanças para bien e pro comun e buen rregimiento e gouernaçion dela vuestra justiçia e dela rrepublica delos vuestros rregnos e sennorias."

Cf. Id., iii. 14, 1.

those matters which are not clearly defined by the laws. Any form of government, therefore, is just and "temperatus" whether Monarchical or Aristocratic, or controlled by all the citizens, if it is directed to the common good, and is in accordance with the will of the subjects; but it is "intemperatus" when it is directed to the good of the ruler, and is contrary to the will of the subjects.<sup>1</sup>

In another place Nicolas says that it is the general opinion of all experienced men that the power of making the laws of the Roman people could be taken away from the Emperor, as it was from the Roman people that he received this power. And, in yet another place, while he admits that the King has the right to interpret and to dispense with the law in doubtful cases, for the public good and to secure justice, he insists that this does not mean that he can annul the law without that

<sup>1</sup> Nicolas of Cusa: 'De Concordantia Catholica,' III., Preface (p. 354): "Legis autem latio, per eos omnes qui per eam stringi debent, aut majorem partem, aliorum electione fieri debet; quoniam ad commune conferre debet. Et quod omnes tangit, ab omnibus approbari debet: et communis definitio, ex omnium consensu, aut majoris partis, solum elicitor. Nec potest excusatio de obedientia legum sibi tunc locum vindicare, quando quisque sibi ipsi legem condidit: non est enim bona dispositio, bene leges poni, non obedire autem, ut dicit Aristoteles, quarto Politicorum, Cap. 7. Est itaque etiam eorum interpretari, quorum condere. His enim legibus regnum gubernare necesse est; amare enim et obedire omnibus insunt. Quare etiam melius pro republica extitit, legibus quam optimo viri regi, ut ex intentione tertio Politicæ, 9 Cap., hoc Aristoteles perquirens concludit, ac I. Rhetoricæ Cap. 1. Ubi enim non principantur leges ibi non est politia, ut quarto Politicæ 4 Cap. Statui autem oportet leges cum gravitate magna, ac digestæ multum per prudentiam, longa

experientia suffultam, ut, secundo Politicæ 2 Cap. dicitur. Oportet deinceps principantes esse pro legum observatione, quos primo secundum ipsas leges dominare oportet. . . . Et quanquam secundum leges princeps dominare debeat; tamen quia de his est dominus de quibus secundum leges nihil dicitur certitudinaliter, ut tertio Politicæ Cap. 6., ideo oportet eum esse prudentem, ut tertio Politicæ Cap. secundo, et quinto Ethicorum tractatu de justitia, ut epikeizare recto valeat per directionem legis ubi deficit propter particulare. Et tunc ipse omnis principatus, sive Monarchicus per unum, sive Aristocraticus plurium sapientum, sive Politicus omnium civium simul, et cujuslibet secundum suum gradum, quando secundum voluntatem subjectorum existit, ad communem tendens utilitatem, temperatus et justus dicitur, ut hæc per Aristotolem tertio et quarto Politicorum. Si autem præter voluntatem subjectorum, ad proprium tendens utilitatem principatus existit, intemperatus existit, ut tertio Politicorum capite quinto."

counsel with which it was issued, but only that he can declare the "ratio legis" in relation to some particular case.<sup>1</sup> We shall have occasion to discuss the principles of Nicolas of Cusa when we deal with the position of the ruler, and the source of his authority, but in the meanwhile it is important to observe that he is clear and emphatic in asserting that the authority of the law is derived from the community, and that it is the law which should be supreme, and not the Prince; his authority is related properly to those matters which are not determined by the law.

If we turn now to France, it must be acknowledged that it is difficult to find much direct evidence in the constitutional documents, about the theory of legislation. As we shall see later, we have a great deal of information about the representative assemblies of the whole kingdom, the States General, and the Estates of the various provinces, and the authority which they claimed or possessed, but we have not found much direct evidence about the formal methods of legislation. There is, however, one great legislative enactment, about the method of which we have direct evidence, that is the Ordonnance establishing the new military organisation of the "Gens d'Armes."

This Ordonnance was issued by the King at a meeting of the States General at Orleans in 1439, after representations made to the King by the members of all the three Estates of the Kingdom; and it was made with the deliberation and "advis" of the Princes of the Blood Royal, many Prelates and great Lords, and of the nobles and the men of the good cities.

We are not here properly concerned with the purpose and details of the Ordonnance, it is sufficient to notice its general

<sup>1</sup> Id. id., iii. 4 (p. 361): "Et hoc est commune omnium peritorum dictum, potestatem condendi leges populi Romani ab imperatore tollere posse, quoniam ab ipsis potestatem habet."

Id. id., iii. 12: "Et licet rex dispensare aut interpretare, nihilominus, ipsam sic conditam legem, in dubiis occurrentibus, pro bono publico, et ad

finem justitiæ, possit, per ἐπιείκτιαν virtutem: tamen hoc suo modo, sicut in Romano pontifice et canonibus supra dictum est, intelligi debet. Non quod rex tollere legem sic editam possit absque Concilio, quæ cum Concilio edita est, sed declarare rationem legis in occurrente casu.

character. Its immediate purpose was the disbandment of the companies of soldiers raised by many different persons, and the substitution for these of a body of soldiers raised by the command of the King, and under the command of officers appointed by the King. Its ostensible object, and no doubt a real one, was the prevention of the pillage of the people of France by the creation of a body of disciplined troops under the control of the Crown. We cannot here deal with the results of the creation of what was apparently intended to be a permanent royal military force. We are here concerned to observe that this highly important statute was issued by the King, not simply on his own authority, but after a meeting of, and representations from the States General.<sup>1</sup>

While, however, we may not be able to find many clear illustrations of the forms of legislation in France in the fifteenth century, we have, in the works of John Gerson, at one time Chancellor of the University of Paris, and the most important representative of the French Church at the Council of Constance, some very important statements of his conception

<sup>1</sup> 'Ordonnances,' vol. xiii. p. 306. Orleans, Nov. 2, 1439: "Pour obvier et donner remède à faire cesser les grands excez et pilleries faites et commises par les gens de guerre, qui par longtemps ont vesuec et vivent sur le peuple sans ordre de justice, ainsi que bien au long a esté dit e remonstré au Roi par les geus des trois estats de son Royaume, de présent estant assemblez en cette ville d'Orléans: le Roi par l'advis et délibération des seigneurs de son sang . . . plusieurs prélats et autres seigneurs notables, barons et autres, gens d'église, nobles et gens des bonnes villes, considerant la pauvreté, oppression et destruction, de son peuple ainsi détruit et fouillié par lesdits pilleries . . . et n'est pas son intention de les plus tolerer, ne soustenir en aucune manière, mais en ce, bon ordre et provision y estre mis et données, par le moyen et aide de Dieu nostre Créateur, a faict, constitué, ordonné et establiz, fait et establit pour loi et edict

général, perpetuel e non revocable, par forme de Pragmatique Sanction, les édicts, lois, statuts, e ordonnances qui s'ensuyvent.

(1) Premièrement. Pour ce que grands multitudes de capitaines ce sont mis sus de leur auctorité et ont assemblé grand nombre de gens d'armes et de traict, sans congé et license du Roi, dont grands maux et inconveniens sont advenus, le roi voulant bon ordre et disciplin être mises au fait de la guerre, et restraindre telles voyes, a ordonné que certain nombre de Capitaines de gens d'armes et de traict, sera ordonné pour la conduite de la guerre, les quels capitaines seront nommez e esleuz par le Roi, prudens et sages gens; et a chacun capitaine sera baillé certain nombre de gens qui par lui seront esleuz de fait ou office de capitaine de gens d'armes et de guerre; et leur deffend de plus eux nommer ne porter le nom de capitaine, sur les peines cy—après déclarées."

of the source and authority of law, and the relation of the King of France to it.

In the Tract entitled 'Regulae Moralis' we find him restating the important doctrine of Gratian that law is not instituted until it is promulgated, and that it has no force unless it is approved by the custom of those who are concerned (*moribus utentium*).<sup>1</sup> The same principle is repeated in a Tract, 'Liber de Via Spirituali Animae,' and Gerson points out that this means that the people have much authority in making and abrogating laws.<sup>2</sup>

More important, however, are Gerson's statements about the relation of the King to the Law when established. In the Treatise 'De Potestate Ecclesiastica,' he enumerates the forms of Government, which, according to Aristotle, are good, and he describes them all, the monarchy, the aristocracy, and the "Politia," as ruling according to Law.<sup>3</sup> In another place he says that the King of France had created the "Parlement," and did not hesitate to submit to its judgment.<sup>4</sup> In yet another place he maintains that even the King cannot slay any man except by process of law.<sup>5</sup> And again, in terms

<sup>1</sup> Gerson *Regulae Moralis*, Opera, vol. 1, Part II., col. 10 "Lex non instituitur nisi etiam promulgatur, neque vigorem habet nisi cum moribus utentium approbatur."

<sup>2</sup> Id. 'Liber de Via Spirituali Animae,' Opera, vol. II part II. col. 209 "Praeterea positum est in decretis di. IV. (Gratian Decretum D. 4) quod leges instituuntur cum promulgantur, firmiter cum moribus utentium approbantur. Igitur per argumentum a contrario sensu: si moribus utentium nequaquam approbantur, illae nullum habent firmiter, et ita populus habet multum in sua potestate dare robur legibus aut tollere, praesertim ab initio."

<sup>3</sup> Id., 'De Potestate Ecclesiastica,' Opera, vol. I part I, Consideratio XII. col. 138 "Describitur regnum quod est politia sub uno bono. Vel expressius quod est congregatio

communitatis perfectae sub uno, secundum leges suas bonas pro republica . . . Describitur aristocratia quod est politia sub paucis bonis, vel expressius quod est congregatio communitatis perfectae sub paucis bonis republicae per leges suas principaliter intendentibus, ut senatus. Describitur politia appropriato nomine seu Timocratia quod est congregatio communitatis perfectae sub plurimis utilitati republicae per leges suas principaliter intendentibus."

<sup>4</sup> Id., 'Sermo pro viagio Regis Romanorum,' Opera, vol. I. part I. col. 152 "Ubi rex instituit parlamentum, a quo iudicari non refugit."

<sup>5</sup> Id., 'Summa Eiusdem contra Mag. Ioannem Parisiensem,' Opera, vol. I. part I col. 399. "Sicut est rex, qui quidem non posset sine iuris ordine, non montum, non vocatum, non convictum interficere

which remind us of Bracton, Gerson urges upon every Prince and Prelate that even if he is said to be "legibus solutus," he should follow the example of Jesus, who accepted the Law of Circumcision, and should submit to the laws which he had made, both as an example to his subjects, and as showing his reverence to God.<sup>1</sup>

We find that the same principle, of the relation of the King of France to the Courts of Law, is expressed by Gerson's great contemporary, Peter d'Ailly, the Archbishop of Cambrai. In discussing the question whether the Pope should submit to the judgment of a General Council, and the saying "Major non iudicatur a minore," he continues that this was not always true, for the King of France, who was "major et superior" in his kingdom, was frequently in certain cases judged by his own "Parlement," and judgment given against him.<sup>2</sup>

We shall have more to say about Gerson's conception of the nature of Kingship in a later chapter, but we think that his statements about the relation of the King of France to the law, and his great Court of Law, the Parlement of Paris, are very important.

It is hardly necessary to set out again the evidence as to the general constitutional principles of the source and authority of law in England in the fifteenth century.<sup>3</sup> We must, however, consider briefly the treatment of this subject by Sir John Fortescue, for his works are important not only in themselves, but as illustrating the continuity of political thought. We must not indeed assume that his judgments corresponded

<sup>1</sup> 'Sermo in die circumcisiones Domini,' Opera, vol. I part I. col. 240, 41 "Ad apparentem gratiam Dei in circumcissione humilis pueri Iesu, princeps et prelatus quilibet, et si dicatur solutus legibus, pati debet legem quam ipse tulerit, tum pro subditorum exemplo, tum pro reverentia praestanda Deo, ut appareat gratia Dei in eo, et non secularia desideria videantur dominari"

<sup>2</sup> Peter d'Ailly 'De Ecclesiae et Cardinalium auctoritate,' part

III cap. IV. col. 931 "Ad hanc autem rationem respondetur primo quod maior rationis, licet regulariter sit vera, tamen quandoque fallit. Nam Rex Franciae, qui est major et superior in toto regno saepe in aliquibus casibus iudicatur, et contra eum fertur sententia in suo Parlamento"

<sup>3</sup> Bishop Stubbs has discussed this with great care in his 'Constitutional History.' Cf. especially, vol. III. edition 1891, sections 364, 365, 439 441.

completely with all the actual conditions, in England or elsewhere, but it is even further from the historical reality to imagine that they express an eccentric opinion.

We have three important treatises by Fortescue: 'De Natura Legis Naturae,' 'De Laudibus Legis Angliae,' and the 'Governance (or Monarchy) of England,' and they represent the same general principles.

Fortescue cites as from St Thomas Aquinas' 'De Regimine Principum,' ii. 8, 19 (but this part of the work is not by St Thomas, but probably by Ptolemy of Lucca<sup>1</sup>), and from Egidius Romanus, the description of the two forms of government, the "dominium regale" and the "dominium politicum." The ruler who has the "dominium regale" governs according to laws which he has himself made, while the ruler who has the "dominium politicum" governs according to laws made by the citizens.<sup>2</sup>

Fortescue, however, adds that there is a third form of "dominium" which is "politicum et regale," and he gives as an example of this, the Kingdom of England, where the King cannot make laws without the consent of his three Estates, and the judges are bound by their oaths to give judgment according to the law of the land, even if the King were to command the contrary; while on the other hand the people cannot make laws without the authority of the kings, who succeed each other by hereditary right.<sup>3</sup>

<sup>1</sup> Cf. vol. v. p. 24.

<sup>2</sup> Fortescue, 'De Natura Legis Naturae,' i. 16.

<sup>3</sup> Id., 'De Natura Legis Naturae,' i. 16: "Sed et tertium esse Dominium non minus his dignitate et laude, quod politicum et regale nominatur, nedum experientia et veterum historis edocetur, sed et dicti Sancti Thomae doctrina edoctum esse cognoscimus. In regno namque Angliae reges sine trium Statuum regni illius consensu leges non condunt, nec subsidia imponunt subditis suis; sed et iudices regni illius, ne ipsi contra leges terrae, quamvis mandata principis ad contrariam auferant, iudicia reddant,

omnes suis constringuntur sacramentis.

Numquid tunc hoc dominium politicum, id est plurimum dispensatione regulatus dici posset, verum etiam et regale dominium nominari mereatur, cum nec ipsi subditi sine regia auctoritate leges condere valeant, et cum regnum illud, regiae dignitati suppositum, per reges et eorum heredes successive hereditario jure possideatur, qualiter non possidentur dominia aliqua politice tantum regulata."

Cf. for the position of the judges 'De Laudibus Legum Angliae,' 51: "Justiciarius iste inter cetera tunc jurabit, quod justiciam ministrabit indifferenter omnibus hominibus coram

Fortescue deals with this subject again in other terms in the treatise 'De Laudibus,' and contrasts the character of English Constitutional Law with that of the Roman Law, and its doctrine, "Quod Principi placuit legis habit vigorem," and with the "Regimen Regale" of the King of France<sup>1</sup>; and again, in the "Governance of England," where he suggests that the earliest kings possessed the "Dominium Regale," and that such a government might have been good under good Princes, but when men grew more civilised (mansuete) and more disposed to virtue, great communities grew up such as that of those who came to England with Brutus, and incorporated and united themselves into a realm which should be governed by such laws as they should agree upon.<sup>2</sup>

We have thus so far found nothing to suggest that the conception of the source and authority of law was different in the fifteenth century from that of the fourteenth century. The law proceeded from the Prince, no doubt, but it was from the Prince acting with the community. We have indeed observed in the proceedings of the Cortes of Castile and Leon reference to the use by the kings of such phrases as "motu proprio," or "of his certain knowledge and absolute power," but we have also seen that the Cortes emphatically and repeatedly protested against the use of such extravagant phrases, and that the kings repeatedly agreed that they were not to be used in the royal Briefs. The law, not the King, was supreme.

eo placitantibus, inimicis et amicis, nec sic facere differet etiamsi rex per literas suas, aut oretenus, contrarium jusserit."

Cf. for relation of Parliament to legislation, 'De Laudibus,' 18.

<sup>1</sup> Id., 'De Laudibus,' 9, 34.

<sup>2</sup> Id., Governance of England II.: "But afterwards when mankynd was more mansuete and better disposed to virtue, grete comunalties, as was the felowshippe that came into this lande with Brute, wyllynge to be united and

made a body politike called a Reaume havyng an hed to govern it . . . than they chese the same Brute to be their hed and kynge. And thai and he upon this incorporation and institution, and onynge of themselves into a Reaume ordeyned the same Reaume to be ruled and justified by suche lawes as thai all wolde assent unto; which lawe therefore is called 'Politicum.' And because it is ministred by a kyng, it is called 'Regale.'"

## CHAPTER II.

THE SOURCE AND AUTHORITY OF LAW.  
CIVILIANS AND CANONISTS.

WE have so far considered this subject as it is illustrated in the constitutional documents, and in some of the political writers of the fifteenth century. We must now, however, turn to a body of literature whose traditions were very different, that is, to the work of the Civilians.

They, indeed, like the Constitutional lawyers, accepted the principle that it was from the community that all legislative authority was immediately derived. The Civilians, however, also, and naturally, as they were interpreting the law of the Roman Empire, conceived of this legislative authority as having been conferred by the Roman people upon the Emperor. This conception, as we hope we have made clear, was wholly alien to the normal political theory of the Middle Ages.

We must, however, always bear in mind that, while all the Civilians had accepted the principle that the Roman people had conferred the legislative authority on the Emperor, the Civilians of the twelfth and thirteenth centuries had been sharply divided on the question whether, in doing this, they had completely and permanently alienated the legislative power from themselves, or whether they could, if they wished, still resume it. And especially they were divided upon the question whether, and how far, the custom of the people retained its authority.<sup>1</sup>

We have considered the position of the Civilians of the

<sup>1</sup> Cf. vol. ii. pp. 59-67, and vol. v. p. 66.

fourteenth century with regard to these questions in the first Part of this Volume, we must now consider how far there was any important development in the Civilians of the fifteenth century.

The first question we have to discuss is whether these fifteenth century Civilians thought that the Roman people had conferred its legislative power upon the Emperor in such a sense that they had finally and completely lost this, or whether they thought that the Roman people still retained their power of legislation or could resume it.

There is an interesting and important passage in a Commentary on the Institutes, written by Christophorus Porcius, a Jurist of the middle of the fifteenth century, which raises the question very sharply. He is commenting on the words, "Sed et quod Principi placuit legis habitu vigorem," &c., and points out that the gloss indicated that there were two opinions among the Civilians, the one, that the Roman people could not now establish a "general law," the other that it could still do so. The first opinion was held, Porcius says, by Bartolus, and commonly by the "Citra Montani," the second by the "Ultra Montani." The latter was the opinion which Porcius himself preferred, and he gives reasons for this. He cites various texts from the Corpus Juris, and especially urges that the Roman people could create a "general custom," and could therefore establish a "general law," and that the Roman people had not transferred (non transtulit) its jurisdiction to the Emperor, but had only granted (concessit) this to him; the word "concessit" signifies the "translatio usus"; not "dominium," and the people can revoke this. He adds that while they had granted jurisdiction to the first Emperor, this did not mean that it went necessarily to his successor, and the fact that the Emperor was now elected by the German Princes, and confirmed by the Pope, did not destroy the right of the Roman people to revoke the election of the Emperor.<sup>1</sup>

<sup>1</sup> Christophorus Porcius: Comm. non possit condere legem generalem, et on Institutes, i. 2, 6: "Sed et quod hanc sententiam tenuit gl. in l. non principi. . . . In fi. glos. in verb. ambigitur ff. De Legibus (Dig. i. 3, 9). concessit, colligitis duplicem opinionem. Quam opinionem sequuntur Bartolus Primam, quod populus Romanus hodie et communiter citra montani. . . .

Whatever may be the more immediate source of the opinion of Porcius, it is clear that it represents the survival of the conceptions of Azo and Hugolinus and Odofridus, which we have discussed in earlier volumes.<sup>1</sup>

His reference to the "Ultramontani" as having held this opinion and the "Citramontani" as maintaining the other is very interesting, but presents us with considerable difficulty. In the meanwhile we must consider what light may be thrown upon it by an examination of other Civilians of the fifteenth century. We begin with the conception of the legislative authority of the Roman people. Bartholomew de Saliceto, a Civilian of the last years of the fourteenth and the early years of the fifteenth century, cites Jacobus Butrigarius, an important Civilian of the fourteenth century, as maintaining that the Roman people could still revoke the authority which they had conferred upon the Emperor, and that they thus possessed the power of legislation. Saliceto himself does not agree with Butrigarius, for the election of the Emperor, he says, now belongs to the German Princes, and his deposition to the Pope, and therefore the Roman people could not now make a "general law," even during the vacancy of the Empire, for

Contrariam sententiam, s. quod populus Romanus hodie possit condere legem generalem, videtur hic tenere gl. et aptrus, in l. fi. c. De Legibus (Cod. I. 14, 12), et hanc sententiam tenuerunt ultra montani, quorum opinio mihi placere consuevit, et in eam sum proclivior. Primo per tex rotundum in l. non ambigitur ff. De Legi (Dig. 1. 3, 9). Secundo per l. nova c. de Of. Praetoris, Tertio, rationem, nam populus Romanus potest inducere consuetudinem generalem, l. de quibus ff. de legibus (Dig. 1. 3, 32) ergo et statuere legem generalem, arg. l. cū. quid, ff. c. cer. pet. (i). Quarto quia populus Romanus non transtulit omnimodam jurisdictionem in imperatorem, sed illam sibi concessit, ut in d. l. 1 ff. de const. principum (Inst. I. 2, 6), quod verbum, concessit, significat transla-

tionem usus, non dominium . . . ergo potest quemcumque revocare . . . Denique quia licet populus Romanus concessit primo imperatori jurisdictionem, eo mortuo non est acquisitum suo successore. . . . Vel responditur ut in glo non obstat, quod populus transtulerit, quia respondeo quod illa verba sunt exponenda, i. concessit, per hunc textum in l. 1 de constitutionibus principum (Inst. 1. 2, 6), . . . non obstat quod eligitur a domnis de Alemania et confirmetur per Papam, quia huiusmodi electio, et Papae confirmatio facta in iure communi, non videtur tollere jus alterius xii Dist. c. praeceptis (Gratian Decretum D. xii 2) unde non videtur tollere jus populi Romani revocandi imperatorem."

<sup>1</sup> Cf. vol. II. pp. 59 67, vol. V. p. 66.

the power of doing this had passed to the Church or the Pope.<sup>1</sup>

Paulus de Castro, one of the most important Civilians of the fifteenth century, interprets the action of the Roman people in conferring the authority upon the Emperor by the "lex regia," in the same way as Porcius, that is, he describes it as a "concessio" rather than a "translatio," and therefore, he says, the Roman people could, before the coming of Christ, have revoked the "lex regia" and deposed the Emperor. But, with the coming of Christ, this was all changed, for the Empire was then transferred to the Church, and only the Pope could confirm and crown the Emperor, or depose him, for the Church holds the Temporal as well as the Spiritual sword. It is evident that Paulus is stating the extreme Papalist theory, but we are not here concerned with this. In another passage he sets out his principle in direct terms: the Roman people cannot now make a law or create a "general custom."<sup>2</sup> It is possible

<sup>1</sup> Bartholomæus De Saliceto: Comm. on Code I. 14, 12. "Opp. quod non soli imperatori liceat legem condere, quia etiam populus Romanus potest . . . item, non obstat, videlicet, quod hic non dicitur solum per adverbium sed etiam per nomen, ad denotandum quod nullus alius potest nisi solus princeps: nam populus constat ex personis pluribus . . . item non obstat quod populus non possit hodie quia omnem potestatem populus transtulit in principem . . . Jac. Butrigarius videtur velle quod posset, potestatem principi concessum revocando, quod asserti posse, quia per viam legis regiae transtulit . . . igitur per contrariam legem revocare posset . . . concludit, quod imperium ad se populus Romanus revocare posset. Haec opinio forte olim tolerari poterat, sed hodie non toleratur, cum electio imperatoris spectat ad principes de Alemania, et jus privandi eum spectat ad Papam, ut extra de re iudicata C. ut apostolicae, et sic cum populus imperio et potestate imperatoris non habeat se impedire,

videtur, quod nec legem generalem possit condere, et etiam vacante imperio, quia tunc donec electio sit facta, succedit ecclesia, seu papa."

Cf. Joannes de Imola. Comm. on Decretals 1. 7, 1.

<sup>2</sup> Paulus de Castro: Comm. on Digest 1. 3, 9 ("Non ambigitur"). "Ex quo patet quod illa (lex regia) fuit magis concessio quam translatio, ut patet in I. l. 1. ti. in verb. concessit (Inst. 1. 2, 6); per quam non abdicatur substantia, ut in concedente, sed transfertur usus. . . . Sed expone, quantum ad usum non quantum ad substantiam. Et ideo dico quod populus Romanus ante adventum Christi poterat revocare legem regiam, et ea revocata privare imperatorem, quia non poterit sibi imponere legem a qua recedere non poterit . . . Secundo, potest intelligi post adventum Christi, et tunc dico quod imperium Romanum fuit a populo Romano translatum in ecclesiam et non remansit nisi nomen, et dicitur imperium Christi vel ecclesie, et solus Papa potest ipsum privare,

that in this last passage he is referring to the actual people of the city of Rome. These Jurists then seem clearly to hold that the Roman people had no longer any general legislative authority.

We turn to the question of the nature of the legislative authority of the Prince. Paulus de Castro, commenting on the words "Quod Principi placuit," &c., says that though the Prince, when making laws, ought to consult the "periti," his laws are valid even though he has not done so, and in his Commentary on the Code he repeats emphatically that the Prince can make laws by his own authority, and without the Counsel of the "Proceres," and he explains the terms of that rescript of Theodosius and Valentinian which seemed to require some consultation of the Senate, as expressing, not necessity but "humanitas."<sup>1</sup> Jason de Mayno, one of the most important Civilians of the later part of the fifteenth century, says the same.<sup>2</sup> We have pointed out that some of the great Civilians of the twelfth and thirteenth centuries,

sicut confirmare et coronare . . . Et iurat sibi fidelitatem; nam apud ecclesiam est uterque gladius temporalis et spiritualis. . . . Nihil concludo potest hodie populus Romanus in imperio."

Cf. Paulus · Comm on Digest 1 3, 32: "Hodie secus, quia imperium non est apud populum Romanum nec ab eo recognoscitur; et sic hodie non potest legem facere sed est apud Romanam ecclesiam. Et ideo non potest introducere generalem consuetudinem."

Cf also Antonus de Butrio, a Canonist of the late fourteenth century, Commentary on Decretals 1. 2, 3 (fol. xii). "Sicut originaliter princeps reciperet potestatem a populo Romano, tamen hodie potestatem jurisdictionalem recognoscit a Papa . . . quia in eo vera erat habita potestas utriusque juris . . . Romanus populus non posset revocare potestatem imperii, quia non habet potestatem illam a

populo sed a Papa. Solus ergo imperator habet potestatem legis universalis condendae, populus autem non, vel senatus, nisi quatenus permitteret princeps."

<sup>1</sup> Paulus de Castro Comm on Digest i. 4, 1 "Quod principi placuit. Nota hic in verbo placuit quod licet in legibus condendis debet adhiberi consilium peritorum, ut in l. humanum Cod. De Leg (Cod I. 14, 8) . . . Si tamen non requiritur, valet, quia sufficit quod ita placuit legislatori."

Id, Comm. on Code I 14, 12. "Imperialis (2) Nota quod imperator solus etiam sine consilio procerum potest legem condere et sic illud quod dicitur in l. humanum (Code I 14, 8), non est necessitatis sed humanitatis ut debeat adhibere consilium procerum"

Cf Bertachinus Repertorium Juris, vol iii. fol 10

<sup>2</sup> Jason de Mayno. Comm on Digest i. 21 (fol. 25).

and specially the author of the Summa Trecensis (Irerius?), Roger and Azo, had maintained that the Emperor must, when making laws, follow the method prescribed in Code I. 14, 8, while Bulgarus maintained the opposite.<sup>1</sup>

More important, however, are some statements of Jason de Mayno, with regard to the relation of the Prince to the laws when made. In his Commentary on the Digest he cites Baldus as having said in his treatise on Feudal Law, that the Prince has "plenitudo potestatis," and that when he wills anything "ex certa scientia" no one can ask him why he does it, and in another place again he cites Baldus, as having said that the Pope and the Prince can do anything "supra jus et contra jus, et extra jus." In his Commentary on the Code, Jason cites Bartolus, as having said in one of his "Consilia" that when the Prince does anything "ex certa scientia" he removes all legal obstacles.<sup>2</sup> The impression produced by these passages is only confirmed by Jason's observation on the well-known rescript of Theodosius and Valentinian, "Rescripta contra jus elicita a iudicibus praescribimus refutari" (Cod. I. 19, 7). This does not mean, Jason says, that the Prince had not authority to issue such rescripts, but only that, as there might be a doubt whether they had not been obtained from him "per importunitatem," when the Prince issues such a rescript, he should add a "non obstante" clause.<sup>3</sup> It is, however, true that the effect of these passages is to some extent modified by

<sup>1</sup> Vol ii pp. 67-70.

<sup>2</sup> Jason de Mayno Comm on Digest i. 4, 1. "Et dicit Baldus in Prelud. Feud in xii. col.: 'Quod in principe est plenitudo potestatis et postquam aliquid vult ex certa scientia nemo potest ei dicere, cur facis ista . . . Alibi dicit Baldus, quod Papa et Princeps ex certa scientia super jus et contra jus et extra jus omnia possunt.'"

Id, Comm. on Cod I 19, 1 (fol 40, v.) "Licet servilis . . . quinto . . . confirmo quia quum princeps aliquid facit ex certa scientia, tollit omne obstaculum juris, secundum Bartolum, in consilio quod incipit Civitati Cam

erini"

<sup>3</sup> Id, Comm on Code I. 19, 7 "Rescripta. . . . No. primo regulam, quod rescripta, contra jus impetrata, non debent per iudices observari . . . Sed numquid ista regula procedat ex defectu potestatis principis, quia non possit, vel ex defectu voluntatis.

Baldus . . . et Paulus . . . dicunt quia ex defectu voluntatis, quia non presumitur principem aliquid velle, quod sit contra jus, et si aliquid concessit, presumitur per importunitatem concessisse et ideo si princeps vellet, posset rescribere contra jus, adiecta clausula non obstante"

another citation which Jason makes from Baldus: it is sacrilegious to dispute about the authority of the Prince, but it is lawful to discuss his knowledge and intention, for the Prince sometimes errs; it is always to be presumed that the Prince desires what is just and true, and he wishes his actions to be controlled by the justice of heaven and the Courts of Law (poli et fori).<sup>1</sup> It would seem then that these Civilians were clear that the Roman people had no longer any legislative authority in the formal sense, while the Emperor had an absolute and unconditional authority in relation to positive law.

There are, however, certain aspects of the relation of the Prince to Law, which require a separate treatment and first, we must consider his relation to Custom, and here we must take account of the Canonists as well as of the Civilians.

John of Imola, who was both Civilian and Canonist, says first that "Consuetudo" may be called that form of law which is established by the "mores" of him who has the power of making law, and that it does not require the knowledge or consent of the Prince; but he adds that this was so because the Pope permitted the development of a custom even if contrary to the law, if it were reasonable, and had a sufficient prescription, and he refers to the terms of the Decretal of Gregory IX. on which he is commenting. He adds that the Emperor had also permitted this by the law "omnes populi" (Digest i. 1, 9), and, therefore, custom did not require the knowledge or consent of either Pope or Emperor, in order to be valid.<sup>2</sup>

<sup>1</sup> Id., Comm. on Digest i. 4, 1 (fol. 25). "Tamen adverte quod licet de potestate principis sacrilegium sit ut dixi, disputare, de scientia et voluntate principis licitum est disputare, quia princeps quandoque errat, l. 2 ff. De Sup leg secundum Baldum hic qui etiam subdit quod in principe nunquam aliquid presumitur placere, nisi quod justum et verum sit et princeps vult actus suos regulari a justitia poli et fori"

<sup>2</sup> John of Imola Comm on Decretals i. 4, 11 "Potest dicere ut hic

Jo, quod consuetudo est jus quoddam moribus illius inductum qui jus condere potest, habens vim legis . . . Nam non videtur requiri consensus vel scientia principis Nam Papa hic permittit consuetudinem induci etiam contra jus, dummodo sit rationabilis et prescripta, et sic non requiritur aliter consensus vel scientia ejus Et similiter imperator concedit potestatem condendi statuta, et consequenter consuetudines in l. omnes populi (Dig i. 1, 9) et ideo non requiritur ejus consensus vel scientia"

Bertachinus, in his 'Repertorium' or Dictionary of Law, of the later fifteenth century, cites various emphatic phrases about the authority of custom. Custom and statute have equal authority, a general custom creates the "Jus Commune," a custom of such antiquity, that there is no memory to the contrary, has the force of a "Privilegium" of the Prince; the Emperor is "solutus legibus," but he is not "solutus moribus et ratione," he is bound to maintain the "consuetudines."<sup>1</sup>

That great Canonist of the early fifteenth century, Zabarella (generally referred to as "the Cardinal") treats the subject of the source and authority of Custom at some length, but with such caution that it is difficult to arrive at any certain conclusion. He is commenting upon the Decretal of Pope Gregory IX. (Decretals i. 4, 11). Some people had maintained that it was only in former times that custom could make or abrogate law, while others maintained that it did not follow because the people could not now make "law" that they could not make custom. He cites Gul. de Cuneo as maintaining that while the power of making "law" had been transferred to the Prince, the power of making custom neither had been, nor could be transferred. Zabarella does not indeed agree with this last contention, but he is convinced that at least in the case of Canon Law, custom would in some cases prevail against a canon without the consent of the Prince (*i.e.* the Pope).<sup>2</sup>

<sup>1</sup> Bertachinus, 'Repertorium Juris,' vol. i. fol. 471, v.: "Consuetudo et statutum aequiparantur. . . . Consuetudo generalis facit jus commune. . . . Consuetudo tanti temporis quod non sit memoria in contrarium habet vim privilegii principis. . . . Consuetudo habet vim constitutionis"

Vol. iii. fol. 10, r. "Imperator est solutus legibus . . . sed de equitate debet vivere legibus . . . non tamen est solutus moribus et ratione" . . . Fol. 12, r "Imperator tenetur servare consuetudines suas"

<sup>2</sup> F. Zabarella Comm on Decretals I iv 11 (fol 86): "Quidam ergo, ut refert Inno dicunt quod consuetudo

habebat hanc auctoritatem olim quum populus condebat legem . . . nam cum legislatoris suffragio leges scribantur, ejus etiam tacito consensu abrogantur. . . . Hanc opinionem aliqui improbant, quia etiam, praesupposita illa opinione, quod hodie populus Romanus non possit legem condere, non per hoc inferitur, idem esse de consuetudine, nam de permissione legis procedit, quod consuetudo valeat etiam ad tollendam legem, si consuetudo est rationabilis et prescripta, ut hic inde dicit Gul de Cuneo in l de quibus (Dig i. 3, 32) quod licet in principem sit translata potestas condendi legem, non est translata potestas inducendi con-

Another great Canonist of the fifteenth century, Nicolas de Tudeschis, who is generally known as Panormitanus, sets out very clearly the superiority of custom over Positive Law, if it has prescription and is "rational," while it is invalid if it lacks "reason." He maintains that it was thought (by some) that custom could only be created with the knowledge of him who can make law, but he cites the opinion of John (?) as maintaining that the knowledge or counsel of the Pope was not necessary for the creation of custom, otherwise it would rarely or never come into being.<sup>1</sup>

Yet another very important Canonist of the same century, Turrecremata, deals in considerable detail with the whole question of the nature and authority of law, in his Commentary on the Decretals of Gratian. It is natural that his treatment of the nature of law has something of the breadth and scope of Gratian's treatment of the subject. He was also greatly

suetudinem, nec transferri potuit, quum surgit ex tacito consensu, quod tenet Bart. l. quae sit longa consuetudo, l. secunda in repetitione (Cod. viii. 52).

Haec ratio non urget, quoniam potent hodie induci consuetudo, interveniente tacito consensu principis; nec potest esse translata iurisdictio in principem, quin etiam sit translata potestas consuetudinis inducendae, quum sit jus ex quo legantur subditi, et pro lege servate ut in diffinitione consuetudinis. . . .

Secundo, solvit Inno, quia leges, quae dicunt quod consuetudo est abrogatrix legum etc loquuntur de legibus municipalibus, quas sibi quisque populus statuit, quas etiam contraria lege vel consuetudine potest tollere, secus in lege imperiali quae solum lege imperiali tollitur. Tertio solvit Inno quod leges primae loquuntur de consuetudine generali, quae ex certa scientia legislatoris s. principis inducitur. . . . Quinto, solvit Inno, distinguendo, an consuetudo praecesserit legem, et tunc lex ei derogat, an e contrario, et tunc ipsa derogat legi, nisi lex consuetu-

dinem prohibeat, ut in usuris et reverentia. . . . (fol. 87) Ex hoc inferitur quod consuetudo ecclesiastica non potest induci contra legem canonicam, sine tacito consensu Papae, sicut et nemo citra Papam potest statuere contra canones. . . . Dic verus quod aliquo casu contra canonem potest valere consuetudo, sine consensu tacito principis."

<sup>1</sup> Panormitanus Comm on Decretals I iv. 11 (vol. i fol 103) "Nota in § licet, quod consuetudo praevalet juri positivo, si est rationalis et praescripta, e contrario consuetudo ratione carens non derogat juri, et ratio est quia consuetudo, cum sit quoddam lex, debet habere rationem in se, alias non est lex. . . . Si ergo amittit substantialia legis, non potest praepjudicare legi. . . . (fol 105) Quarto, requiritur, quod consuetudo sit inducta sciente illo qui potest condere. Sed Joannes. . . . tenet quod consensus Papae seu scientia non requiritur ad consuetudinem induendam, alias raro vel nunquam induceretur consuetudo."

influenced by the profound treatment of the subject by St Thomas Aquinas. We shall discuss his general conception of political authority in another place, here we are concerned with an important passage in which he treats the relation of law to custom.

We may, he says, consider the authority of law from two points of view, the "firmitas auctoritatis" and the "firmitas stabilitatis." Laws derive the first from the authority of the legislator, the second from its correspondence with the conditions and customs of those who are subject to it; and laws are therefore void unless are confirmed by their custom.<sup>1</sup> We must, however, observe that in a later passage he seems to maintain that, even when the multitude has not the power of making law, its custom obtains the force of law, but subject to the condition that this is allowed by those who have the authority of imposing laws on the multitude.<sup>2</sup>

We have considered these references to the relation of law and custom, because the subject is one of great importance, but we think that while the jurists are conscious of the great importance of the question it is not easy to derive from them clear and complete conclusions.

There is, however, another conception of the relation of the Prince to the Law, of which we must take account, and with regard to which there is a general agreement among the

<sup>1</sup> Turrecremata Comm. on Gratian Decretum D iv part iii. (p 64) "Leges instituuntur. . . . Respondeo notandum, quod dupliciter possumus de firmitate legum loqui, aut de firmitate auctoritatis, aut de firmitate stabilitatis. Si de firmitate auctoritatis, istam habet lex ab instituyente, a quo robor et auctoritatem suscipit. Si vero loquamur de firmitate stabilitatis, istam habet lex ex convenientia et aptatione ad mores subditorum. Quia enim ut dictum est in C. erit autem lex (Gratian Decretum D iv 2), oportet quod lex sit possibilis secundum naturam, secundum consuetudinem,

loco temporisque conveniens, dicimus quod leges firmitate stabilitatis et permanentiae, quum moribus utentium approbantur, sive cum moribus subditorum leges adaptantur. Deficiunt autem, tolluntur et abrogantur quum utentium moribus non conformantur."

<sup>2</sup> Id id, D xi 1 (p 121). "Si vero multitudo non habeat liberam potestatem condendi sibi legem. . . . nihilominus tamen ipsa consuetudo in tali multitudine prevalens optinet vim legis, in quantum tolleratur per eos ad quos pertinet multitudinis legem imponere."

Civilians. This is the conception that the Prince is bound by any contract which he has made with his subjects. We have dealt with this as it appears in the Civilians of the fourteenth century, but it has also an important place in the fifteenth century.

John of Imola, in one place, says that while the Emperor and the Pope are not bound by "positive" laws, they are bound by the divine and natural law, and therefore by their "Contract," for this is founded upon natural law. And in another place the Prince is bound by a contract with his subjects, "naturaliter," though not "civiliter."<sup>1</sup>

Paulus de Castro, also, sets out the same general principle, and cites Cynus as having said that if the Prince makes any contract with his subjects he is bound to keep it, just like any private person, and that this also applies to his successor; and he also cites Bartolus as having said that when a Statute passes into a contract, it cannot be revoked by those who made it.<sup>2</sup>

Franciscus Accoltis, while asserting in the same way that the Prince was bound by his contract with his subjects, repudiates emphatically the opinion which he attributes to the "Doctors" (we have just seen that it was held by John of Imola) that the Prince was only bound "naturaliter" and not "civiliter," and he cites Baldus as having maintained the same opinion as himself.<sup>3</sup>

<sup>1</sup> John of Imola: *Commentary on Decretals* i. 2, 2 (fol. 13): "Item adverte quia licet Papa et Imperator non ligantur suis legibus positivis . . . tamen ligantur lege Divina et naturali. . . . Et per predicta patet quod Papa et Imperator etiam suo contractu ligantur. quia etiam jure naturali id proceditur."

Id. id., ii 19, 1 (Ex Epistola), fol. 54: "Nota quod ex contractu principis cum subiecto, princeps obligatur saltem naturaliter. Civiliter eum obligari non videtur quum illa descendat ex legibus quibus est solutus."

<sup>2</sup> Paulus de Castro *Comm. on Cod.* i. 14, 4 (fol. 26): "Ultimo, per

istam legem determinatur duo. Primo secundum Cynum quod si princeps facit aliquem contractum cum subditis, debet illud observare et non rumpere, vel frangere, vel contravenire, sicut quilibet alius privatus, et eodem modo eius successor observare tenetur, quum afficit ipsam dignitatem cujus ipse est administrator.

Per hoc etiam determinat Bartolus in l. omnes populi (Dig. i. 1, 9) quod quum statutum transit in contractu non potest a statutibus revocari." Cf. pp. 15 and 19.

<sup>3</sup> Franciscus Accoltis. *Comm. on Decretals* ii 19 (fol. 49). "Ex Epistola. Nota primo secundum Doc.:

Bertachinus says simply, the Emperor can revoke a "Privilegium" given by his predecessors, unless he received money for it, but he cannot revoke his contract, and cites Cynus and Bartolus.<sup>1</sup>

Jason de Mayno sets out the same principle with some important distinctions. He treats the making of a contract by the Prince as one of the modes of legislation, for his contract has the force of law; and he cites Bartolus and Paulus, as holding that it has even more force than the Law, for though the Prince is not bound by the Law, he is bound by agreement and contract, which belong to the "jus gentium"; and he cites Baldus as saying that the Pope and the Emperor are bound by the agreements (pacta) which they have made with the "Civitates." He then cites Bartolus as maintaining that while contracts are binding on the Prince who made them, they do not bind his successors, unless they belonged to the nature and custom of his office, as in feudal matters. He himself distinguishes, he agrees with Bartolus in the case of the Emperor and Pope, for they succeeded by election and not by inheritance, but when the King, or other Prince, succeeded by inheritance the successor was bound to maintain all the contracts of his predecessors.<sup>2</sup>

quod imperator faciens contractum cum subdito, obligatur saltem naturaliter ad observantiam pacti, et sic sentiunt in dictis suis, quod princeps subdito non obligatur civiliter, sed naturaliter tantum per l. digna vox (Code i. 14, 4). . . . Nam quum obligatio civilis oritur a lege civili . . . si lex civilis non ligat principem, ergo non potest obligari civiliter, naturaliter autem obligatur qua ipsa naturalis obligatio sumit originem a jure naturali. . . . Jus autem naturale non potest tolli per principem, nec limitari sine causa . . . Tu, autem, adverte, ad primum dictum, quia Baldus in l. princeps ff. De Legibus (Dig. i. 3, 31) dicit quod princeps obligatur non solum naturaliter sed civiliter ex contractu. . . . Ego autem dico indubitanter quod princeps contra hendo obligatur civiliter et naturaliter."

<sup>1</sup> Bertachinus, 'Repertorium Juris,' vol. iii. fol. 10, r.: "Imperator potest revocare privilegium sui antecessoris . . . nisi receperit pecuniam pro eo; sed contractum suum non potest revocare" Id. id. id., fol. 12, r.: "Imperator tenetur servare conventiones et pacta et contracta. Cy. et Bar. in D l. digna vox" (Cod. i. 14, 4).

<sup>2</sup> Jason de Mayno. *Comm. on Digest* i. iv. 1 (fol. 25 v.): "Adde quantum modum (of making laws by the Prince), s. per viam contractus, quia contractus principis habent vim legis. . . . Imo fortius secundum Baldum et Paulum hic, licet princeps non ligetur lege . . . tamen ligatur lege conventionis et contractus quae sunt de jure gentium. . . . Ubi Baldus de natura Feudi, ubi etiam per eum, an princeps teneatur suas consuetudines observare,

Philipp Decius, a Civilian of the later years of the fifteenth century and the early years of the sixteenth century, asserts that the Prince is bound by his contract, and cannot violate it even "de plenitudine potestatis"; and he cites Baldus and Paulus and Peter de Anchorano.<sup>1</sup>

It may appear to some that these discussions of the binding nature of the "Contract" of the Prince are of little more than technical significance, but that is hardly true. The conception was not new in the fifteenth century, but had a considerable place in the work of the great Civilians of the fourteenth century, and it reappears in the sixteenth century in the theory of Bodin. We venture to suggest that the question arose naturally in Italy, in connection with the great treaties which determined the relation of the Emperor to the Italian cities, but it has also a more general significance, as indicating a limit to the theory of the unrestrained authority of the Prince.

We began this chapter by drawing attention to the sharp distinction which was made by Christopher Porcius between the opinions of the "Citra Montani" and the "Ultra Montani"

nam licet Deus subiecit principi leges, tamen non subiecit contractus. . . . Et dicit Baldus . . . quod pacta que faciunt Papa et Imperator cum civitatibus sunt servanda. Subdit autem Baldus hic, quod licet pacta et contracta principis ligent principem, non tamen ligent ejus successorem: . . . et quia jus non transit ad successorem sed de novo creatur per electionem. . . . Nisi essent de natura vel consuetudine sue dignitatis, prout est in feudo. . . . Puto, licet alii non tangant, quod ista distinctio sic indistincte non sit vera; verum intelligo dictum Baldi procedere in Imperatore vel Papa, quia tales dignitates non deferuntur successione sed per electionem. . . . Tunc quum successor non habeat dignitatem a predecessore, sed nova electione consequatur, puto verum esse quod dicit Baldus, quod non teneatur pactis. Sed in regibus, ducibus, marchionibus, et

similibus, quum regna deforantur per successionem quia primogenitus succedit in regno ducato vel comitatu . . . saltem attentata generali consuetudine, credo quod successor teneatur servare omnem contractum et quancunque conventionem sicut quilibet successor privati."

<sup>1</sup> Philippus Decius, 'Consilium' (in Goldast, Monarchia, vol. iii., edition 1621), C. xix.: "Et hoc bene facit, quia quum princeps ex contractu obligatur, etiam de plenitudine potestatis contravenire non potest, ut notanter dicit Paulus de Castro in l. Digna vox. Cod. de legibus et idem Baldus in C. i. § ad hoc, col. 5 in ver. item natalia, ex Gl. de pace juramento firmata, idem tenet Paulus de Castro in Consil. 420, 'Videtur in antiquis,' et hoc idem in terminis hujus questionis tradit Petrus de Anch. in Consil. 65, pro declaratione dubiorum col. 2."

on the question of the continuing authority of the Roman people in making laws. We have, however, not been able to find much which illustrates this distinction. This may be due to the fact that the Civilians whose work we have been able to examine, are all of them Italian; that is what Porcius presumably means by "Citra Montani." It is true, however, that if we take account not merely of Civilians or even Canonists, but of the great political writers of other European countries, such as John Gerson in France, Nicolas of Cusa in Germany, or Sir John Fortescue in England, we should find that they held that legislative authority belonged properly and normally not to the Prince alone, but to the whole community. How far we may think that Porcius is referring to this, we are, however, quite unable to say.

If we endeavour to summarise our conclusions about the position of those Civilians with whom we have dealt here, it seems to us true to say that they were clear that the Roman Emperor had an absolute and unconditional authority in making "positive" law and that the people of the Empire had no legislative authority in the general sense, and that even if they recognised a certain authority in their custom, this rested upon the sanction of the Prince or Pope. (We are, it must be carefully observed, not dealing with the powers of the great Italian cities to establish municipal laws for themselves; this is a great and complex subject and has been dealt with in detail by many learned writers.)

Whether they would all have accepted the somewhat extreme terms cited by Jason de Mayno from Baldus, that the Pope and the Prince could do anything "supra jus et contra jus, et extra jus," may possibly be doubted. They are all, including Jason himself, clear that when the Prince has entered into a "contract" with his subjects, his authority is limited by the "contract."

It is evident that there was a very sharp contrast between the political theory of most of the writers we have dealt with in this chapter and the general tendencies of the fifteenth century.

## CHAPTER III.

THE AUTHORITY OF THE PRINCE: ITS SOURCE  
AND NATURE. POLITICAL WRITERS.

WE turn from the conception of the authority of the law to that of the authority of the Prince or Ruler, and we find a number of important writers, who in different countries deal with the subject in some detail; and as we shall see, they show a remarkable agreement in their judgments.

We begin with Gerson, for he was earliest in time and certainly was not less representative than the others. We cannot here discuss his place in the great conciliar movement, but it seems to us reasonable to say that his attitude to political authority is related to his conception of the authority of General Councils.

In one treatise ascribed to Gerson there is a discussion of the origin of political society, which is interesting as illustrating his relation to the Patristic and Stoic tradition. In the state of innocence man had no laws or coercive justice, it was sin which compelled men to submit to these, and he enumerates in technical language the causes of coercive authority.<sup>1</sup> Gerson, however, adds, a little further on, that man is by

<sup>1</sup> J. Gerson · 'Sermo pro Justitia ad Regem' (Opera, vol. iv. col. 855): "Meditemur etiam hominem creatum fuisse sine peccato, et in justitia pro statu innocentiae. Fecit Deus hominem rectum etc. Homo in illo statu non indigebat legibus aut justitia activa coerciva ut ad bonum converteretur. Non igitur requirebatur dominatio

civilis aut politica. . . . Accidit autem quod propter transgressionem legis quae imposita erat homini et denunciata, et propter inobedientiam, mox regnum hominis et dominium in tyrannidem et subjectionem versum sit, ac omnino veluti infirmatum et perversum. . . . Et hic radicem habemus et causas dominationis et coercivi domini "

nature "Civilis," and needs the help of his fellow men, and was therefore driven to the life of society. The Commonwealth is a society in which men have to command and to obey to the end that they may live in peace and sufficiency, and as the principles of Natural Law are not sufficient for the government of the temporal life, human laws were established; but these must not be contrary to the Natural Law.<sup>1</sup>

This is interesting, as illustrating what we have before suggested, that in spite of the great authority of St Thomas Aquinas, the Aristotelian conceptions had not made any very profound impression.

We turn to Gerson's treatment of our immediate subject, the source and nature of the authority of the King or Prince.

In a work described as 'Sermo ad Regem Franciae nomine Universitatis Parisiensis,' which is obviously a short treatise on the nature of Kingship, Gerson describes the monarchy as having been originally created by the common consent of men, and for the good of the whole community.<sup>2</sup> And, he goes on, it is an error and contrary to natural equity and the true character of lordship to say that the lord is not bound by any obligation to his subjects; as the subjects owe their lord help and service, he owes them his protection and defence.<sup>3</sup> The

<sup>1</sup> Id. id., vol. iv. col. 856. "Adjiciamus insuper et dicamus quod postquam homo natura sua civilis est et communicativus, et talem habet indigentiam cui convenienter succurrere non potest absque alterius subsidio, homo inductus fuit et veluti compulsus in communem vivere cum aliis, et opus fuit instituere ac ordinare aliquas convivendi modos. Et virtus justitiae, quae ad hoc faciendum inclinatur, nominatur civilis aut politica. Politia (ut dictum est) est hominum societas ad bonum ordinata, ad recte praecipendum et obediendum, ut in pace vivatur et tranquillitate et sufficientia, aut quoad vitam hanc temporalem, aut quoad spiritualem. Justitia politica est virtus quae inclinatur reddere unicuique quod suum est secundum ordinationes et finem politiae ubi ipsa fuerit,

sive temporalis sit sive spiritualis. Et quoniam principia juris aut naturalis ordinationis non sufficiunt ad temporalem vitam gubernandam, ordinatae fuerunt et institutae humanae quaedam ordinationes et veluti voluntariae, naturali juri minime obviantes."

<sup>2</sup> Id. . 'Sermo ad Regem Franciae nomine universitatis Parisiensis.' (Opera, vol. iv. col. 798). "Propterea rex aliquis persona privata non est, sed est una potestas publica ordinata pro totius communitatis salute. Sicuti ab uno capite descendit, et dependit totius corporis vita, et ad hoc reges ordinati fuerunt, et principes in principio per communem hominum consensum, et eo modo perseverare debent."

<sup>3</sup> Id. id. id., col. 799. "Haec veritas est contra horum errorem qui dicere ausi sunt dominum in nullo subjectis

words seem to be reminiscent of the principle of the mutual obligations of feudal law.

Gerson's conception of monarchy is clearly that of an authority derived from the community, and limited by obligations to the community. He repudiates very emphatically the error of those who said that all things belonged to the lord and that he could do whatever he pleased,<sup>1</sup> and the contention of those who misapplied the description of the conduct of the King by Samuel, and neglected the principles of Kingship set out in Deuteronomy, and the sound judgment of natural reason which is never contradicted by the divine law.<sup>2</sup>

This brings Gerson to a discussion of tyranny, which he describes as a poison which tends to destroy all political life; men ought, according to their position, to resist it. He warns them indeed against unreasonable and unjustifiable sedition which may produce results worse than tyranny itself, but he asserts that the tyrant has lost all right to his authority, that he is hated by God and by man, and rarely dies a natural death.<sup>3</sup> He therefore argues that it would be well that the royal authority should be limited and restrained; and he cites the reply of Theopompus to his wife when she complained that he was leaving a diminished authority to his children; that it might be diminished but it would be more permanent. It would be more permanent, because it would be more reasonable

suis teneri aut obhgari, quod est contra jus divinum et naturalem aequitatem, et veram domini fidem, quemadmodum subditi fidem, subsidium et servitium eorum superiori debent, sic superior fidem, protectionem et defensionem suis debet subjectis, bonitas una aliam requirit."

<sup>1</sup> Id. id. id., col. 799: "Hic manifestum est hos errare qui dicunt domnia omnia ad ipsos spectare, et quod agere possunt ad eorum arbitrium et voluntatem, omnia quae subjectorum sunt absque ullo titulo ad se trahendo, quid hoc sibi vult."

Cf. id.: "Regulae Morals." (Opera,

vol. i part ii. col. 22): "Omnia sunt principis, non quidem proprietario jure, nec pro se, sed pro necessitate reipublicae"

<sup>2</sup> Id., 'Sermo ad Regem Franciae' (vol. iv. col. 800). "Hic apparet ulterius, quod devus ille perperam et perverse intelligeret textum Bibliae, qui contra veritatem vertere vellet verba scripta, I Reg. viii cap. 'Hoc est jus regis,' quia verus sensus literalis alibi est et specialiter, Deut. xviii, omnino his contrarius; et etiam omne bonum rationis naturalis judicium, cui nunquam contrariatur jus Divinum."

<sup>3</sup> Id. id. id., col. 801.

and more honourable, for true authority is a reasonable authority.<sup>1</sup>

The principle which Gerson sets out here, that the royal authority should be limited and restrained, corresponds very closely with that which he expresses in other works. In the 'Sermo in viaeio Regis Romanorum' of July 1415 he cites the usual definitions of Monarchy, Aristocracy and Democracy, but adds that it would be better still to have a constitution composed of more than one element, as for instance, of Monarchy and Aristocracy, as in France, where the king does not disdain to be judged by the Parliament; while it would be best of all that it should contain all the elements, Monarchy, Aristocracy and "Timocracy."<sup>2</sup> In another work he says that it is intolerable that the judgment of one man should be able to direct the Commonwealth at his pleasure, for the "canon" says most truly that what concerns all should be approved by all, that is by the greater and wiser judgment of all.<sup>3</sup> In another place again Gerson puts this conception into concrete

<sup>1</sup> Id. id. id., col. 802 "Estque multo eligibilis ut minus habeant (reges aut principes) dominium, quod sit rationale sanctum et durans, dando aliqua restringentia . . . Tale responsum dedit Theopompus uxori suae quae conquerebatur de hoc quod certis legibus potentiam suam restrinxisset, sicut rex se subest in multis casibus justitiae parlamenti. Verecunda est, dicebat foemina illa, liberis tuis potentiam diminui sine quam non conquisisti. Respondit ipse. Sino eis minorem potentiam sed durabiliorem. Quare durabiliorem? Quia rationabiliorem. Sed dices. est autem minus honorabilis Seias quod non, sed magis honorabilis, quia habere subjectos secundum rationem est singularis dominium, singularis dignitas, honor, nobilitas et ingenitas. Et in hoc dominus non se subiecit subjectis sed rationi, cui jure divino et naturali unusquisque dominus et alius quilibet obedientiam debet et subiecit

tionem. De his Seneca: 'Si vis omnia subire tibi, subice te rationi.'

<sup>2</sup> Id., 'Sermo in viaeio Regis Romanorum' (Opera, vol. i col. 152) "Esset autem inter istas politias illa melior quam aliqua singularis quae ex regali et aristocratia componeretur, ut in regno Franciae, ubi rex instituit parlamentum, a quo judicari non refugit. Esset vero omnium optima et saluberima politia quae triplicem hanc bonam complecteretur, regalem, aristocratiam, et timocratiam.

<sup>3</sup> Id., 'De considerationibus quas debet habere princeps' (Opera, vol. ii. col. 850). "Quid enim minus tolerabile, quam si universam rempublicam una unus sententia presumeret pro libito versare reversaque, cum verissime dicit canon, 'Quid omnes tangit ab omnibus debet approbari' Ab omnibus intellige, vel a majore omnium sanoreque consilio."

terms, and says it would be well that the nobles, clergy and citizens should be called together from the different parts of France, who know and could set out the miserable conditions of their various provinces.<sup>1</sup> Gerson, that is, preferred a mixed constitution, and this not only in the State but in the Church. In one of his most important works, which was related to the Council of Constance, and in which he discusses at length the nature of authority in the Church, he speaks of the best form of constitution for the Church as being like that of Israel under Moses, a mixed authority, royal, aristocratic, and "timocratic."<sup>2</sup> It is indeed evident that the constitutional conceptions of Gerson about the proper organisation of political authority are closely related to his parallel conceptions about the constitution of the Church.

In other passages to which we have referred in a former chapter Gerson expresses the principle that the royal authority should be limited and restrained, under the terms of the King's relation to the law. In the treatise we have just cited "De Potestate Ecclesiastica" when enumerating the forms of government which, according to Aristotle are good, he describes them all, the monarchy, the aristocracy and the "timocracy" as being according to law;<sup>3</sup> and again in another place,

<sup>1</sup> Id., 'Sermo ad regem' (Opera, vol. iv. col. 807): "Tales ad consilia vocari debent qui timeant Deum et periculum propriæ eorum conscientie, et qui bonum commune private et propriæ preponerent utilitati. . . . Juxta hanc considerationem valde videretur expediens, ut de principioribus regni partibus nonnulli vocarentur et audirentur, tam nobiles, quam clerici et cives, qui libere miserabilem statum patriarum suarum exponerent."

<sup>2</sup> Id., 'De Potestate Ecclesiastica' (Opera, vol. i. col. 123): "Consideratio viii. Maneat ecclesiastica politia optimo regimine; quale fuit sub Moyse gubernata, quoniam mixta fuit ac triplici politia. Regali, Moyse, aristocratica in 72 senioribus, et timocratica

dum de populo et singulis tribubus sub Moyse, rectores sumebantur."

<sup>3</sup> Id., 'De Potestate Ecclesiastica,' Consideratio xiii. (Opera, vol. i. col. 138): "Describitur regnum, quod est politia sub uno bono. Vel expressius quod est congregatio communitatis perfectæ sub uno, secundum leges suas bonas pro republica. . . . Describitur aristocratia quod est politia sub paucis bonis, vel expressius quod est congregatio communitatis perfectæ sub paucis, reipublicæ per leges suas principaliter intenditibus ut senatus. Describitur politia appropriato nomine seu timocratia . . . quod est congregatio communitatis perfectæ sub plurimis utilitatem reipublicæ per leges suas principaliter intenditibus."

every Prince and Prelate should follow the example of the humility of Jesus in submitting to the law of circumcision; even if the Prince is said to be "legibus solutus," he should submit to the law which he has made, both as an example to his subjects and to show his reverence to God.<sup>1</sup> In another place again, in a discourse against John of Paris' assertion of the right of tyrannicide, he says that even the King cannot slay any man without due process of law<sup>2</sup>; and in another place in words which we have already cited, that the King of France submits in many cases to the judgment of the Parliament.<sup>3</sup>

Finally, in one passage incidental to his discussion of the authority of the Church in the last resort to depose the Pope, Gerson cites Aristotle as teaching that the community has the power to correct, and even to depose the Prince if he is incorrigible. And he adds, this power cannot either be taken away from or abdicated by a free community, which has the power to determine its own affairs.<sup>4</sup>

We may put beside these judgments of Gerson those of Peter d'Ailly, the Archbishop of Cambrai, as expressed in an important tract which he wrote in connection with the Council of Constance. He contends that it is not expedient that the Church should be governed by a purely regal constitution, and, turning to the State, he admits that the Monarchy in

<sup>1</sup> Id., 'Sermo in Die Circumcisionis' (Opera, vol. i. col. 240): "Ad apparentem gratiam Dei in circumcisione humilis pueri Jesu, princeps et prelatus quilibet, et si dicatur solutus legibus pati debet legem quam ipse tulerit, tum pro subditorum exemplo, tum pro reverentia præstanda Deo, ut appareat gratia Dei in eo, et non secularia desideria videantur dominari."

<sup>2</sup> Id., 'Sermo contra assertionem Mag. Joannes Paris' (Opera, vol. i. col. 399): "Sicut est rex, qui quidem rex non posset sine juris ordine non monitum, non vocatum, non convictum interficere."

<sup>3</sup> Id., 'Sermo, ad Regem' (Opera, vol. ii. col. 802): "Sicut rex se subdit

in multis casibus justitiæ parliamenti."

Cf. id., 'Sermo pro Viagio Regis Romanorum' (vol. i. col. 152): "Ut in regno Franciæ ubi rex instituit parlamentum a quo judicari non refugit."

<sup>4</sup> Id., 'De auferribilitate Papæ ab Ecclesia' (Opera, vol. i. col. 161): "Sicut enim tradit Arist. V. Poli. quod ad communitatem totam spectat principis vel correctio, vel totalis destitutio, si irremediabilis perseveret. Et hæc potestas inauferrabilis vel inabdicabile est a communitate libera, quæ de rebus suis facere potest ad libitum, nec per appropriationem vel aliquam legem potest suspendi; quanto magis hoc habebit ecclesia."

which one man rules according to virtue is the best of all simple forms of government, but a mixed government, in which Aristocratic and Democratic elements are combined with Monarchy is better, for in such a government all have some part,<sup>1</sup> and he maintains as St Thomas and Gerson had done, that this was the nature of the government of Israel as originally instituted by God.<sup>2</sup>

It is also interesting to observe that, in discussing the question whether the Pope was subject to the government of a General Council, he says that the principle that the greater is not judged by the less is not always true, for the King of France, though he is greater than any other in the Kingdom is often, in some cases, judged by the Parliament, and judgment is given against him.<sup>3</sup>

We put beside these theories of the authority of the ruler in Gerson and Peter d'Ailly, those of some of the most important Canonists of the fifteenth century, Zabarella, "Panormitanus," and Turrecremata, for their opinions correspond rather with those of Gerson and d'Ailly than with those of the Civilians.

We may begin by observing that "Panormitanus" is clear that political authority is the result of sin; if it were not for this, all men would be equal.<sup>4</sup> This does not mean that

<sup>1</sup> Peter D'Ailly, 'De Ecclesiae et Cardinalium auctoritate' (Gerson, Opera, vol. 1. col. 918): "Sciendum est, quod licet regimen regnum, in quo unus singulariter principatur multitudinem secundum virtutem, sit melius quolibet alio regimine simplici, ut ostendit philosophus III. Politicorum, tamen si fiat mixtum cum aristocratia, in qua plures dominantur secundum virtutem, et cum democratia in qua populus principatur, tale regimen melius est, in quantum in regimine mixto omnes aliquam partem habent in principatu: et etiam quia, licet regimen regis sit optimum in se, si non corumpatur, tamen propter magnam potestatem, quae regi conceditur, de facile regimen degeneret in tyrannidem, nisi sit in

rege perfecta virtus, quae raro et in paucis reperitur."

<sup>2</sup> Id. id. id.

<sup>3</sup> Id. id. (Gerson, Opera, vol. 1. col. 931): "Ad hanc autem rationem, respondetur primo, quod maior rationis licet regulariter sit vera, tamen quandoque fallit. Nam rex Franciae, qui est major et superior in toto regno, saepe in aliquibus casibus iudicatur, et contra eum fertur sententia in suo parlamento."

<sup>4</sup> Panormitanus. Comm. on Decretals 1. 33, 6 (vol. 1. part II. fol. 125): "Fatendum est quod exercitium jurisdictionis non competit contra bonos; unde si non esset peccatum non opereretur habere superiorem, sed omnes humanitus essent aequales."

these Canonists conceived of government as coming directly from God. On the contrary, Zabarella, at least, emphatically maintained that normally it was derived immediately from the community. He cites the "philosophers" as saying that the rule (regimen) of the State (civitas) belonged to the congregation of the citizens or its "valentior pars," and he infers that it may therefore be said that the rule of the world belonged to the congregation of the men of the whole world, or their "valentior pars."<sup>1</sup> He refers to the authority of Aristotle for the first part of his statement, but his reference to the "valentior pars" suggests rather a reference to Marsilius. In another place Zabarella says that a kingdom may arise in one of three ways: by the revealed will of God, by the consent of those who are ruled, or by violence; the third, he says, is not to be justified, it is merely "de facto." The usual method, he evidently means, is by consent.<sup>2</sup>

He applies this principle to the Roman Empire, for the whole "Plenitudo Potestatis" was in the first "universitas," and thus it has been said that the Roman people, while transferring its authority to the Prince, also retained it, for it could not make a law which it could not revoke.<sup>3</sup> Again he says that the Roman people had transferred their authority to the Prince by the Lex Regia, and mentions that he had seen in the Church of the Lateran a brazen tablet which described the powers given by the Roman Senate and people to Ves-

<sup>1</sup> Zabarella. Comm. on Decretals I. vi 6 (fol. 107). Sic enim dicunt philosophi quod regimen civitatis consistit penes congregationem civium, vel ipsius congregationis partem valentiolem, quae sententia colligitur Aristotele, tertio politicorum, c. viii., et conformiter dicendum est quod regimen orbis penes congregationem hominum totius orbis, vel ipsius partem valentiolem consistat."

<sup>2</sup> Id. id. I. vi 34 (fol. 149, v): "Regnum in terris surgit tribus modis, primo per Dei voluntatem aliquo modo revelatum hominibus, secundo modo per consensum eorum qui reguntur, tertio, per violentiam. . . . Tertio modo non

expedit justificare, quia illa est de facto."

<sup>3</sup> Id., I. vi. 6 (fol. 110, v). "Nam in prima universitate est totalis plenitudo potestatis tamquam in fundamento, ut ibi per hoc quod dicitur quod populus Romanus transferendo jurisdictionem in principem, etiam in se retinuit, quia non potuit a se abdicare, statuendo legem a qua non posset recedere. . . . Et colligitur quod major est potestas populi quam magistratus ipsius. I x hoc dicit Gulielmus de Cuneo, ff de legi. non ambigitur (Dig. 1. 3, 9) populum Romanum posse revocare potestatem datum principi."

pasian, and he says that it was clear from this tablet that the people had not transferred all their power to the Prince, but had retained the power of making laws; but he adds, that however this might have been once, all power had come to be in the hands of the Prince.<sup>1</sup> Government then, while it arose from the Divine institution, is conceived of by him as normally taking its origin from the community; it is therefore valid and legitimate even among the infidels, and he cites the authority of Innocent IV.<sup>2</sup>

These are significant principles, about the nature and source of government, but it is also important to observe that Zabarella held that the Electors of the Emperor acted not in their own names, or as individuals, but as Lupold of Babenberg had said, as a Collegium, that is they elected the Emperor by a process which represented the "universitas" of the Roman people. The Electors were "surrogati populo Romano," and thus they had the same power as the Roman people had exercised in the case of Nero, of deposing the Emperor, especially with the tacit consent of the Pope.<sup>3</sup>

<sup>1</sup> Id id, I vi 34: "Vidi tamen aeneam tabulam, quae adhuc est Romae in Ecclesia sancti Jo Lateran: in qua descripta est potestas per senatum et populum Romanum tradita Vespasiano. Et ex illa tabula constat non omnem potestatem ab initio fuisse translata in principem, sed sub istis capitulis, ita quod etiam post translationem remansit potestas Romano populo condendarum legum, quod vult ita § et quod principi, et § lex quae precedit (Inst. 1. 2, 4-6) Et ff de leg. 1. de quibus (Dig. 1. 3, 32) Quicquid autem tunc fuerit, postea sic invaluit, quod omnes potestas esset in principe."

<sup>2</sup> Id id, III. 34, 8 (fol. 201, v). "Dicit Innocentius quod dominae possessiones et jurisdictiones herede sine peccato possunt esse apud infidelis, haec enim non tantum pro infidelibus (fidelibus?) sed pro qualibet rationabili creatura facta sunt."

Cf Panormitanus Comm. on Decretals II 34, 8, fol. 177.

Cf. also vol. v. p. 33.

<sup>3</sup> Id id, I. vi. 34 (fol. 150, r.). "Ad secundum, de forma electionis, dico, quod haec questio presupponit aliam, an isti eligant tanquam collegium, an tanquam singuli, et quod tanquam singuli tenet Hostiensis hic, sed quod tanquam collegium tenet Leopoldus in tractatu De Juribus Regni et Imperii Romanorum c. vi. . . . et movetur quia isti eligunt jure populi Romani; et qui surrogatur alteri censetur eodem jure populus autem Romanus per exercituum representantem universitatem populi Romani eligebat, . . . et hoc videtur consonum veritati . . . Si haec praesupponimus quod in hoc sunt surrogati populo Romano, dicendum est, quod sicut populus Romanus ex causa poterit imperatorem deponere, sicuti dicitur factum de Nerone, qui fuit a senatu judicatus et depositus, ut est in historis, ita et isti ex causa hoc possunt, praecipue tacite approbante Papa."

Zabarella, however, discusses this question further and says that there was a difference of opinion about the power of revoking the authority granted to the Prince. He cites Gul. de Cuneo as maintaining this could be done, and Baldus as maintaining the opposite, because the jurisdiction of the Roman people had been transferred by Constantine to the Pope. He seems himself to agree with Gul. de Cuneo, for the donation only related to the jurisdiction of the Roman people over the City of Rome, not over the world. The Electors, as "surrogati" of the Roman people, can therefore for just cause depose the Emperor. This at least is the case when the Emperor Elect has not yet been crowned and approved by the Pope. This is, Zabarella says, his own opinion, but he submits his opinion to the judgment of those who might be more competent.<sup>1</sup>

The general principles of government, and of the authority of the ruler, are also developed by Turrecremata, and it is worth while, at the risk of a little repetition, to put his views together. Turrecremata was commenting, not on the Decretals like the majority of the Canonists of the time, but on the Decretum of Gratian, and this gives him occasion for a more systematic exposition of the theory of law and government. It is also obvious that he wrote under the influence of St Thomas Aquinas, rather than that of the Canonists.

We may begin with his observation, drawn directly from St Thomas (Summa Theologica I. 2, 90, 3), that the ordering

<sup>1</sup> Id id, I. 6, 34 (fol. 150): "De hoc tamen an populus Romanus possit revocare potestatem datam principi varie scribitur . . . Sed quod possit, no, ibi Gul de Cuneo, et pro hoc quia populus non potuit sibi legem imponere, a qua non possit recedere, ff De Legi, si quis in prin, testamenti . . . Sed bene facit illud e ibi a cuncto populo, ex quo colligitur, quod major est potestas populi quam magistratus, et de hoc ibi per Baldum in contrarium . . . quia Jurisdictio populi Romani quoad urbem per Constantinum translata in Papam; sed per hoc non tollitur jurisdictio

populi Romani quoad orbem, et, dato quod sit sublata, tamen representatur in istis electoribus, qui, ut predicti surrogantur populo Romano, et sic videtur procedere, quod predicti, quod possint imperatorem ex causa deponere Et saltem hoc videtur procedere, quando electus in Imperatorem nondum est coronatus et sic non approbatus per Papam, quia non habet jus nisi ab electoribus In hoc autem, quia forte pondet in facto, non pretendo sermonem, paratus etiam in premissis acquiescere sententis melius sentientium."

of things for the common good belongs either to the whole multitude, or to one who holds authority in the place of the whole multitude, and has the care of the whole multitude.<sup>1</sup> Again he takes from St Thomas the description of the various forms of government, the monarchy, the aristocracy, and the democracy, and the statement that the best form of government is that which is composed of all these elements, and in which the law is made by the "majores natu cum plebibus."<sup>2</sup> In another place he discusses the question whether it is better to be governed by the law or by the best king, and he replies dogmatically that it is better that all things should be ordered by the law, than by the will of any one person.<sup>3</sup> Turrecremata is really touching upon that distinction between the "regimen politicum" and the "regimen regale" with which we have already dealt.<sup>4</sup> He also sets out the general distinction between the king and the tyrant. The king is one who governs rightly and for the common good, while the tyrant rules perversely and for his own profit.<sup>5</sup> It is, however, more important to observe that he follows St Thomas in maintaining that men are only bound to obey their princes as far as the order of justice requires, and therefore subjects are not bound to obey them if their authority is usurped or if they issue unjust commands.<sup>6</sup> In another place and in some detail

<sup>1</sup> Turrecremata: Comm. on Gratian Decretum, D 2, 4 (p 52): "Respondeo dicendum, quod non cujushbet hominis est leges condere, sed aut principis aut totius multitudinis. Probatur ista conclusio sic, quod lex proprie et principaliter respicit ordinem ad bonum commune. Ordinare aliquid in bonum commune est vel totius multitudinis, vel alicujus gerentis vicem totius multitudinis, ergo condere legem vel pertinet ad totam multitudinem, vel ad personam publicam, quae totius multitudinis curam habet, quia et in omnibus aliis ordinare in finem est ejus cujus est proprie ille finis"

<sup>2</sup> Id id, D 2 (p 51)

<sup>3</sup> Id id, D 4 (p 58). "Quarto quaerebatur Utrum melius esset omnia lege ordinari, quam regi optimo

viro, sive quam dimittere iudicis arbitrio . . . Respondeo, quod melius est omnia ordinari lege, quam arbitrio quorumcumque committere"

<sup>4</sup> Cf. vol. v. pp. 71-76 and p. 142 of the volume.

<sup>5</sup> Id id, D 4 (p 60)

<sup>6</sup> Id id, D 8 (p 85). "Ad tertium dicendum quod principibus secularibus in tantum homo obedire tenetur in quantum ordo justitiae requirit, et ideo si non habent justum principatum sed usurpatum, vel si injusta precipiant, non tenentur eis subditi obedire, nisi forte per accidens propter vitandum scandalum vel periculum"

(This is a direct quotation from St Thomas Aquinas' Summa Theologica II 2, 104, 6)

he follows St Thomas in the discussion of the nature and limitation of men's obligation to obey the law. Laws may be unjust for various reasons, because they are contrary to human well-being, or because the ruler imposes burdensome laws on his subjects, not for the common good, but to satisfy his own greed, or because the legislator exceeds the authority which has been given him. Such commands should be called acts of violence, rather than laws, as St Augustine had said, "that is not law which is not just, and therefore some laws are not binding on the conscience."<sup>1</sup>

There is little or nothing in the passages on which Gratian is commenting to suggest this particular mode of dealing with the authority of the ruler and the law; and Turrecremata may have intended to correct an impression which might be derived from these passages in Gratian if taken alone, that obedience was always binding. It is important to observe that the political theory of St Thomas was still understood and treated as having great authority.

We can now turn to Germany and some very significant observations of Nicolas of Cusa.

Every ordered empire or kingdom, he says, takes its origin from election; it is thus that it can be conceived of as set up by the providence of God; and, more broadly still, all ordered superiority arises from an "elective agreement of free submission"; and all authority is recognised as Divine when it arises from a common agreement by the subjects.<sup>2</sup> We are

<sup>1</sup> Id. id., D 10 (p 102). "Tertio leges humanae frequenter ingerunt calumniam et injuriam hominibus secundum illud Isa. c., 'Vae qui condunt leges iniquas' . . . Sed licitum est unicuique oppressionem et violentiam evitare, ergo leges humanae non imponunt homini necessitatem quantum ad conscientiam . . . Respondeo dicendum tamen juxta St Thomas in I. Secundae, q 96, Art. iv. Quod leges postae humanitas vel sunt justae vel injustae, &c (Quoted directly from St Thomas Aquinas)

<sup>2</sup> Nicolas of Cusa, 'De Concordantia Catholica,' III 4 (p. 380). "Omne enim ordinatum imperium vel regnum (ut superius quodam loco dictum est) ex electione ortum capit et tunc vera Dei providentia censetur praelatum. . . . Ecce, si ea quae superius habentur ad mentem revocet, quomodo omnis superioritas ordinata, ex electiva concordantia spontaneae subjectionis exortitur et quod populo illud Divinum Seminarium, per communem omnium hominum aequalem necessitatem et aequalia jura inest, ut omnis potestas quae

reminded of the sweeping phrase of the *Sachsenspiegel* "al werlik gericht hevet begin von kore."<sup>1</sup>

Again, the principle of free election does not arise from positive law or from the authority of any one man, but from the Natural and Divine Law. The Electors, therefore, who were created with the common consent of all the German and other subjects of the Empire in the time of Henry II. have their authority fundamentally (*radicalem vim*) from the common consent of all those who could by Natural law have created the Emperor, and not from the Roman Pontiff, who has no power to appoint a King or Emperor over any country without its consent.<sup>2</sup>

In another place Nicolas lays down the same conclusion, but with even greater breadth; every political order, he says, is founded on the law of Nature, and if it contradicts this, it has no validity. He admits that the wiser and better men should be elected to make laws and to rule according to them, for they are naturally the rulers of other men; but they have no coercive power over the unwilling. For all men are by nature free, and therefore all government (*principatus*) arises only from agreement and the consent of the subjects (*consensu subjectiva*); it cannot be created except by election and consent.<sup>3</sup>

*principaliter a Deo est, sicut et ipse homo, tunc divina censeatur, quando per concordantiam communem a subjectis exortur.*"

<sup>1</sup> Cf. vol. iii p. 153.

<sup>2</sup> Nicolas of Cusa. *Id.*, iii 4 (p. 360): "Hoc est illud ordinatum spiritualis colligantiae divinum matrimonium, in radice durativae concordantiae collocatum, per quod ista respublica, optime ad finem eternae felicitatis summa pace dirigitur. Et quia hujus radices divini et humani juris superius habentur, non replico idem, sufficit scire quod electio libera, a naturali et divino jure dependens, non habet ortum a positivo jure, aut homine quocumque, ut in ejus arbitrio existat, quoad hoc, validitas electionis, maxime in eligendo

regem et imperatorem, cujus esse et posse ab uno homine non dependit. Unde electores qui communi consensu omnium Alemannorum et aliorum qui imperio subjecti erant, tempore secundi Henrici constituti sunt, radicalem vim habent ab ipso communi omnium consensu, qui sibi naturali jure Imperatorem constituere poterant non ab ipso Romano pontifice, in cujus potestate non est dare cuicumque provinciae per mundum regem vel imperatorem, ipsa non consentiente."

<sup>3</sup> *Id.* *id.*, ii 14 (p. 319): "Omnis constitutio radicatur in jure naturali, et si ei contradicit, constitutio valida esse nequit. . . . Unde cum jus naturale, naturaliter rationi insit, tunc cognata est omnis lex homini in radice

In the Preface to Book III. Nicolas expressed his preference for monarchy, but he prefers an elective monarchy to one which had originally been created by election, and was transmitted by hereditary succession.<sup>1</sup> And he goes on to contend that it was right that every human government should correspond to the type of Christ Himself; he was both God and man, and every government has both a human and a Divine origin. All "majestas" is sacred and spiritual: it comes from God, but also from man; Christ was born both God and Man of the Virgin and with her free consent, and thus all government should arise from the Church or Congregation of men by pure consent, not by violence or ambition or corruption. For Christ was under the law, and came not to destroy but to fulfil it.<sup>2</sup>

*sua. Ideo sapientiores et prestantiores alius rectores eliguntur, ut ipsi e sua naturali clara ratione sapientia et prudentia praediti, justas leges eliciant, et per eas alios regant, et causas discutiant, ut pax servetur, sicut sunt responsa prudentum, 2 Dist. Ex quo event, quod ratione vigentes, sunt naturaliter aliorum domini et rectores: sed non per legem coercivam, aut judicium quod redditur in invitum. Unde cum natura omnes sunt liberi tunc omnis principatus, sive consistat in lege scripta, sive viva apud principem, per quem principatum coercentur a malis subditi, et eorum regulatur libertas ad bonum metu poenarum, est a sola concordantia et consensu subjectiva. Nam si natura aequae potentes et aequae liberi homines sunt, vera et ordinata potestas unus communis aequae potentis naturaliter, non nisi electione et consensu aliorum constitui potest, sicut etiam lex ex consensu constituitur 2 Dist 1 lex 8, Dist quae contra (Gratian Decretum, D. viii 2, 8), ubi dicit pactum inter se gentis aut civitatis. Generale pactum societatis humanae est obtemperare regibus suis. Ecco quia pacto generali convenit humana societas, velle regibus obedire,*

*tunc quia in vera regiminis ordine, ipsius rectoris electio fieri debet, per quam electionem constituatur rector, judex eligentium: tunc ordinata et recta dominia et presidentia per electionem constituuntur."*

<sup>1</sup> *Id.* *id.*, iii Preface (p. 355): "Inter autem omnia temperati principatus genera, monarchicus prae eminent. Inter autem species hujus, principatus temporalis, monarchicus, qui per electionem constituitur, absque successoribus, praefertur ei qui per electionem constituitur cum ipsis successoribus."

<sup>2</sup> *Id.* *id.*, iii Preface (p. 356) "Sed haec radix ad omnia cum his praemissis sufficit, quod quemlibet principatum inter Christi fideles, oportet Christo, cujus figuram et successionem gestat, in typo conformari."

Respicat itaque ad Christum, qui est ipsa veritas, et primo consideret quoniam ipse est dominus et magister, Deus et homo ita omnis principatus ex quodam divino et humano exurgit. . . . Sacra est omnis majestas et spiritualis et a Deo, est etiam ab homine, ut Christus verus virginis Mariae filius. Unde ex incorrupta et intemerata virgine, ejus liberali consensu interveniente, dum diceret, fiat mihi secundum

From Germany we turn to England, and to the work of Sir John Fortescue. As we shall see, his political principles are developed with special reference to England, but this does not mean that they are not also related to those of the writers whom we have just been considering and to the political tradition of writers like St Thomas Aquinas.

In what seems to have been his earliest work he takes from St Thomas the definition of the Natural Law as "participatio legis aeternae in rationali creatura," and it is from the natural law that all just kingship is derived.<sup>1</sup> By this law alone can be determined the "jus regnandi" in any kingdom. This law is the source of all human laws, and they cannot properly be called laws if they depart from it.<sup>2</sup> He repudiates the notion that Kingship could be taken as defined in such terms as are used by Samuel (1 Sam. viii.); this was not a statement of the "Jus Regis" in general but of the King whom Israel had demanded.<sup>3</sup>

So far Fortescue has been dealing with the general principle that all political authority is founded upon justice and the Law of Nature, but he then turns to the distinction between the "dominium regale," the "dominium politicum," and the "dominium politicum et regale."

We have already dealt with this in an earlier chapter,<sup>4</sup> with reference to the supremacy of the law, made by the whole community, and above the King, and we need not go into this again. We may, however, cite a passage from the 'De Laudibus Legum Angliae,' which draws out very emphatically the nature of the authority of the "Dominium Politicum

dum verbum tuum, Christus nascitur Deus et homo. Ad modum hujus, ex unica incorrupta ecclesia sive congregatione hominum, ex purissimo consensu prodire debet verus principatus, non ex aliqua violentia, non ex ambitione, aut pravitate simoniaca, sed ex puritate qua Christus in mundum propter amorem salutis populi dignatus est venire . . . Christus enim sub lege erat, non venit solvere legem, sed adimplere, humilis et mitis corde, medicus

mansuetissimus."

<sup>1</sup> Fortescue, 'De Natura Legis Naturae,' 1 5,

<sup>2</sup> Id id, 1. 10. "Et per eam (Lex Naturae) solum discuti potest omne jus regnandi in quocunque regno quod superiorem nescit. . . Haec lex namque mater est omnium legum humanarum, a qua si ipsae degenerant indigne vocantur leges."

<sup>3</sup> Id id, 1 12, 16.

<sup>4</sup> Cf pp 141 1'3.

et Regale," as it existed, in Fortescue's judgment, in England.

This work is in the form of a dialogue between the Chancellor and the Prince of Wales. The Prince had asked whether it was the Civil Law or the Law of England which he should study, and the Chancellor rebukes him for such an "evagatio"; for the King of England cannot change the law at his pleasure, his authority is not simply "regale" but "regale et politicum"; if it were simply "regale" he could change the Laws, and could impose talliages and other burdens on his people at his pleasure. This was the meaning of the doctrine of the Civil Law, "Quod principi placuit," but the authority of the Prince who governs "politice" is very different. The people indeed approve the government of the king, so long as he does not become a tyrant, but it was to avoid this danger that St Thomas had desired that the kingdom should be so ordered that the royal power should be restrained by the Law.<sup>1</sup>

Fortescue was, however, well aware of the fact that there had been kings of England who had been impatient of these restraints, and he represents the Prince as asking why some of his ancestors had endeavoured to bring in the Civil Law. Fortescue answers in the person of the Chancellor. The law

<sup>1</sup> Id, 'De Laudibus Legum Angliae,' ix.: "Dubitas nempe, an Anglorum legum vel civilium te conferas. . . Non te conturbet, Fili Regis, haec mentis evagatio. Nam non potest Rex Angliae ad libitum suum legem mutare regni sui, principatu nedom regali, sed et politico, ipse suo populo dominatur. Si regali tantum ipse praeset eis, leges regni sui mutare ille posset, tallagia quoque et cetera onera eis imponere ipsis inconsultis, quale dominium denotant leges Civiles, cum dicant, 'quod Principi placuit leges habet vigorem.' Sed longe aliter potest rex politice imperans genti suae, quia nec leges ipse sine subditorum assensu mutare poterit, nec subjectum populum remtentam onerare

impositionibus peregrinis, quia populus ejus libere fruatur bonis suis, legibus quas cupit regulatus, nec per regem suum, aut quemvis alium deplatur; consimiliter tamen plaudit populus, sub rege regaliter tantum principante, dummodo in tyrannidem ipse non labatur. De quali rege dixit Philosophus III. Politicorum quod melius est civitatem regi viro optimo quam lege optima. Sed quia non semper contingit presidentem populo hujusmodi esse virum, Sanctus Thomas, in libro quem regi Cypri scripsit, de Regimine Principum, optare consetur regnum sic institui, ut rex non valeat populum suum tyrannide gubernare, quod solum sit, dum potestas regia lege politica cohibetur."

of England did not sanction the maxim of the Civil Law, "Quod principi placuit," for the King of England was bound by his coronation oath to observe the Law. Some English kings had been impatient of this, for they thought that they had not that freedom of government possessed by those who ruled according to this maxim, who could at their pleasure make and unmake laws, inflict punishments, impose taxes, and even at their pleasure interfere in the Law Courts. Some English kings had therefore endeavoured to shake off the "iugum politicum," not understanding that the real power of both kinds of kings was the same, and that it was not a "yoke," but "liberty," to rule the people "politice," a security to the people and a relief to the king.<sup>1</sup> In order to make this clear to the Prince, he draws out some of the effects of a "regimen tantum regale," as they could be seen in France. He points out how the French people were preyed upon by the gens d'armes, were oppressed by ordinary and special taxation, by the burden of the Gabelle on salt, which they were compelled to buy, and their consequent poverty, their miserable food and clothing. The nobles indeed were not liable to taxation, but they were liable to be punished and even executed without any proper trial before the ordinary Judges, but in the King's "Camera."<sup>2</sup> In England, on the contrary, no one, not even the King, could take a man's possessions without payment; he could not impose talliages, subsidies or any other taxes

<sup>1</sup> Id., 'De Laudibus,' xxxiv.: "Andisti namque superius quomodo inter leges civiles præcipua sententia est, maxima, sive regula, illa quæ sic canit, 'Quod principi placuit, legis habet vigorem,' qualiter non sanciant leges Angliæ, dum nedum regaliter, sed et politice rex ejusdem dominatur in populum suum, quo ipse in coronacione sua ad legis sue observanciam astringitur sacramento; quod reges quidam Angliæ egre ferentes, putantes proinde se non libere dominare in subditos, ut faciunt reges regaliter tantum principantes, qui lege civili, et potissime predicta legis illius maxima, regulant plebem suam, quo ipsi ad eorum libi-

tum jura mutant, nova condunt, penas infligunt, et onera imponunt subditis suis, propriis quoque arbitriis contencencium cum velint dirimunt lites; quam moliti sunt ipsi progenitores tui hoc jugum politicum obicere, ut consimiliter et ipsi in subjectum populum regaliter tantum dominari, sed potius debacchari queant; non attendentes quod equalis est utriusque regis potentia, ut in predicto tractatu de Natura Legis Naturæ docetur, et quod non jugum, sed libertas est, politice regere populum, securitas quoque maxima, nedum plebi, sed et ipsi regi; allevacio etiam non minima sollicitudinis suæ."

<sup>2</sup> Id. id., xxxiv., xxxv.

without the consent of the Kingdom in Parliament, nor could anyone be brought before any court, except that of the Ordinary Judge; and the people were well clothed and well fed.<sup>1</sup>

The contrast which Fortescue makes between the happy condition of England under a monarchy limited and controlled by law and the miserable circumstances of France is indeed very emphatic, but it is important to observe that Fortescue did not think that this arbitrary and uncontrolled monarchy had always existed in France; in another treatise he speaks of it as the unhappy result of the long war with England. Saint Louis, he says, and indeed the other kings of France, did not impose taxes upon the people without the consent of the three Estates, which had the same character as the Parliament in England.<sup>2</sup> We shall see presently that Fortescue's conception of the actual contemporary constitutional condition of France was very far from adequate.

It is interesting to compare Fortescue's conception of the nature of the French Monarchy with that which was expressed by an important and almost contemporary Frenchman, that is by Philippe Pot, the Sieur de la Roche, as reported by Jean Masselin in his "Diarium" of the States General which met at Tours in 1484. We do not suppose that Masselin's report of de la Roche's speech to the Estates can be accepted as representing in precise terms what he said, but it may be properly taken as expressing the general conceptions of that important section of the Estates to which Masselin and de la Roche belonged.

Jean Masselin was a Canon of the Cathedral, and a representative of the "Bailliage" of Rouen, and he put together

<sup>1</sup> Id. id., xxxvi.

<sup>2</sup> Id., 'Governance of England,' iii.: "And how so be it that the French kynge reyneth upon his people, 'dominio regali,' yet Scynt Lowes sometyme kynge there, nor any of his progenitors sette never tayles or other imposicions upon the peple of that

land, without the assent of the three Estates, wiche, when thai be assembled, be the like to the Courte of Parlement in Ingelende. And this ordre kepte many of his successours into late dayis, that Ingelende men made such warre in Fraunce that the III. Estates durst not come togedre."

in the form of a "Diarium," or Journal, an account of the proceedings of the Estates. There was much discussion, he says, of the powers of the Estates, especially with regard to the appointment of the Council of Regency during the minority of the King (Charles VIII.), and he then gives an account of the speech made by the Sieur de la Roche.

De la Roche begins by contending that the decision on this question belonged not to the Princes of the Blood, but to the Estates.<sup>1</sup> The Kingdom was a "dignitas," not an "hereditas," and when the Commonwealth was left without a ruler, the care of it belonged to the States General, not that they should themselves govern, but that they should appoint those most worthy to do this.<sup>2</sup> This leads him to a discussion of the origin and nature of kingship. He had learned, he says, from history and from his ancestors, that in the beginning kings were created by the will of the people, and that they appointed those who were pre-eminent in virtue and industry. Princes do not rule for their own benefit, but, forgetting their own concerns, they should set forward the good of the Commonwealth; those who act otherwise are tyrants. It is of the greatest importance to the people by what law and by what ruler the Commonwealth is to be guided. The "Respublica" is the "res populi" as they had often read.<sup>3</sup>

<sup>1</sup> Jehan Masselin: "Diarium Statuum Generalium Franciae, habitorum Turonibus anno 1484," ed. 'Collection des Documents Inédits,' A. Bernier, Paris, 1835, p. 140.

<sup>2</sup> Id. id., p. 246: "Ad quod accedit quod regnum dignitas est, non hereditas, quae nequaquam debeat, instar haereditatem, ad naturales tutores sanguine scilicet propinquos, continuo devenire. Quid ergo? Num respublica absque rectore vacua, et omnibus exposita manebit? Minime profecto: sed ad statuum generalium examen primum defertur: non quod eam per se ipsi prouerent, sed quod ei proficiantur dignissimi quique statuum iudicio."

<sup>3</sup> Id. id., p. 146: "Et ut res patiamur, historiae predicant, et id a

majoribus meis accepi, initio domini rerum populi suffragio reges fuisse creatos, et eos maxime prelatos, qui virtute et industria reliquos anteirent. Ad utilitatem enim suam sibi quisque populus rectores eligebat. Siquidem principes non ideo praesunt ut ex populo lucrum capiant ac ditentur, sed ut, suorum obliti commodorum, rempublicam ditent et provehant in melius. Quod si aliter quandoque faciunt, profecto tyranni sunt et nequam pastores. . . . Populi ergo maxime interest qua lege, quoque rectore ducatur respublica, cujus si optimus rex, est optima res est, si secus, deformis et inops. Nonne crebro legistis rompublicam rem populi esse? Quod si res ejus sit, quomodo rem suam negliget aut non curabit."

A little later he appeals to Roman History against those who wished to attribute all power to the Prince, for in Rome the magistrate was created by the election of the people, and no law was promulgated until it had been submitted to the people, and approved by them. He did not, however, here wish to discuss the power of the Prince who lawfully administered the Commonwealth, being of full age. The case before them was that where the King, on account of his minority, or for other reasons, could not take hold of the government.<sup>1</sup>

He had shown then that the "Respublica" was "Res populi," and had been entrusted by the people to the King; those who hold it by other means and without the consent of the people are tyrants, and "alienae rei invasores." It was evident that the King (on account of his minority) could not himself rule the Commonwealth, and it was necessary to provide for its care by others. This responsibility did not pass to any one prince, nor to several, nor to all of them. It must return to the people who originally granted the authority; the people must resume it, for it was the people who would suffer from the absence of government or from its bad administration. He does not suggest that the "habitus regnandi" or lordship should go to any one but the King; but the guardianship of the kingdom, for the time being, belonged to the people and those elected by them: by the people, "populus," he did not mean the "plebs" alone, but all men, of all conditions, for under the name of the States General were included the princes and all the inhabitants of the kingdom.<sup>2</sup>

<sup>1</sup> Id., id., pp. 148, 9: "Quomodo ab assentatoribus tota principi tribuitur potestas, a populo ex parte facto. Nam apud Romanos quisque magistratus electione populi fiebat, nec aliqua lex promulgatur nisi primum populo relata ab eo probata fuisset. Adhuc quoque multis in terris veteri more rex electione queritur. Sed nolo nunc discutere de potestate principis, qui per aetatem jure rompublicam administrat. Tantum in proposito nostro questio

concludatur, cum rex ob minoritatem vel alias impeditur a regimine capessendo."

<sup>2</sup> Id. id., p. 148: "Et imprimis vobis probatum esse velim rompublicam rem populi esse, et regibus ab eo traditam, eosque qui, vi vel alias, nullo populi consensu, eam habuere, tyrannos creditos, et alienae rei invasores. Constat autem regem nostrum rompublicam per se disponere non posse. Igitur eam aliorum cura ac ministerio

De la Roche continued by urging upon the States General that they were the elected procurators of all the Estates of the realm, and held the will of all in their hands; they should therefore not be afraid to recognise that they had been summoned in order that the Commonwealth should be directed by their advice in the minority of the King. He argues that the contention of those who said that the States General only met to grant taxes was in manifest contradiction to the historical facts. The Assembly of the States General was not something new, nor was it unprecedented that they should take hold of the administration of the Commonwealth during a vacancy, and entrust it to upright men; preferably to men of the royal blood, if they were men of character; and he cited various cases which illustrated this. It was the States General which decided between Philip of Valois and Edward III. of England. It was the States General who after two years granted the Regency of the Kingdom to Charles (afterwards the Fifth) when King John had been taken prisoner by the English. It was the States General by whose advice the kingdom was ordered in the time of Charles VI. He concluded therefore by urging them to set to the work of ordering and nominating the "Council of Regency."<sup>1</sup>

procurari necesse est. Verum respondi: Nec ad aliquem unum principem nec ad plures, vel omnes simul, hoc in casu, revertitur. Oportet propterea, ut ad populum redeat, hujus rei donatorem, qui eam quidem resumat, velut suam, praesertim cum hujus rei aut diuturna vacatio, aut mala regentia in suam semper solius perniciem redundet. Non sum tamen ejus mentis, ut dicam habitum regnandi, sive dominium ad quemquam alium quam ad regis transire personam; sed regni tamen procuratio atque tutela, non jus, sive prociotas, pro tempore populo vel ab eo electis jure tribuitur. Populum autem appello, non plebem, nec alios tantum regni subditos, sed omnes cujusque status, adeo ut statuum generalium nomine etiam completi principes arbitrer, nec aliquos

excludi qui regnum habitent."

<sup>1</sup> Id. id., p. 148: "Cum autem intelligatis vos universorum statuum regni legatos et procuratores doctos et omnium voluntatem vestris in manibus esse, cur concludere timetis vos ad hoc maxime vocatos negotium, quatenus respublica ob minoritatem regis, quodammodo vacans, vestro consilio procuretur? . . . Haec etiam illos liquido refellunt, qui duntaxat levandorum tributorum, non alterius operae vel finis gratia conventionem indictam arbitrantur. . . . Verum huic sententiae manifestissime contradicit et experientia rerum, et processus a nobis habitus, quo patuit multas alias res a nobis tractatas fuisse. . . . Non est autem res nova haec generalium statuum conventio. Non est inusitatum eos vacantem rei-

As has been already said, we do not think it probable that the Sieur de la Roche made a speech whose terms corresponded exactly with all this, but we think that what Masselin reports represents the political and constitutional ideas of some not unimportant number of the members of the States General. It will be observed that what is said embodies three very important conceptions. The first, which belongs to what we may call general political theory, that all authority originally comes from the community, and can come from no other source, and that this authority naturally reverts to the community, when by any accident the government it set up fails. The second, the general constitutional principle that the States General represented the authority of the whole community, and that their authority was not in any way limited to the granting of financial assistance to the Government. The third, that the appointment of the Regency should not be carried out without the advice and consent of the Estates. We shall return to the proceedings of this meeting of the States General in Chapter VI.

There is a very interesting treatise of about 1477 by Wessel of Groningen, which sets out some very important conceptions of the source and the nature of political authority.

The primary subject of the work is the nature and limitations of the Papal and Ecclesiastical authority, and this belongs to

publicae administrationem capessere, proborumque sui gremii virorum eam credere consilio; omnino tamen praefidentes regii sanguinis viros, dummodo essent virtute praediti.

Et ne longius hujus rei monumenta repetam, temporibus Philippi Valesii, cum inter eum et Angliae Regem Eduardum, pro jure regnandi armis decertaretur, tandem inter eos convenit, sicut jure debebant, nec veriti sunt rem tantam statuum generalium committere judicio: eorumque pro Philippo data sententia, adversum Anglos defensione utimur. . . . Temporibus item Johannis, Francia Regis, cum eventu belli et injuria fortunae captivus

teneretur, nonne status politiam regnum et administrationem assumpserunt, ordinaverunt, commiserunt? Et quamvis ipsius Johannis filius esset Carolus Quintus, qui jam vigessimae aetatis annum compleverat, non est tamen continuo ei regentia credita, sed biennio post primam conventionem, rursus status Parisius congregati, memoratus Carolus reipublicae regimen cepit, non alias quam eorum consensu ac decreto. Sed quid paulo vetustiora commemoro? Regnum quidem, Caroli Sexti temporibus, qui duodenis fere patri successerat statuum consilio ordinatum ac procuratum fuit."

the literature of the Conciliar Movement, but in some chapters it deals with the general question of political authority.

In one place Wesselius maintains that the true relation of the subject to the ruler must be carefully considered, for it is not one of an unconditional obligation, rather it is of the nature of a contract with the ruler, and if the ruler does not observe the law of the contract, the subject is not bound by it.<sup>1</sup> This is a very sharp statement of that contractual conception of the nature of political authority which we have discussed in previous volumes. Wesselius, however, not only states the principle, but goes on to explain its rationale. All subjection should be voluntary, and should only be accepted after due deliberation upon the causes of it, and of the results which are to be expected from such subjection; and, inasmuch as it is these which have led men to enter into the contract with a ruler, the contract is terminated if the conditions are not fulfilled.<sup>2</sup> After praising the Franciscan custom of electing their superior from year to year, and urging that the relation between a Bishop and his diocese is terminable if he prove unworthy of his charge, he goes on to argue that it should be the same with Kings, for in every well-ordered commonwealth the chief magistrate should either be annually elected, or his authority should be restrained by the votes of those who have consented to it. What does election mean, he says, but the freedom of those who have

<sup>1</sup> Wesselius Groningensis: 'De dignitate et potestate ecclesiastica,' xviii.: "Consideratu dignum, quanto debet subditus praelato suo, et inferior suo superiori. Hoc enim debitum non est conditionis ut sit debitum absolute, sed magis est pacti cum prelato. Non enim superior dominus est inferioris, licet inferiores dominos eos vocent, et superiores aliquando justis causis perferant. Nisi tamen superiores, juxta debitum pacti, legi pactionum aequi sint, non tenebitur subditus integro debito, sed quantum ille legem superioris implet, catenus debitor est subditus. Unde si prorsus legem ille praelatorum abjecerit, jam tunc nullo debito

ligatur subditus."

<sup>2</sup> Id. id. id.: "Omnis enim illa subjectio voluntaria et spontanea esse debet, quare non subeunda nisi cum deliberatione. Deliberatio autem causam considerabit et fructum. Unde quandocumque causa cum fructu eiusmodi sunt, ut movere possent deliberantem ante contractum, pari ratione solvunt obligatum, quando alter contrahentium deficit in promisso. Fere enim ex natura hujus obligationis est ut subditi superiorem sibi eligant, quatenus talem sibi eligant, in quo et ex quo suae deliberationis fructum et causam proximo coniectant."

deliberated on it. Kings, therefore, are not to be obeyed in evil things, but rather they may lawfully "in regno turbari," unless this might cause even greater evils.<sup>1</sup>

These are drastic and far-reaching principles which Wesselius sets out, but when we allow for the sharpness of the phrases, there is nothing new in them. The contractual conception was embodied in Feudalism, and in the whole political system of the Middle Ages<sup>2</sup> the principle of election or recognition corresponded with the constitutional practice, while the principles of limitation and deposition were at least perfectly familiar.<sup>3</sup>

This is not, however, all which is important in Wesselius. In another chapter he points out that the real meaning of St Paul's words, "There is no power except from God," requires a careful examination. It is obvious that those who hold temporal or spiritual power may greatly err and lead those who obey them into mortal error. We must, therefore, resist the unrighteous authorities unless we wish to be partakers with them. The words of St Paul (Romans xiii. 1) must therefore be interpreted by those which follow, "There is no power but for edification." The power, so far as it edifies, is from God, but he who "edifies" by resistance also received the power of resistance from God.<sup>4</sup>

<sup>1</sup> Id. id. id.: "Deberet etiam simile esse de regibus. Unde in omni republica bene instituta, summus magistratus vel tempore vel auctoritate, ut vel annuus tantum sit, vel suffragiis consentientium ab insolentia compescatur. Quid enim electio signat, nisi libertatem deliberantis. Oportet enim parere meliori, et hunc debet electio coniectare, a quo quantum electus deficit, pro tanto ei non est obediendum. . . . Ex hoc fundamento non solum regibus non parendum in malis, verum etiam iure deberent regno turbari, nisi maiore damno timerentur accepta mala resaratum iri."

<sup>2</sup> Cf. vol. iii. part i. chap. 4; part ii. chap. 6.

<sup>3</sup> Cf. vol. v. part i. chaps. 7 and 8.

<sup>4</sup> Id. id., 23: "Non perfunctorie aut superficialiter legendum aut intelligendum verbum apostoli ad Romanos,

'Non est potestas nisi a Deo, et quae a Deo sunt, ordinata sunt. Itaque qui potestati resistit, Dei ordinatione resistit.' Possunt enim qui in potestate tam corporali quam spirituali errare et graviter errare, ut in via Dei scandalizent subjectos, et obediens in mortalem errorem praecipitent. . . . Secleratis ergo potestatibus oportet obviare, nisi velimus occulta societate participare.

Verba igitur apostoli de potestate, sicut alibi moderantur, ipse dicens, 'non est potestas nisi in edificationem,' intelligenda sunt. Quatenus enim aedificat potestas, a Deo est, et quatenus non aedificat, qui resistendo aedificat, a Deo potestatem resistendi habet. Posse igitur aedificare potestas a Deo est, et qui plus aedificat plus in potestate est."

Wesselius was evidently anxious to correct the error of those who thought that all authority, good or bad, just or unjust, was a divine authority. This conception had indeed been little regarded in the Middle Ages, but there are some traces of it in the fourteenth and fifteenth centuries, and the criticism of Wesselius is therefore of some importance.

It seems to us that it is important to observe at this point that the theory that in the last resort the unjust ruler might legitimately be deposed, had, at the outset of the fifteenth century, an important illustration in constitutional action, that is, in the deposition of the Emperor Wenceslas in the year 1400. This may seem a somewhat unimportant occurrence, but, as we shall see later, it was not forgotten in the sixteenth century.

It is therefore worth while to notice the terms in which the electors, that is the Archbishops of Mainz, Trier, and Cologne, and the Count Palatine, expressed their judgment and declared Wenceslas deposed. We do not, it will be understood, pretend to deal with the actual circumstances which lay behind their action, and its merits. We are only concerned with the constitutional principles which they assumed, and the terms in which they justified their action.

They charge him with neglect to act for the peace of the Church and of Germany, with his betrayal of the authority of the Empire, specially in the case of Milan, and with the reckless way in which he had allowed his seal to be affixed to blank forms which he sold to his friends, and they accused him of having murdered many ecclesiastics and others.<sup>1</sup>

<sup>1</sup> 'Deutsche Reichstagsakten,' vol. iii. (Ed. Julius Weizsäcker, Royal Academy of Science, Munich, vol. iii. 204) (p. 255): Enumeration of charges against Wenceslas "(1) Nemlich daz er der heiligen Kirchen ny zu fridden gehulffen hait. . . . (2) So hait er auch dez heilige Romische Rich swerlich und schedelichen entgledet und engledon lassen, nemelich Meylan und daz land in Lamparten. . . . (3) Er hait auch

vil stede und lande in Deutschen und Welschen Landen dem Riche zugehör-ende, und der ein teyl verfallen sint dem heiligen riche, uebergeben, und der nit geachtet, noch an deme heiligen Riche behalden; (4) So hait er auch umbe geldes willen dicke und vil syne freunde gesand mit ungeschriben brieven, dy man nennet membranen, dy doch mit syner majestat ingesigel besiegelt waren. . . . (5) So hait er

They say that they had remonstrated with him in vain, and had finally invited him to meet them at Ober Lahnstein and waited for him, but he had not come. The Archbishop of Mainz therefore, in the name of the electors, and acting as in a court, declared Wenceslas deposed,<sup>1</sup> and notified the Princes, lords and cities of the Empire that they were free from their oath of obedience to Wenceslas, while they continued to be bound by their oath to the Empire and to the person who should be elected King of the Romans.<sup>2</sup>

When we now endeavour to put together the political principles of the writers with whom we have dealt in this chapter, it is evident that there is a substantial agreement among them. They are clear that all political authority is derived from the community, that is, while they conceive of it as coming from God ultimately, directly and immediately it comes from the whole body of the community. It is indeed interesting to observe that Wesselius thought it well to correct the misinterpretation of St Paul's words, "The powers that be are ordained by God." It is clear that, whether they were ecclesiastics or laymen, they did not recognise the doctrine of what is called the Divine Right of Kings; they were clear whether they were Englishmen or Frenchmen that the authority of the

auch ny kene achte gehabt alle der mishel und Kriege, dy leider manche zijt in Deutschen und in anderen Landen des heiligen Riche swerlich und verterplich gewesen und noch werende sint. . . . (6) Er hat auch, das erschreglich und unmenschlich ludet, mit syns selber hand, und auch ubermiez ander ubelteden die er by ymo hait, erwirdige und bidderbe prelaten paffen und geistlich lude, und vil andere erbar lude ermordet, erdrunket, verbrand mit fackeln und sy jemerlichen und unmenschlichen wider recht getodet, das eym Romischen Konige unczemelichen stohet und ludet."

<sup>1</sup> Id. id., p. 257: "Und wir Johann Erzbischoff vorenant, Gots namen

zu dem ersten angeruffen, in Gerichtes stad gesessen, in namen und wegen unsere vorgeschriben Herren und midde Kurfürsten des heiligen Romischen Riche und unser selbes, umbe diese egenanten und andere vile grosser gebresten und sachen uns darezu bewegende, abethun und abesezen mit dissem unserme Urteil, daz wir thun und geben in dieser schrift, den vorenanten Herren Woncezlaus als einen unnutzen versümelichen unachtbaren entgleder und unwerdigen hant haber des heiligen Romischen Riche, von dem selben Romischen Riche und vor aller der wirde und herlichkeit darczu gehöreude."

<sup>2</sup> Id. id. id.

King was a limited authority. Gerson, d'Ailly, and Turrecremata emphatically prefer a mixed government, that is, a government which included the aristocratic and democratic elements, as well as the monarchical. Gerson and d'Ailly in France, and Fortescue in England, are clear that the legal rights of the subjects are protected, even against the King, by the Courts of Law. Gerson, Zabarella, and Wesselius are even clear that in the last resort the violent and unjust ruler might be resisted and deposed.

These writers, then, know nothing of absolute monarchy; indeed, it is evident that such a conception would have seemed to them irrational and repulsive; they all, like the Mediæval writers in general, conceived of monarchy as the best form of government, but it was a monarchy limited and conditioned by the law, and the good of the community for which it existed.

## CHAPTER IV.

### THE THEORY OF THE DIVINE RIGHT.

WE have been carefully searching for the appearance of the theory of the absolute Divine authority of the King in the fourteenth and fifteenth centuries, as we have done in other volumes with relation to the earlier Middle Ages.

In our first volume we pointed out that this theory was first explicitly stated by Gregory the Great, and in later volumes, that, in spite of his great authority, there is hardly any trace of it, except in a small group of imperialist writers, of whom the most important was Gregory of Catino, during the great conflict between the Popes and the Emperors in the eleventh and twelfth centuries. The great Mediæval writers, like St Thomas Aquinas, ignore this theory, and even speak with confidence of the right to resist and even to depose the unrighteous ruler.<sup>1</sup>

The only writer of any importance in the fourteenth century who seems to us to have maintained the doctrine of the absolute Divine authority of the King was Wycliffe, and we have dealt with this in an earlier chapter. It seems to us that the con-

<sup>1</sup> We wish again to express our great regret that, owing to the troubled times in which it came out, our attention had not been called to the admirable work of Professor F. Kern, 'Gottesgnadenthum und Widerstandsrecht im Mittelalter.' We greatly regret that we were unable to consult it in writing our last volume. We are glad to take this opportunity to draw the attention of students of mediæval politics to this work, which is, as far as we have seen, the most thorough study of the subject, within its limits. We are glad to find that, as we think, we are not compelled to alter the judgments which we have expressed in former volumes, but Professor Kern has handled his subject with a fulness and precision which command our admiration.

ception was wholly alien to the political thought of the fifteenth century, as we have so far considered it, but it found expression in two quarters, in Spain in 1445, and in a work of Aeneas Sylvius (afterwards Pope Pius II.) written apparently in 1446.

We cannot here discuss the circumstances which lay behind the appearance of this conception in the proceedings of the Cortes of Olmedo in 1445, but it is evident that the country was in a highly disturbed and disorderly condition, not indeed uncommon in Spain in the fourteenth and fifteenth centuries, and it was very natural that men should set out in the strongest terms the urgent need of political order and obedience.

However this may be, the principle of the Divine authority of the King, and the wickedness of resistance to him, is expressed in very strong terms. After referring to the wars and revolts caused by some of the King's subjects in his kingdom, the Cortes declared that the Divine Law expressly forbade men to touch the King, who was the Lord's Anointed, or to speak evil of him, for he was the Vicar of God, or to resist him, for to resist the King was to resist the ordinance of God.<sup>1</sup>

This statement is rendered more significant when we observe that the Cortes went on to say that the revolted affirmed in their justification that they were acting in the King's own interest, and in accordance with the law of the kingdom as expressed in the 'Siete Partidas' of Alfonso X. The passage from this law book, which they quote at length, certainly seems

<sup>1</sup> 'Cortes of Castile and Leon,' vol.iii. 18 (Olmedo, 1445). Present, the King, various prelates, nobles, doctors of the King's Council, and the Procurators of the cities and villas of the kingdom.

The Cortes presented a supplication to the King in which they first refer to the revolt of some of his subjects, p. 458: "Oluidada la ley natural, por estilo dela qual las abejas han un principe, e las gruas siguen un cabdillo, e aque ellos acatan e obedescen; e asi mesmo pospuesta la ley devinal, lo qual espresamente manda e defienda que ninguno non sea osado de tocar en

su rrey e principe, commo a quel que es unguido de Dios, nin aun de rretraer nin dezir del ningunt mal nin aun lo pensar en su espiritu, mas que aquel sea tenido commo vicario de Dios e onrrado commo por escolente, e que ningunt non sea osado dele rresistir, por quelos que al rrey rresisten son vistos querer rresister ala ordenança de Dios, alo qual asi fazer todos son obligados e tenudos, non solo temiendo la ira de Dios, e el mal e pena que dello los puede venir, mas aun por la guarda de sus consciencias."

to suggest that the subjects should guard the King not only against themselves and foreigners, but also against himself, not only by good counsel, but by preventing him from committing any act which might dishonour him, and injure his kingdom.<sup>1</sup> The Cortes urged that the revolted were misinterpreting the passage; they cited a number of other passages from the 'Siete Partidas' on the nature of the authority of kings, which seemed to them to forbid such actions as those of the insurgents, and they contended that these should not be tolerated. It would, they said, be abominable and contrary to God, and Divine and Human Law, that the King should be subordinate to his vassals and subjects, and should be judged by them; for the King is the Vicar of God, who holds his heart in his hands; he is the head and heart and soul of his people, who are his members, and owe him reverence and obedience; his authority is so great that all laws are subject to him, for he holds his power from God and not from men.<sup>2</sup>

After further citations from the "Fuero de las leyes," the Cortes urged that if anything in the 'Siete Partidas' was contrary to these principles, the King should revoke it "de su cierta çiencia e proprio motu e poderio absoluto," so far as it

<sup>1</sup> Id. id. (p. 459). These are some words they quote from the 'Siete Partidas,' ii., 13, 25: "E por ende el pueblo deve mucho punnar en guardar su rrey, lo uno por que lo han ganado espiritualmente por don de Dios, e lo al naturalmente por rrazon e por derecho, e esta guarda quele han de fazer es en tres maneras. La primera, de si mesmo, la segunda de ellos mismos, la tercera delos estrannos. E la guarda que han de fazer a el de si mesmo es que non le dexen fazer cosa a sabiendas por que se piorda el alma, ninque sea a mal estança e desonrra de su cuerpo e de su lignage, o a grant dapno de su rregno."

<sup>2</sup> Id. id. (p. 483): "Lo quarto, por que cosa seria muy abominable e sacrilego e absurda e non menos escandalosa e dapnosa e contra Dios e ley divina e umana e rrepugnante a toda buena poliçia e rrazon natural e a

todo derecho canonico e çeuil, e enemiga de toda justia e lealtat, major mente delas leyes de nuestros rregnos, si el rrey cuyo coraçon es en las manos de Dios, e lo el guia e inclina a todo lo quel plazee, et qual es vicario e tiene su logar en la tierra, e es cabeça e coraçon e alma del pueblo, e ellos son su miembros, al qual ellos naturalmente deuen toda lealtat e fidelitat e sujeçion e obediencia e rruenerencia e serviçio, e por el se ha de guiar e mandar el derecho del poderio el quel es tan grande, especialmente segunt las leyes de nuestros rregnos que todas las leyes e los derechos tienen so si, por que el su poderio non lo ha delos omes mas de Dios, cuyo logar tiene en todas las cosas temporales—oviese de ser e fuese sugeto asus vasallos e subditos o naturales, e por ellos juzgado."

might be contrary to the aforesaid laws of the "Fuero" and "Ordinamiento."<sup>1</sup>

It would be difficult to find a more emphatic assertion of the doctrine of the "Divine Right" of the King, and of his absolute authority as above the Law. It is possible that this may be related to the attempt made by Juan II. at the Cortes of Palencia in 1431 to annul the provisions of the Cortes of Bribiesca in 1387 and to give his Briefs the authority of law, which we have already considered; but as we have seen, Juan II. had been compelled to withdraw from this position.<sup>2</sup>

We have another example in the fifteenth century of the assertion of the "Divine Right" in a treatise of Aeneas Sylvius: 'De Ortu et Auctoritate Imperii Romani,' written, as we have said, apparently in 1446.

This treatise is indeed primarily an exposition of the nature and authority of the Empire, and it is only incidentally that it touches upon the "Divine Right," and it is perhaps worth while to observe its more general principles. Aeneas Sylvius begins by tracing the origin of monarchy to the conflicts among men; its purpose therefore is to secure peace and justice. The conflicts of nations compelled men to accept some supreme authority; this was the origin of the various Empires of the ancient world, and finally of Rome.<sup>3</sup> In Rome itself men were driven by similar causes to agree that the Government should be placed in the hands of one man; the Prince was created and it "ratum esset quicquid ab eo constituitur."<sup>4</sup> All peoples are subject to the authority of the Empire, for the purpose of the Empire is universal peace.<sup>5</sup> These, however, are little more than commonplaces; we are concerned to know what in the view of Aeneas Sylvius was the authority of the Emperor. The Emperor has authority to make law, to interpret law and to abrogate law where

<sup>1</sup> Id. id. (p. 492): "Las quiera rrevoocar de su çierta çiençia e proprio motu e poderio rreal absoluto, así o en quanto son e pueden ser contra las dichas leyes del Fuero e Ordinamiento."

<sup>2</sup> Cf. p. 133.

<sup>3</sup> Aeneas Sylvius, 'De Ortu et Auctoritate Imperii Romani,' 2-4.

<sup>4</sup> Id. id., 5.

<sup>5</sup> Id. id., 10-13.

there is reasonable cause.<sup>1</sup> In another chapter he deals with the question of appeals from the Emperor alone to the Emperor acting with the Princes; he flatly denies that any such appeal can be made, and adds that the Emperor has just as great an authority when acting alone as when acting with the Princes.<sup>2</sup> We are not here discussing the constitution of the Empire, but it is obvious that Aeneas is speaking under the terms of the interpretation of Roman Law by the Civilians rather than under those of the actual constitution of the Empire in the Middle Ages.

The Emperor has supreme legislative power, but we are also concerned to know what Aeneas thought was his relation to the actually existing law. It is right that he should live, and judge, according to the law, and he cites the 'Digna vox' (Cod. i. 14, 4),<sup>3</sup> but he adds that while it is honourable to say this, it must not be asserted that the Emperor is subject to the law, for he is "legibus solutus."<sup>4</sup> Aeneas may not, however, have meant by this much more than to assert the dispensing power of the Emperor, that he had authority to temper the rigour of the law by Equity.

It is, however, when we turn to Aeneas' discussion of the relation of the subject to what might be the unjust actions of the Prince that we come to the matter with which we are here specially concerned. We must always, he says, presume that there is a rational cause behind the action of the Prince, and therefore, even if he should unjustly annul, or derogate from some "privilegium," we must not revile or resist him, for there is no one who can judge his temporal actions. Whatever the

<sup>1</sup> Id. id., 19.

<sup>2</sup> Id. id., 22: "Nunc ultimo loco de appellationibus transigamus eosque confutemus qui a sententia summi principis asserunt appellandum. . . . Sed appellant quidam rursus ad Caesarem adjunctis principibus, quasi maior sit imperator cum illis quam sine illis. . . . Sed vana atque inania sunt ista fundamenta. Tanta est enim in Caesare potestas, sine principibus quantum cum ipsis. Amat enim uni-

tatem suprema potestas. . . .

33. Cumque in Caesare summa potestas sit, summaque auctoritatis plenitudo, nil est quod adjunctis principibus auctoritatis accedat, quoniam neque summo adici quicquam potest, neque plenum potest esse plenus."

<sup>3</sup> Id. id., 20.

<sup>4</sup> Id. id., 20: "Quod quamvis pulchrum est dicere, non tamen asserendum est imperatorem esse subjectum, cum sit solutus."

Prince does must be patiently endured, however unjust it is, and we must look for some amendment of his action by his successor, or to its correction by that heavenly judge who does not suffer violence and injury to be perpetual. We must remember that whatever the Prince does, is done by the permission of God, for the heart of the King is in the hands of God, who turns it whither he wills.<sup>1</sup>

Aeneas was setting out in dogmatic phrases the doctrine of passive obedience, and relating this to the conception, that whatever the Prince does is done by the permission of God. He returns to this again in a passage of which we have already quoted a part, in which he deals with the question of appeals from the judgment of the Emperor. He admits that sometimes unrighteousness and an unjust judgment might proceed from the highest authority, but there can be no appeal, for there is no judge who can examine the temporal actions of Caesar. Men must recognise that they are subject to the Prince, and must reverence the Emperor and Lord of the world, for he rules over temporal things in God's place, and as men must do what God commands, they must also accept the commands of Caesar, "sine repugnatione."<sup>2</sup>

It is clear that Aeneas was concerned in this treatise to assert the absolute authority of the Emperor, both as supreme

<sup>1</sup> Id. id., 16: "Verum quum in omnibus quae geruntur a principe, caussa presumatur et ratio facti, si quando vel abrogare privilegia vel ipsis derogare principem contingit injuste, quamvis liceat eum per viam supplicationis informare, humiliterque petere restitutionem, non tamen reclamare licet, vituparare vel impugnare, si perseveret, cum nemo sit qui de suis factis temporalibus possit cognoscere. Tolerandum est patienter, quod princeps facit, quamvis inique, expectandaque est successoris emenda, vel superni correctio iudicis, qui violentias atque injurias non sinit esse perpetuas. Cogitandum insuper est, quod princeps agit Dei fieri permissione. Quia cor regis (ut inquit

*scriptura) in manu Dei est, et ubi voluerit, inclinabit illud. . . . Ex quo fit, ut occulto Dei iudicio apud Deum justa nonnunquam reperiantur, quae nobis videntur injusta."*

<sup>2</sup> Id. id., 23: "Etenim quamvis ex summo solio nonnunquam procedat iniquitas, injustumque iudicium prodeat, non tamen ideo locus est appellationis, quum nemo sit iudex, qui temporalia Caesaris facta valeat examinare. . . . Cognoscant homines se principi esse subjectos, imperatorumque mundi et dominum tanquam Dei vicem in temporalibus gerentem venerentur, et sicut quae Deus iubet implenda sunt, nihilque contra replicandum est, sic temporalia Caesaris mandata sine repugnatione suscipiant."

Legislator, and as being above the Law, and his references to this unchallengeable Divine authority are of some importance.

It is then, we think, true to say that in the statements of the Cortes of Olmedo and of the treatise of Aeneas Sylvius we have a clear and sharp re-statement of a political doctrine which had little importance in the Middle Ages, but which, as we shall see later, was developed by some writers in the sixteenth century.

## CHAPTER V.

## TAXATION.

WE have in a previous chapter dealt with this subject, as related to the fourteenth century, in some detail. We must now examine it in relation to the fifteenth century, for there appears to have been some confusion about this: naturally enough, for there are some statements by important writers of the fifteenth century which if uncontrolled by a more precise examination of the actual facts, might produce, and indeed have produced, a somewhat incorrect judgment: Sir John Fortescue, for instance, in his 'Governance of England,' attributed the poverty-stricken condition of the French people to the arbitrary power of taxation of the King.<sup>1</sup>

We must therefore consider carefully the evidence as to the constitutional principles, and the actual practice of taxation in the fifteenth century, and we begin with France, for it is here that there seems to have been most uncertainty. As we shall see, there is evidence that from time to time the French Crown endeavoured to impose taxation without the consent of the Estates, Provincial or General, but we think that it is also clear that the legal right to do this was not recognised, and that normally, when the Crown needed more than it received from its ordinary fixed revenues, it asked for Aids or Subsidies, either from the Provincial Estates or the States General.

It is unnecessary to enumerate all the occasions on which the kings of France asked for Aids from the States General or

<sup>1</sup> Fortescue: 'Governance of England,' chap. 3. Cf. his work 'De Laudibus,' chap. 35.

Provincial Estates; we deal with some of the more important examples.

The Treaty of Troyes of 1420, by which the unhappy King Charles VI. recognised Henry V. of England as his successor, contains a clause providing that Henry was not to impose upon the Kingdom of France any taxes without reasonable cause, and that these were to be in accordance with the laws and customs of the Kingdom. According to Juvenal des Ursins the Three Estates met in Paris later in the same year, and were asked for an Aid, and after deliberation expressed themselves as prepared to grant whatever the King and his Council should command.<sup>1</sup>

These proceedings were, it may be urged, taken, not under the legitimate government of France, but under the English usurpation, and we turn to the legitimate government. In a letter of Charles VII. of 1423 we find him mentioning that the Three Estates of the Kingdom had granted him an Aid at their meeting in Bourges.<sup>2</sup> In 1425 the States General meeting at Melun granted Charles VII. a Taille, but attached to this the condition that he should inform them what measures he proposed to take to put an end to the disorders caused by the soldiers, otherwise they would not make a grant.<sup>3</sup> In 1423, as we learn from another letter of Charles VII., the Three Estates of Languedoc had met in April and May at Carcassonne, and had granted him the sum of 200,000 "livres tournois."<sup>4</sup>

What is, however, more significant is the account given in a letter of Charles VII. of December 1427 to his Lieutenant in Languedoc, of the complaints made by the Estates of

<sup>1</sup> 'Recueil des Anciennes Lois Françaises,' vol. viii. 695 (p. 639): Juvenal des Ursins, 'Histoire de Charles VI.' (Ed. 1653, p. 381).

<sup>2</sup> 'Ordonnances,' vol. xiii. p. 14: "Charles. . . Aux Commis à imposer et asseoir en notre pays de Poictou, l'ayde a nous presentement octroyée par les gens des Trois Estats de notre royaume, à l'Assemblée par eux faiete en notre ville de Bourges."

<sup>3</sup> 'Recueil,' vol. viii. 28 (p. 731).

Cf. Picot, 'Histoire des États Généraux,' vol. i. p. 299.

<sup>4</sup> 'Ordonnances,' vol. xiii. p. 34: "Charles. . . Comme ez mois de Mai et d'Avril derrièremment passez, a l'Assemblée des Trois Estats de notre pays de Languedoc, que lors par notre Ordonnance furent assemblez en notre ville de Carcassonne, nous fut octroyé par les gens du Commun Estat du pays la somme de deux cent milles livres tournois."

Languedoc. At their meeting in that year they had protested that it had always been part of their liberty that no Aid or Taille, &c., should be imposed upon them by the King, until he had called together the Council or the Deputies of the Three Estates, and they complained that, in spite of this, the Lieutenant of the King, in virtue of a simple "letter patent," had imposed upon them a new Aid of 22,000 "livres tournois," over and above the Aid of 150,000 francs which had been imposed with the consent of the Three Estates. The King accordingly ordered the levy of the new Aid to be suspended until the meeting of the Three Estates which had been summoned for the following January.<sup>1</sup>

In a letter of Charles VII. of October 1428 there is a reference to a meeting of the States General at Chinon which had granted him an Aid of 500,000 francs, part for the Langue d'Oc, part for the Langue d'Oil.<sup>2</sup> According to Vaissette's 'History of Languedoc,' the King laid down, at this time, the general principle, at least for Languedoc, that for the future no one should impose any Aid or Subsidy without his express com-

<sup>1</sup> 'Ordonnances,' vol. xiii. p. 133 : " Nous avons ouï la dolente et grievo complainte à nous faites de par les gens des Trois Estats de notre dit pays de Languedoc, exposez par leurs notables ambassadeurs et messagers pour ce envoyez par devers nous, disons que jaçoit ce que de tout temps ils soient en telle liberté et franchise, que aucun aide ou taille ne doit de par nous estre sur eux imposé, à quelque cas que ce soit, sans premièrement appeler à ce et faire assembler le Conseil ou les Deputez des trois Estatz d'icelui pais, et que en ladite liberté et franchise les ayons jusques—cy maintenus ; néant moins par vertu d'une simple lettre patente commandée et faite scélée sous notre scel, au mois d'Aout dernièrement passé, à la relation de vous notre Cousin et Lieutenant, sans que ladite lettre ait été par nous passée, ni sans y avoir aucunement appelé ledit Conseil des Trois Estats, vous avez

imposé et mis sus audit pays un aide nouvel de 22 m. livres tournois, outre et par dessus la dernière aide de 150 m. francs, qui par le consentement desdits trois Estats y avait été paravant imposés.

Pour ce est il que nous, . . . voulons toujours nos loyaux subjects estre favorablement traités, et attendu même-ment que ledit aide et impost de 22 m. livres a été fait sans notre sù et sans ce que nous ayons esté advertis qu'il en feut nécessaire . . . par ces présentes octroyons de nostre grace speciale, se mestier est, que d'icelui aide de 22 m. livres et de tout autre nouvel aide dont en les voudreit charger, ils soient tenus en souffrance et suspens, sans plus avant y procéder par maniere de contrainte, ne autrement, jusques à ce que à la prochaine assemblée des trois Estats de nostre obéissance . . . en soit par nous autrement ordonné."

<sup>2</sup> 'Recueil,' vol. viii. 39 (p. 749).

mand and without calling together the three Estates, as had been the custom.<sup>1</sup>

We have again references to grants of money by the Estates of Languedoc in 1431, 1434, and 1435,<sup>2</sup> and to the imposition by the King with the consent of the Three Estates of his "obedience" (presumably the whole kingdom) of a variety of Aids which had been levied for the War but had been abolished when the King left Paris.<sup>3</sup>

It is then evident that during the first part of the century it was in virtue of a grant by the States General, or the Provincial Estates, that Aids and Subsidies were normally levied by the King. We have, however, found a few cases in which there is no indication that the Estates had been consulted.<sup>4</sup> This does not, however, amount to much more than the possibility that in the disturbed conditions of the early years of the fifteenth century the government of France may have occasionally levied taxes without taking account of the normal constitutional custom.

We must now consider how far the constitutional practice of the earlier part of the century gave place to another system in its later part, and we must first examine the significance of the important ordinance issued after the Meeting of the States General at Orleans in 1439. We have already referred to this Ordinance in an earlier chapter, but must now examine its relation to taxation.

Its main purpose was, as we have already seen, the establishment of a body of royal "Gens d'Armes" and the prohibition of the levy of all private forces. It was in order to carry this out that, as we should infer, the King, with the consent of the Three Estates, imposed a Taille, which was presumably intended to be continuous, at least for the period of the War.

<sup>1</sup> 'Ordonnances,' vol. xiii. p. 140. ('Vaissette Histoire de Languedoc,' vol. iv. p. 471): "Avec défense a toute sorte de personnes de mettre ou imposer désormais aucune ayde ou subside en Languedoc, sans son expres mandement, et sans appeler les gens des

Trois Estats du pays ainsi qu'il était accountumé de faire."

<sup>2</sup> 'Vaissette Histoire de Languedoc,' vol. iv. pp. 478-482.

<sup>3</sup> 'Ordonnances,' vol. xiii. p. 211.

<sup>4</sup> 'Ordonnances,' vol. ix. p. 5; vol. x. p. 214.

The most important clauses of this "Ordonnance" are, for our present purpose, two: the first says that, in spite of the imposition of a Taille by the King with the consent of the Estates, some of the Lords, Barons, and others hindered the raising of the Taille or other Aids on their lands, and sometimes appropriated them on the pretext that the King was in debt to them. The Ordonnance commands that this must cease.<sup>1</sup> The second forbids men of any condition or estate to raise any "Taille" or "Aid" or tribute from their subjects under any pretext whatever, without the authority of the King given in his "letters patent," and declares that for the future any place or lordship where such "Tailles" or Aids had been imposed without his permission, was to be confiscated to the King.<sup>2</sup>

It is not within the scope of this work to deal with the complex question of the various forms of taxation in France. It has been held by some historical writers that the provisions of this Ordinance represented a far-reaching change in the royal power of taxation, by giving the King the power of levying "Tailles" on his own authority; others do not go so far.<sup>3</sup>

<sup>1</sup> 'Ordonnances,' vol. xiii. p. 312 (41): "Et pour ce que souvente fois après que du consentement des trois Etats, le roi a fait mettre sus aucune taille sur son peuple pour le faict de sa guerre, et lui subvenir et aider à ses nécessitez, les seigneurs, barons, et autres empêchent et font empêcher les deniers de ladite taille et aussi des aides du roi en leur terres et seigneuries, et les aucuns les prennent soubz couleur qu'ils ont esté assignez, on dient aucune somme leur être déties, ou aussi esté promises par le Roi, et aucuns autres croissent et mettent avec et pardessus la taille du Roi, sur leurs sujets, et autres, grandes sommes de deniers qu'ils font lever avec et soubz couleur de la taille du Roi, à leur profit; parquoy le Roi est empesché et ne peut estre payé les deniers de la taille par son peuple; le roi ordonne, mande, et commande que toutes telles voies dore-

navant cessent."

<sup>2</sup> *Id. id.*, p. 313 (44): "Et pour ce que plusieurs mettent tailles sus en leurs terres, sans l'auctorité et congé du roi, pour leur volonté, ou autrement, dont le peuple est moult opprimé, le Roy prohibe et défend à tous, sur lesdictes peines de confiscation de biens, que nul de quelque estat, qualité on condition quil soit, ne mette ou impose taille ou autre aide ou tribut sur ses sujets ou autres, pour quelque cause ou couleur que ce soit, sinon que ce soit de l'auctorité et congé du Roi, et par ses lettres patentes; et déclare le Roi dès-à-présent, le lieu ou seigneurie ou telles tailles ou aides soront mis sus sans son auctorité et congé, commis et confisque envers lui."

<sup>3</sup> Cf. Picot: 'Histoire des États Généraux,' vol. i. pp. 322 ff.; 'Recueil des Anciennes Lois,' vol. ix. pp. 57, &c.

We think that however important the provisions of the Ordinance may have been with regard to certain forms of taxation, it would be a very serious error to think that it established the principle that taxes in general could be imposed by the King without the consent of the Community.

There is an interesting account by Monstrelet of the demands put forward by an Assembly of the Princes and Nobles at Nevers in 1441, and the answer of the King. They urged that the Lords and the Estates of the Kingdom should be called together to impose "Tailles" and "Impositions" on the Kingdom. The King replied that the Aids had been imposed upon the Lords with their consent, but that the King could impose the Tailles by his royal authority, in view of the circumstances of the Kingdom. There was no need to call together the Three Estates for this purpose; that was only a burden upon the poor people who had to pay the expenses of those who attended.<sup>1</sup>

In the Ordonnances, however, from 1439 to the time of the meeting of the States General in 1484 we find frequent references to formal grants of money by the Estates of the several provinces, while we also find frequent complaints about taxation without their consent. In February 1443(4) we find Charles VII. referring to a statement of the Three Estates of Languedoc that they had voluntarily and freely granted him large sums of money by way of Aid for the War; and so again in 1448.<sup>2</sup> In 1456 Charles asked the same

<sup>1</sup> Monstrelet: 'Chronique' (ed. 1862), vol. vi. p. 26: "Ont remonstré au roy comme telles tailles et impositions se doivent mettre sus et imposor, et appeler les seigneurs et les Estats du royaume.

Réponse. Les aydes ont esté mises sus par les seigneurs et de leur consentement. Et, quant aux tailles, le roy, quand il a esté en lieu, les a appeler ou leur fait savoir. Combien de son autorite roial, veu les grandes affaires de son royaume, si urgents, comme chascun sait, et mesmement ses ennemis en occupent une grande partie, et détruisent le sourplus, les peut mettre sus,

le que auctre que luy ne puct faire sans congé. Et n'est ja nul besoin d'assembler les trois Etats, pour mettre sus lesdites tailles, car ce n'est que charge et despence au pauvre commun peuple, qui a à payer les frais de ceux qui y viennent. Et ont requis plusieurs notables seigneurs des dz pays, qu'on cessât de telle convocation faire. Et pour cette cause soit convenus, qu'on envoie la commission aux eslues, selon le bon plaisir du roy. (Cited in 'Recueil,' vol. ix. p. 99.)

<sup>2</sup> 'Ordonnances,' vol. xiii. p. 392; vol. xiv. p. 18.

Estates for an Aid of 130,000 "livres tournois"; they replied that their province was greatly impoverished, but they made a grant of 116,000 livres for one year.<sup>1</sup> In 1458 the people of Normandy complained of the violation of their laws and liberties, and Charles replied by confirming their Charter, and promised that no Tailles, subventions or exactions should be imposed on the people of the Duchy beyond the customary "redditus, census, et servitia nobis debita" except for some clear and urgent need, and then only by a meeting of the Three Estates of the Duchy, as had been customary.<sup>2</sup> It should be observed that "Talliae" are included in the taxes which are not to be levied without the Estates. In March 1462(3), we find Louis XI. referring to the fact that the Three Estates of Normandy had granted him 400,000 "livres tournois" as representing all Aids, Tailles, &c., for the previous year.<sup>3</sup> In an Ordinance which as the Editors think belongs probably to 1463, we find that the Estates of Languedoc had granted an Aid, but complained that the Receiver of Taxes had taken more than the Estates had granted.<sup>4</sup> In 1476(7) we have a letter of Louis XI., relating to the Government of the Duchy of Burgundy, which had fallen to the French Crown on the death of Charles the Bold, and Louis declares that no Aids or Subsidies should be levied in the Duchy unless they had been granted and authorised by the Three Estates of the Duchy.<sup>5</sup>

We have found direct evidence in a few cases of an attempt by Louis XI. to over-ride the Estates, and to levy taxes, if necessary, without their consent. The most important is a

<sup>1</sup> 'Ordonnances,' vol. xiv. p. 388 (1).  
<sup>2</sup> Id., vol. xiv. p. 465: "Quod de cetero per nos aut nostros successores in dicto Ducatu in personis aut bonis ibidem commorantibus, ultra redditus, census et servitia nobis debita, tallias, subventiones, impositiones, aut exactiones quascunque facere non possimus, nec debeamus, nisi evidens utilitas vel urgens necessitas id exposcat, et per conventionem et congregationem gentium trium statuum dicti Ducatus,

sicut factum fuit et consuetum tempore retro lapso."

<sup>3</sup> Id., vol. xv. p. 627;

<sup>4</sup> Id., vol. xvi. p. 25.

<sup>5</sup> Id., vol. xviii. p. 247 (17): "Que l'on ne pourra lever ni cueillir sur iceulx nos pays et duché, aydes ne subsides à notre prouffit ou d'autres, se non que lesdites aydes ayent esté octroyées, accordées et consenties par lesditz gens des trois Estats."

letter of 1469 to the royal officers in Dauphiné: Louis instructs them to request the Three Estates to make a grant of money for the year, but if the Estates refuse or delay to do this, they are to impose the tax and to levy it by the methods used in cases of debts to the Crown, notwithstanding any privileges or exemptions granted by himself or his predecessors. It must, however, be observed that Louis adds, that this was to be done without prejudice to such privileges or exemptions for the future.<sup>1</sup>

In 1478 we find a declaration of Louis XI. that he had ordered the imposition of a tax throughout the Kingdom, and he demanded 1300 "livres tournois" from the people of Perigord, but, it should again be noticed, that he did this without prejudice to their privileges for the future.<sup>2</sup>

What conclusion then are we to draw? It seems to us clear that, whatever may have been the significance of the provisions of the Ordinance of 1439 with regard to the "Taille," it was still recognised as a general principle that Subsidies and Aids could not be imposed without the consent of the Estates, Provincial or General.

We turn to the proceedings of the great States General held at Tours in 1484 at the accession of Charles VIII. When the

<sup>1</sup> Id. id., vol. xvii. p. 288: "Vous mandons . . . que vous assemblés lesdictes gens des dictes trois estats dudict pays de Dauphiné . . . (et) leur requerrez très-instamment de par nous qu'ils nous veuillent octroyer et accorder . . . la somme de quarante-cinq mille florins pour l'ayde accoutumée, avec la somme de vingt-quatre mille livres tournois forte monnaie . . . et en cas qu'iceux gens de dictes Trois Estats seroient refusans ou delayans de nous octroyer pour ceste dicte année les dictes deux sommes dessus déclarés, nous voulons et vous mandons qu'en leur refus ou delay vous les mettiez sus et imposiés par la manière devant dicte . . . et non obstant oppositions et appellations quelconques . . . (et). Contraigniez ou faictes contraindre tous ceux sur lesquels lesdictes sommes

auront esté imposées, par toutes voies et manières accoutumées de faire pour nos propres debtes et affaires, non obstant comme dessus et quelconques privilèges et exemptions qui pourroient avoir esté données et octroyées le temps passé, par nos prédecesseurs, ou nous, à aucuns desdictes habitants, et sans prejudice diceux privilèges et exemptions pour le temps à venir."

<sup>2</sup> Id., vol. xviii. p. 403: "À ceste cause advons advisé, conclud et ordonné, faire mestre sus, asseoir et imposer ladicte somme, en et par toutes les elections de notre royaume, pour la porcion de laquelle avons ordonné estre mis sus et imposé en votreditte election (Perigord) la somme de treize cens livres tournois. . . . Et sans prejudice de leurs privilèges pour le temps à venir."

Estates came to deal with the financial business, the officers of the Crown attended and laid before them the actual condition of the finances of the country and the demands of the Crown. The Estates as Masselin reports in his 'Diarium' were not satisfied that the statement of the revenue was correct, and it was proposed to grant the King the same amount as had been given to Charles VII., but only for two years, when the Estates were to meet again.<sup>1</sup> The Chancellor, as representing the Crown, was not satisfied, and while offering to reduce the amount of taxation, demanded 1,500,000 livres.<sup>2</sup> Masselin reports that a number of the Princes and Lords attempted to persuade them to submit to the demands of the Crown, and asserted dogmatically and in threatening terms that the King had the right to take his subjects' goods to meet the dangers and necessities of the Commonwealth, and that many thought that the amount demanded should be imposed and levied even if they were unwilling.<sup>3</sup>

The Estates finally decided to offer 1,200,000 livres for two years, and 300,000 for one year, for the expenses of the coronation,<sup>4</sup> but accompanied this with the following statement. They grant the King the same amount as had been levied in the time of Charles VII., but they do this as a gift, and "obtroty," not to be called "tailles," and they do this for two years only. They also grant the sum of 300,000 "livres" for one year, on his accession to the Crown.<sup>5</sup> They also

<sup>1</sup> Masselin, 'Diarium,' pp. 350-360.

<sup>2</sup> Id. id., p. 390.

<sup>3</sup> Id. id., p. 420: "Videmi pro-fecto conari, ut populum etiam invitum, faciatis tenacem et avarum et inofficiosum principi. Quod si etiam contra rationem dissentiret, certe non ambigimus regem posse subditorum bona capere, quatenus reipublicae periculis et necessitatibus provideat. . . . Postremo sciatis plerosque in ea fuisse sententia, ut petitus denariorum numerus quindecies centorum millium vobis etiam statuatur invitis, atque colligatur."

<sup>4</sup> Id. id., p. 428.

<sup>5</sup> Id. id., p. 449: "Et pour subvenir aux grandes affaires dudit seigneur (Charles VIII.), tenir son royaume en seureté, payer et soudoyer ses gens d'armes et subvenir à ses autres affaires, les troys Estatz luy obtroyent, par manière de don et oetroty et non autrement, et sans ce qu'on l'appelle doresnavant tailles, ains don et obtroy, telle et semblable somme que du temps du feu Roi Charles Septième estait levée et cueillie en son royaume, et ce pour deux ans, prochainement venans, tant seulement et non plus. . . . Item, et par-dessus ce, les ditz Estaz . . . luy accordent la somme de trois cent mille livres tournois pour une fois tant

petition the King that he should call together the States General within two years, for they do not contemplate (n'entendent point) that for the future any money should be raised without their being summoned and without their will and consent. They beg him to maintain the liberties and privileges of the Kingdom and to abolish the novelties and grievances which had been introduced.<sup>1</sup>

It is clear that while some persons, representing the Court, made large statements about the power of the King to raise taxes at his pleasure, the States General were quite determined and firm in maintaining the principle that this was contrary to the tradition and custom of the Constitution, and it would appear from Masselin that the King promised to call together the States General within two years.<sup>2</sup>

We have then examined the evidence as to the constitutional usage of France with regard to taxation in the fifteenth century, but we must also take account of some very important statements of Comines in his 'Memoires.'

In one place he sets out the general principle that if any king or lord were to impose any tax upon his subjects outside of his domain without their consent, his action would be

seulement et sans conséquence, et par manière de don et obtroy, pour son nouvel et joyeux advènement à la couronne de France."

(This, and what follows in the next note, are given by the Editor in the original French which Masselin translated into Latin.)

<sup>1</sup> Id. id., p. 451: "Item et ensuivant certain article, contenu ou cayer qui par les ditz Estatz a esté leu et monsté au roi et à Messeigneurs du Conseil, suplient et requièrent les dits Estatz, que le bon plaisir du dit seigneur soit faire tenir et assembler lesditz Estatz dedens deux ans prochainement venans, en lieu et temps qu'il lui plaira et que, de ceste heure, lesditz lieux et temps soient nommez, assignez et déclairez ;

car les ditz Estatz n'entendent point que doresnavant on mette sus aucune somme de deniers, sans les appeler, et que ce soit de leur vouloir et consentement, en gardant et observant les libertez et privilèges de ce royaume ; et que les nouvelletez, griefs et mauvaises introductions qui, par c'y devant, puis certain temps en ça, ont esté faictes soient repaireez ; et de ce supplient très humblement le roi nostre souverain seigneur."

(The article of the Cahier referred to will be found on page 678 of the 'Diarium'.)

<sup>2</sup> Id. id., p. 712: "Le roy est content que les Estatz se tienneut dedens deux ans prochainement venant et les mandera."

mere tyranny.<sup>1</sup> In another place he says that neither the King of France nor any other Prince had the right to impose taxes on his subjects at his pleasure. Those who say that he could do this, do the King no honour, but rather make him to be feared and hated by his neighbours, who would not on any account become his subjects. If the King would recognise how loyal his subjects are, and how willing to give him what he asks, instead of saying that he would take whatever he wished, it would be greatly to his praise. Charles V. never said this and Comines had not heard any king say it; he had heard their servants say it, but they only did this out of servility, and did not know what they were talking about.<sup>2</sup>

We shall return to Comines when we deal in the next chapter in more general terms with the position of representative institutions in the fifteenth century. In the meanwhile it is obvious that his evidence about the principles of taxation is of great importance, especially in correcting the impression which such statements as those of Sir John Fortescue might produce.

Comines does not indeed say that there had been no arbitrary taxation in France, but he confirms the judgment

<sup>1</sup> Philippe de Comines, 'Memoires,' v. 19, p. 141: "Done pour continuer propos, y a il roy ne seigneur sur terre qui ait povoir, oultre son domaine, de mettre un denier sur ses subjectz; sans octroy et consentement de ceulx qui le doibvent payer, sinon par tyrannie ou violence?"

<sup>2</sup> Id. id., v. 19, p. 142: "Notre roy est le seigneur du monde qui le moins a cause de user de ce mot: 'J'ay privilege de lever sur mes subjectz ce que me plaist,' car ne luy ne autre ne la: et ne luy font honneur ceulx qui ainsi le dient, pour le faire estimés plus grand, mais le font hair et craindre aux voisins, qui pour rien ne voudroient estre soubz sa seigneurie; et mesmes aucuns du royaume s'en passeroient bien, qui en tienent. Mais si notre roy, ou ceulx qui le veulent louer et agrandir, disaient 'J'ay des subjectz

si tres bons et si tres loyaux, qu'ils ne me refusent chose que je leur saiche demander, et suis plus craiuet, obey et servy, de mes subiects que nul autre prince qui vive sur la terre, et qui plus patiemment endurent tous maux et toutes rudesses, et a qui moins ils souviengne de leur dommages passez; il me semble que cela lui seroit grand los (et dis la verité); non pas dire, 'Je prends ce que je veulx, et en ay privilege; il le me fault bien garder.'

Le feu roi Charles Quint ne le disoit pas ainsi, ne l'ay-je point ouy dire aux roys, mais l'ay bient ouy dire à de leurs serviteurs, a qu'il sembloit qu'ilz faisoient bien la bosogue. Mais, selon mon advis, ils mesprenoient envers leur seigneur, et ne le disoient que pour faire les bons varletz, et aussi qu'ilz ne scavoient ce qu'ils disoient."

(which we should derive from the study of the "Ordonnances") that it is impossible to maintain that the King of France had any recognised and constitutional right to impose taxation at his discretion. That he frequently did so is clear, and the right to do so was from time to time asserted by some persons, but it is also clear that the right was emphatically and constantly denied, and that the King from time to time and in quite unequivocal terms recognised that taxation should not be imposed without the consent of the Provincial or General Estates.

The evidence we have found in the proceedings of the Cortes of Castile with regard to the constitutional method of taxation during the fifteenth century, is curiously enough scanty, but what there is, is important. In the year 1411 we find a request made to the Cortes by the Guardians of the young King for the grant of a sum of money for the war against the Moors. The Cortes authorised the levy of the amount asked for, but they attached to the grant the condition that the Guardians should take an oath in the presence of the Cortes that the amount granted should be strictly appropriated to the expenses of the war, and to no other purpose.<sup>1</sup>

In 1420 the Cortes of Valladolid represented to the King that they were much disturbed by the fact that he was raising money without consulting the Cortes, and without their consent. The King replied that he would not levy such taxation till it had been authorised by the Cortes.<sup>2</sup>

<sup>1</sup> 'Cortes of Castile and Leon,' vol. iii. 2 (p. 5) (Valladolid, 1411): "Per lo qual nos demandastes que vos otorgamos, los tros estados del rregno, para cunplir e continuar, e sostener la dicha guerra delos moros . . . quarenta e çinco cuentos desta moneda usal . . . (p. 6). A nos otros plaze todos de una concordia de vos otorgar, e otorgamos vos desde agora todo que nos copiere a pagar delos dichos quarenta e ocho cuentos desta moneda usal en Castiella. . . Los quales dichos quarenta e ocho cuentos vos otorgamos, sennores, para

quelos pague el rregno este anno presente en que estamos, para cunplir e continuar la dicha guerra . . . (p. 7). Et este otorgamiento destos dichos quarenta e ocho cuentos, sennores, vos fazemos con condiçion que fagades juramenta, en presençia de nos otros, que este dinero que vos otorgamos que non lo tomaredes nin destribuyredes en otras costas nin otras cosas algunas, salvo en la dicha guerra delos moros."

<sup>2</sup> Id., vol. iii. 4, 2 (Valladolid, 1420): "E otrosy alo que me pidieron por merced que mandase dar mi carta para

There is also a very important and carefully drawn-out statement by the Cortes of Ocaña in 1469. The Cortes expressed themselves as willing to contribute to the necessities of the King by a grant of money, but, as it appears, they were not satisfied with the financial administration, and they therefore proposed that the amount raised should be placed under the control of persons to be appointed by the Cortes, who should hold it for the King and should only expend it for the restoration of the royal patrimony and the Crown, and other purposes authorised by the Cortes. They also proposed that no payment should be made except under a writ signed by the King himself and at least two members of his Council, and certain persons to be appointed by the Cortes. They also proposed that the King should swear to maintain these provisions, and should request the Pope to excommunicate him if he did not do so. The King assented, except to the clause about the Pope.<sup>1</sup>

vos otros, en que fuese especificado todo el caso, que por mi mandado e en mi presencia el dicho Arçobispo de Toledo los avia dicho, e lo que cerca dello conduyeron, e certificando los, que por caso alguno que acaesçiese, non mandario coger los tales pechos, sin primero ser otorgados: que de aqui adelante quando algunos menésteros me viniesen, ami plazie de vos lo fazer saber primeramente antes que mandase echar nin derramar tales pechos."

<sup>1</sup> Id., vol. iii. 25, 10 (Ocaña, 1469): "Quales per nos otros fueren nonbrados, para que rresçiban delos arrendadores e rrecaudadores e rreçetores, todas las contias que montaren en los dichos pedidos e monedas, e lo tengan donde por vuestra alteza con acuerdo de nos otros fuere mandado, e les dipute salario rrazonable para ello, e que non acudan con cosa dello a persona alguna ni lo gasten, salvo enlo que fuere menester para las cosas conçernientes ala rrestitucion de vuestro patrimonio e rreformacion de vuestros

tra corona rreal, e en las cosas conthenidas enel otorgamiento que por nos otros se hiziere delos dichos pedidos e monedas, e esto que se haga solamente por vuestras cartas o alualas firmado de vuestro nonbre e firmado en las espaldas delos nonbres delos de vuestro consejo, que sean fulano y fulano y fulano y fulano, o alos menos los dos dellos, si los otros no estouieren en vuestra corte, e de algunos de nos otros quales nos otros deputaremos, e delos vuestros contadores mayores, que de otra guisa los dichos rrecaudadores, e arrendadores e rreçetores non sean thenudos de acudir ni acudan con dinero delos dichos pedidos e monedas, e que vuestra alteza jure dolo guardar e manthener asy e que non yrá ni vegná contra ello, e que suplique a nuestro muy sancto Padre, que ponga sentençia de excommunion sobre vuestra rreal persona si lo contrario hiziere o mandare e que desto nos mande luego dar sus cartas para quelos hagamos publicar."

It would appear that, whatever may be the exact significance of some of these complicated provisions, the Cortes not only was the body which authorised the imposition of taxes, but that they considered themselves entitled to see that the amounts raised should be appropriated strictly to the purposes for which they granted them. We see no reason to doubt that the constitutional principles of the fourteenth century, which we have discussed in Part I. of this volume, were maintained in the fifteenth.<sup>1</sup>

It is obviously unnecessary to discuss the question of taxation with regard to England in the fifteenth century, for there cannot be any doubt that it was recognised that Parliament alone had in normal cases the right to levy taxation.<sup>2</sup>

<sup>1</sup> Cf. Part I. p. 92.

(ed. 1896), par. 370 and Index—Taxation.

<sup>2</sup> Cf. Stubbs, 'Const. Hist.', vol. iii.

## CHAPTER VI.

## REPRESENTATIVE INSTITUTIONS.

WE have in previous chapters dealt with the history of law, its source and authority, and with the theories of the nature and limitations of the authority of the Ruler: we must now consider the development of the authority of the community as embodied in and finding expression in representative institutions.

We venture to say that this is the proper method of approaching the development of Parliamentary or quasi-Parliamentary forms. The phrases which are sometimes used, such as that of the "Sovereignty of the People," may be well meant, but are in our judgment somewhat misleading. The term "Sovereignty" itself has often been used so carelessly that it is better to avoid it, and the term "People" is almost equally ambiguous. It would be better to speak of the authority of the "Community," the "Respublica" or "Universitas," for these are more strictly the Mediæval terms, and whatever ambiguity may belong to them, they have at least not become the catch-words of sometimes ill-considered controversy.

We have seen that it is true to say that the normal Mediæval conception, which was only reinforced by the revived study of the Roman Jurisprudence, was that the community was the source of all political authority, which was indeed derived ultimately from God, but immediately from the community. The community was the source of law, and of the authority of the Ruler, Emperor or King; and it is also clear that, while the Prince was conceived of as having, subject to the law,

a large discretion in the exercise of his authority, in fact the Mediæval Prince normally acted with the counsel and advice of some body of councillors, the chief men of the Community, who were conceived of, however vaguely, as having some kind of representative character.

There is nothing therefore to surprise the historian in the fact that this vaguely representative institution should have assumed a more precise and definite character in Spain in the twelfth century, in England and France and other countries in the thirteenth and fourteenth centuries.

We endeavoured to trace very briefly the development of representative institutions in the twelfth and thirteenth centuries in our last volume, and in the first part of this volume we have set out something of their development in the fourteenth century. We must now consider this in the fifteenth, and especially in Spain and France.

It is important to observe that while the Cortes of Castile and Leon did not meet every year, they met very frequently. It is not going too far to say that the Cortes in the fifteenth century continued to be, as in the fourteenth century, a normal part of the system of government.

It is also evident that the Cortes were clearly conscious of their representative character, and greatly concerned to maintain this. We find them repeatedly throughout the century protesting against any interference by the King with the election of representatives. In 1441 they demanded that the King, when he issued his summons to the cities and estates to send their Procurators to the Cortes, should not nominate any particular persons; for the cities should elect freely according to use and custom. The King replied that he would not nominate any persons to be sent as procurators.<sup>1</sup>

<sup>1</sup> 'Cortes of Castile and Leon,' vol. iii. 9, 9 (Palencia, 1431): "Otrosi suplicamos ala vuestra alteza que cada e quando le plonguiere mandar avuostros çibdades e villas que onbien sus procuradores ante vuestra merçod, quela nonbrar que enbien personas çiertas, saluo aquellas quelas dichas çibdades e villas entendieron que cunple auestro seruicio e bien publico delos pueblos; por que libre mente los puedan escoger entre si, segund lo han de uso e de costumbre; pero que non sean delos

In 1442 the Cortes of Valladolid renewed this demand even more emphatically, and added the very important claim that in the case of a disputed election the Cortes itself should consider and decide the question, and not the King or any other "justicia." The King again assented to their demand that he should not nominate any person for election, but his answer to the second point was, as we understand it, that in case of a disputed election they should ask his permission before determining upon it.<sup>1</sup> In 1447 the Cortes again protested against the interference of the King, but on this occasion, though accepting the general principle, the King reserved his right to take such action on his own initiative, if he thought it desirable.<sup>2</sup> In 1462 again the Cortes at Toledo demanded

labradores nin sesmeros nin del estado delos pecheros, por que mejor sea guardado el estado e onrra delos quelos enbian, e se puedan mejor conformar con los otros procuradores quando ovieren de tractar en sus ayuntamientos.

A esto vos rrespondo que yo non vos envié mandar que enbiasedes personas çiertas por procuradores."

<sup>1</sup> Id., vol. iii. 16, 12 (Valladolid, 1442): "Otro si muy esclareçido rrey e sennor, por quanto la esperiençia ha mostrado los grandes dannos e inconvenientes que vienen en los çibdades e villas quando vuestra sennoria enbia llamar procuradores, sobre la eleçeion dellos, lo qual viene por vuestra sennoria se entremeter a rrogar e mandar que enbien personas sennaladas, e asy mesmo la sennora Reyna vuestra Muger e el Prínçipe vuestro fijo e otros sennores; supplicamos auestra sennoria que non se quiera entremeter en los tales rruegos e mandamientos, nin dé logar que por la dicha sennora Reyna o Prínçipe, nin por otros sennores sean fechos; e ordenar e mandar que sy algunos llevaren tales cartas, que por el mesmo fecho pierdan los ofiçios que touieren en las dichas çibdades et villas, e sea privado para sienpre de ser pro-

curador; por quelas dichas çibdades enbien libre mente sus procuradores, e sy caso sera que algunos procuradores vengan en discordia, que el conosciendo della, sea delos procuradores e non de vuestra sennoria nin de otra justia.

A esto vos respondo que dezides bien, e mando que se faga e guarda asy; pero que el conosciendo del tal quando la procuraçion viniere en discordia, que quede ami merçet para lo mandar ver e determinar."

Cf. iii. 21, 9.

<sup>2</sup> Id., iii. 19, 60 (Valladolid, 1447): "Otro si muy poderoso sennor, algunos con importunidad ganan cartas de vuestra sennoria delos que estan cerca dello para que quando vuestra sennoria llama a Cortes e manda quele enbien procuradores, que enbien a ellas, lo qual no es vuestro serviçio e dello se podrian seguir algunos inconvenientes; supplicamos a vuestra sennoria que provea en ello, mandando quelas cartas non se den, e sy se dieren que sean obedecidas, mas non complidas.

A esto vos respondo que asi lo he guardado e entiendo mandar guardar segund que melo suplicastes e pedistes por merçed, saluo quando yo, non a peticion de personas alguna mas de mi

that the King, Henry IV., should not interfere in the elections, and that any person who produced royal Briefs for his election in any city, should be perpetually disqualified for holding any office or "procuraçion" in that city. The King replied that this was already provided for by the laws, specially those of Juan II.<sup>1</sup>

This jealous insistence on the freedom of the elections by the Cortes is of great significance, as we have said, in showing that they were much concerned to vindicate their representative character, and the fact that the Crown was evidently from time to time attempting to control the elections, is significant of the continuing importance of the Cortes.

We have in an earlier chapter considered the functions and authority of the Cortes with reference to legislation, and in the last chapter we have dealt with their authority in taxation, but it must be carefully observed that the Cortes did not conceive of their function and authority as limited to finance and legislation, but claimed that they should be consulted on all the more important affairs of the Commonwealth.

There is an excellent illustration of this in the early part of the century. The Cortes in 1419 represented to the King, Juan II., that when his predecessors ordained anything new or of general importance for the kingdom, they were accustomed to call together the Cortes and to act with their advice, and not otherwise; they complained that this had not been done since his accession, and that this was contrary to custom and law and reason; and they therefore petitioned him that he should do this in the future. The King replied that he had always done this in important matters, and that he intended to do it in the future.<sup>2</sup>

In 1469 we have a statement by the Cortes as emphatic as that of 1419. They protested to Henry IV. against an alliance with England instead of with France, and represented themselves as aggrieved for several reasons, of which the first is important from our present point of view. They maintained

proprio motu, entendiendo ser asy complidero a mi serviçio, otra cosa me plieguiere de mandar e disponer."

<sup>1</sup> Id., iii. 23, 37 (Toledo, 1462).

<sup>2</sup> Id., iii. 3, 19 (Madrid, 1419).

that according to the laws of the kingdom, when the kings had to deal with any matter of great importance, they ought not to do this without the counsel of the principal cities and "villas" of the kingdom, and they complained that the King had not observed this, but had acted without the knowledge of the greater part of the *grandees*, and of the cities and "villas." It is true that the answer of the King was, as it seems to us, evasive; he only promised to consider their petition with his Council, and to take such action upon it as might seem best; but this dogmatic statement of the Cortes of their claim to be consulted on all important matters, and their assertion that this was in accordance with the laws, remains very important.<sup>1</sup>

We turn to the character of the representative system in France in the fifteenth century, but we must again notice that in considering this we must remember not only the States General, but also the Estates of the great Provinces. If we could take account of them we should recognise more clearly the importance of the representative system in France, for though the meetings of the States General in the fifteenth century were important, the meetings of the Provincial Estates were, as we should judge, much more frequent.

What were the matters with which they were concerned? We have already dealt with some of these, especially legislation and taxation, but we must observe that, besides these, they were concerned with all the important affairs of the kingdom.

In the first part of this volume we have pointed out that the attitude of France to the great Schism in the Papacy was determined in some kind of great council of the kingdom.

<sup>1</sup> *Id.*, iii. 25, 29 (Ocaña, 1469): "La primera, porque segund leyes di vuestros rreynos, quando los rreyes han de hazer alguna cosa de gran importancia, no lo deuen hazer sin consejo e sabiduria delos çibdades e villas principales de vuestros rreynos; lo qual en esto no guardó vuestra alteza, hablando nos otros con humill reverencia, ca nunca cosa desto supieron la mayor parte delos

grandes de vuestros rreynos, ni las principales çibdades e villas dellos. . . . A esto vos rrespondo que yo entiendo deliberar sobre lo contenido en uestra petiçion e platicar esto enel mi consejo e hazer sobrello lo que se hallare que es mas complidero a servizio de Dios e al pro e bien comun de mis rreynos e sennorios."

It does not seem that we can call the Assembly, at which in 1408 it was determined that France should be neutral as between the rival claimants to the Papacy, a meeting of the States General, but it had at least something of the character of a National Assembly. The King speaks of the decision as being made after great and mature deliberation with the Princes of the Blood, the great Council and others, both clerical and lay.<sup>1</sup>

We are on clearer ground when we observe that the Assembly summoned to meet in Paris in 1413 in the name of Charles VI., was composed of the Princes, Prelates, representatives of the University, and those of the good towns. The business of this Assembly was to deliberate on the great affairs of the kingdom, and especially on the reform of the Royal officials.<sup>2</sup>

In the Treaty of Troyes by which in 1420 Charles VI. gave the actual administration, and the future succession to the French Crown to Henry V. of England, it was specially provided that the Treaty was to be confirmed by the oaths not only of the great Lords, but also by those of the Estates of the kingdom, spiritual and temporal, and the cities and communities of the kingdom.<sup>3</sup> In another clause of the Treaty it was provided that Henry was to endeavour to secure that, by the advice and consent of the three Estates of the two kingdoms, the union of the crowns of England and France in one person should be perpetual.<sup>4</sup> It was no doubt in accordance with these provisions of the Treaty that the Three Estates were called together in Paris in December of the same year. We have unfortunately only an incomplete account of the pro-

<sup>1</sup> 'Ordonnances,' vol. ix. p. 342.

<sup>2</sup> 'Recueil,' vol. vii. 5, 39. Cf. Moustrelet, 'Chronique,' vol. ii. p. 307.

<sup>3</sup> 'Recueil,' vol. viii. 695, 13, p. 636. "Il est accordé que les grands seigneurs, barons et nobles, et les Estats dudit royaume, tant spirituelz que temporelz, et aussi les citez et notables communitiez, les citoyens et bourgeois du dit royaume, à nous obéissans pour le temps, feront les seremens qui s'ensuivent."

<sup>4</sup> *Id.*, vol. viii. 695, 24, p. 369:

"Il est accordé que notre dit filz labourera par effect de son pouvoir, que de l'adviz et consentement des Trois Estas desdiz royaumes, ostez les obstacles en ceste partie, soit ordonné et pourveu que du temps que notre dit filz sera venu à la couronne de France, ou aucun de ses hoirs, les deux couronnes de France et d'Angleterre à toujours mais perpetuellement, demourront ensemble, et seront en une mesme personne."

ceedings in Juvenal des Ursins' 'Histoire de Charles VI,'<sup>1</sup> but if we could trust a document printed by Rymer in the 'Foedera,' whose source is unknown, we have an important statement of the composition and proceedings of the Estates. They are described as composed of the Bishops and Clergy, the "Proceres," nobles, citizens, and burgesses. After the Chancellor had read the Treaty to them, and the King had declared that he had sworn to observe it, the Estates were adjourned for a few days, and on their reassembling they reported that they approved, accepted and authorised the Treaty and all its provisions.<sup>2</sup>

To return to the legitimate government of France, we have a reference to a meeting of the States General at Chinon, in a letter of 1426.<sup>3</sup> We have already dealt with the very important meeting of the States General at Orleans in November 1439, and we need only point out again that it was with the advice of the Estates that Charles VII. created the new military organisation of France.<sup>4</sup>

In April 1468, Louis XI. called together the States General to deal with a great constitutional question; that was—the demand of his brother Charles that the Duchy of Normandy should be separated from the Crown of France, and held by himself. The Three Estates agreed that it could not be thus separated, but must remain inseparably united and joined to the Crown.<sup>5</sup> It is also significant of the constitutional authority of the States General that on the same occasion, in view of the attacks made by the Duke of Brittany in Normandy,

<sup>1</sup> Juvenal des Ursins, 'Histoire de Charles VI,' ed. Paris, 1653, p. 384.

<sup>2</sup> Rymer, 'Foedera,' vol. x. p. 30: "Responderunt quod, quantum ad Pacem predictam, Ipsi eandem Pacem censentes et reputantes laudabilem, necessariam et utilem utrisque Regnis et subditis eorundem, ymo et toti christi-anitati, ipsam Pacem ac omnia et singula in eadem contenta, quantum in eis erat et velud ipsi tres Status dicti Regni, approbarunt, laudarunt, accep-tarunt et auctorisarunt."

(How far this document can be

trusted is uncertain. It is possible that it represents an attempt in England to give the Treaty of Troyes a legal and constitutional character.)

<sup>3</sup> 'Ordonnances,' vol. xiii. p. 140.

<sup>4</sup> Cf. pp. 138, 194.

<sup>5</sup> 'Recueil,' vol. x. 114 (3), p. 553: "Que en tant qu'il touche ladite duché di Normandie, elle ne doit et ne peut être separé de la couronne en quelque manière que ce soit, mais y est et doit être et demeurer unie, annexée et con-jointe inséparablement."

they gave the King authority to take such action as should be necessary to maintain the statutes and ordinances of the kingdom without waiting to call together the Estates.<sup>1</sup>

It is, we think, evident that the States General in France were conceived of, not merely as a body which should sanction taxation, important though this was, but as, in some sense and degree, representing the whole community of the nation, whose approval and support it was desirable that the King should obtain in matters of great political importance. It is only with this in our mind that we can understand the constitutional attitude of the great States General of Tours which met in January 1484, on the accession of Charles VIII.

We have already dealt with some important questions which arose in the course of their meetings, and here, therefore, we only deal with some other of the most important of these. When the States General met, they conceived their function as being primarily to consider the abuses which had grown up during the last reigns, and secondly to consider and provide for the government of the country during the minority of the King.

The first they proceeded to deal with by arranging the Estates in six divisions, representing the six groups of provinces; each of these divisions was to prepare a statement of grievances and remedies. They then created a commission of six members of each division to prepare a general statement on this basis. We are not here concerned with the details of these statements, but it is important to observe that they covered almost the whole range of the government of the country, not only in matters of finance, but also of the administration of justice.<sup>2</sup>

The question of the Council of Regency was the subject of protracted discussion. It is evident from Masselin's account that there was much difference of opinion among the members

<sup>1</sup> Id. id. id. (9), p. 558: "Et dès maintenant pour lors, et dès-lors pour maintenant, toutes les fois que les-dits cas écherroient, iceux des Etatx ont accordé et consenti, accordent et consentent que le roi, sans attendre autre assemblée ne congregation des Etats,

pourceque aisément ils ne se peuvent pas assembler, y puisse procéder à faire tout ce que ordre de droit et de justice, et les statuts et ordonnances du royaume le portent."

<sup>2</sup> Masselin, 'Diarium,' pp. 66, 74, 76.

of the States General, some maintaining that it was for them to appoint the Council, for the care of the State had now (in the King's minority) come to them, while others maintained that the appointment of the Council belonged to the Princes of the Blood.<sup>1</sup> The final result seems to have been that the Estates did not maintain the right to appoint the Council of Regency, but they requested the King and his Council to add to it twelve persons, to be chosen from the six divisions of the Estates.<sup>2</sup>

It is no doubt probably true that behind the controversy in the Estates about the composition of the Council of Regency, we can see the influence of different factions among the Princes and great nobles, but we are not attempting to write the history of the times.

We turn again to Commines and to his attitude to the States General. His opinions have a special value, not only because he was a man of great experience in political and diplomatic affairs, but because he was a great servant of the French Crown, and cannot be suspected of any desire to depreciate its authority. We have in the last chapter cited his important statements about taxation, but these are only incidental to his treatment of the importance of reasonable relations between the King and his subjects. It is not only with reference to taxation that he thinks that the King should act with the consent of his subjects. After the general condemnation of the attempts of kings to impose taxes upon their subjects without their consent, as being mere tyranny, which we have cited, he continues, that even in the case of war it was much wiser for kings to act after consulting the assemblies of their people, and with their consent, and that this would greatly increase the King's power.<sup>3</sup> Commines is

<sup>1</sup> Id. id., p. 138.

<sup>2</sup> Id. id., p. 702, 3.

<sup>3</sup> Commines, 'Mémoires,' v. 19, p. 141: "On pourroit respondre qu'il y a de saisons qu'il ne faut pas attendre l'assemblee, et que la chose seroit trop longue, à commencer la guerre et à

l'entreprendre. Ne se fault point haster, et on a assez temps: et si vous dis que les Roys et Princes en sont trop plus fors, quand ilz entreprennent du conseil de leurs subjectz, et en sont plus crainctz de leurs ennemis."

obviously referring to the Estates when he speaks of the assembly, and a little later on he speaks of them with special reference to the States General of Tours in 1484. He describes contemptuously certain persons who spoke of this assembly as dangerous, and denounced it as being treason (*leze majesté*) to speak of calling together the Estates, and argued that this would diminish the authority of the King; such persons, he says, were really guilty of a crime against God and the King; they were men who held some undeserved authority, and talked thus foolishly, because they were afraid of the great assemblies, and feared that they would be known for what they were, and be censured.<sup>1</sup> It is clear that Commines looked upon the States General, that is, the meeting of the representatives of the community, and its consultation by the King, as being a useful and normal part of the organisation of a political society, necessary for taxation, and desirable for the effectiveness of public action.

We do not need to discuss in detail the character of the representative Assembly of the Empire, for it is clear that the Emperor was the head of a political body which was tending to become a federal system rather than a unified monarchy, and that the final authority in this system belonged rather to the Diet than to the Emperor.

It is, however, important to observe the terms in which the Diet is described by Nicolas of Cusa. The Council of the Empire, he says, consists of the Emperor, the principal Rulers

<sup>1</sup> Id. id., p. 143: "Et pour parler de l'experience de la bonté des Français, ne faut alleguer pour nostre temps que les Trois Estats tenus à Tours, apres le decez de notre bon maistre le Roy Louis XI. (à qui Dieu fasse pardon) qui fut l'an mil, quatre cents, quatrevingts et trois.

L'on povait estimer lors que ceste assemblee estoit dangereux, et disoient quelques ungz de petite condition et de petite vertu, et ont dit plusieurs fois depuis, que c'est crime de Lèze Majesté, qui de parler d'assembler Estatz, et

que c'est pour diminuer l'auctorité du roi: et sont ceulx qui commettent ce crime envers Dieu et le Roy, et la chose publique; mais servoient ces paroles, et servent à ceulx qui sont en auctorité et credit, sans en riens l'avoir merité, et qui ne sont points propices d'y être, et n'ont accoustumé que de fleureter en l'oreille, et parler de choses de peu de valeur; et craignent les grandes assemblees, de paour qu'ils ne soient congneuz, ou que leurs œuvres ne soient blasmées."

of the various provinces as representing these, and the heads of the great communities (Universitates); and, he adds significantly, when these are met in one representative body, the whole Empire is gathered together.<sup>1</sup>

We may put beside this the terms in which at the Diet of Worms in 1495, a new Court of the Empire, the "Reichs Kammergericht," was established. Its creation was a part of the attempt made in the last years of the fifteenth century to reorganise the constitution of the Empire. The creation of this new Court is represented as being related to an attempt to establish a "Common Peace" for the whole Empire, and it was with the consent of the Electors, Princes, Counts, Nobles, and Estates that the Peace and the Court were established.<sup>2</sup> And it was with the counsel and will of the Diet that the Emperor was to appoint the judges of the Court.<sup>3</sup>

We do not discuss the development of the representative system in the fifteenth century in England, for this has been done by the great historians, but it is worth while to put beside

<sup>1</sup> Nicolas of Cusa, 'De Concordantia Catholica,' iii. 25: "Scimus imperatorem caput et primum omnium, apud quem est imperialis iussio, de congregandis subditis, regibus et principibus, si vero qui ut membra ad ipsum caput concurrere habent; in hoc universali concilio sunt principales praesides provinciarum, suas provincias representantes, ac etiam universitatum magnarum rectores et magistri, et illi qui e senatorio gradu, qui sacer conventus appellatur, existunt. . . . Et dum simul conveniunt in uno compendio representativo, totum imperium collectum est."

<sup>2</sup> "Neue Sammlung," 'Senckenburg und Schmaus,' vol. ii. p. 21; Reichsabschied, Worms, 1495: "Darumb mit cynmütigen, zeytigen Rate der Erwerdigen und Hochgeporenen . . . Curfürsten und Fürsten, Geysstlichen und Weltligen auch Prelaten, Grafen, Herren und Stende, haben Wir durch

heylich Reich und Teutsche Nacion eyngemainen Fried furgenommen, aufgerichtet und gemacht." (p. 6) "Ordnung des kayserlichen Cammergerichts zu Worms. . . . Wir haben aus beweglichen Ursachen, einen gemeinen Landt-Frieden, durch den heylich Römisch Reich und teutsche Nacion, aufgerichtet, und zuhalten gepoten, und nachdem der selb on redlich, erber und furderrlich Recht schwerlich in Wesen besteen möcht, darumb auch Germanien Nütz zu Fürderung und Nothurfft euer aller, unser und des Heyligen Reychs Cammergerichts mit zeitigom Rath Euer der Churfürsten Fürsten und Gemainen Besammlung, auff unserem und des Reychs Tage, hie zu Worms, aufzurichten und zu halten, fürgenommen in Form und Massen als hernach volget."

<sup>3</sup> Id. id.: "Die Richter und Urtheiler die all wir mit Rath und Willen der Sammling yetz hie kiesen werden."

Nicolas of Cusa and Commynes, some of those passages which we have already cited in which Sir John Fortescue describes this, and also some observations on what he understood to have been its history in France.

He deals with it first in his treatise on the Law of Nature, where he treats the English constitutional system as embodying the "dominium politicum et regale," for no laws can be made, nor taxes imposed without the consent of the Three Estates of the Kingdom, while on the other hand the subjects could not make laws without the authority of the King.<sup>1</sup> He deals with it again in the treatise, 'De Laudibus Legis Angliae,' where he points out that the laws of England do not proceed from the mere will of the King, for laws which are made by the Prince alone might often be directed to his private advantage and turn to the injury of his subjects, while the laws of England are made by the wisdom and prudence of more than three hundred elected men, that is by the assent of the whole kingdom, and for the good of the people.<sup>2</sup>

In his 'Government of England' Fortescue contrasts the unhappy condition of the French people under a "Dominium Regale" with that of the English under a "Dominium Politicum et Regale," as he had done in his 'De Laudibus Legis Angliae,' but he also says that though the French King now reigned "Dominio Regali," this had not always been so, for neither St Louis nor his ancestors imposed taxes on the people without the assent of the Three Estates, which were like the Parliament in England, and this had continued till the time of the wars of England against France.<sup>3</sup>

We have, we think, said enough to justify our own conclusion that that representative system whose beginnings in the

<sup>1</sup> Fortescue, 'De Natura Legis Naturae,' i. 16: "Sed et tertium esse dominium, non minus his dignitate et laude, quod politicum et regale nominatur. . . . In regno namque Angliae reges sine trium statuum regni illius consensu leges non condunt, nec subsidia imponunt subditis suis. . . . Numquid tunc hoc dominium politicum,

id est plurium dispensatione regulatum dici possit, verum etiam et regale dominium nominari mereatur, cum nec ipsi subditi, sine regia auctoritate leges condere valeant."

<sup>2</sup> Id., 'De Laudibus Legum Angliae,' xviii.

<sup>3</sup> Id., 'Governance of England,' iii, Cf. p. 175.

twelfth and thirteenth centuries we have traced in the last volume, and whose continued importance in the fourteenth century we have illustrated in the first part of this volume, continued to be a normal part of the political civilisation of Western Europe in the fifteenth century. As we have often said, we are not writing a constitutional history of Europe, and we are only concerned with the representative system as illustrating the conception that political authority was understood to be the authority of the community, primarily indeed through the law which was the expression and the form of its life, but secondarily and in these later centuries especially, as embodied in the Assemblies, Estates, or Parliaments which were accepted as representing the whole community.

We have examined the political and legal literature of the fifteenth century, and we have compared it with the constitutional practice especially of Spain and France, and we think that it is clear that there is little trace of the development of any political conceptions which were different from those of the fourteenth century, or of the Middle Ages. It seems to us evident that the political thought of the time was still dominated by the conception of the supremacy of law and custom, that is, if we use the rather unhappy terms of some moderns, it was not the Prince, but the Law, which was conceived of as sovereign.

The Prince was indeed thought of as august, and was treated with profound deference and respect, but he was not absolute, and his authority was derived from the community. His authority was limited and even terminable if he violated the laws and liberties of the community.

It is true that when we turn from the general political literature to the Civilians we find that they generally represented another mode of thought, and we have come across a few statements of the theory of "Divine Right," in the fourteenth and fifteenth centuries, but there is very little evidence that these absolutist theories had any appreciable influence on the general character of the political ideas of the fifteenth century.

## PART III.

### THE EARLIER SIXTEENTH CENTURY.

#### CHAPTER I.

##### THE THEORY OF A LIMITED MONARCHY.

WE have so far considered the character of the political theory of the fourteenth and fifteenth centuries, and its relation to the actual constitutional conditions of some of the greater European countries. We have now to examine the question how far, and in what respects, we can trace the appearance and development of any new and important political conceptions in the sixteenth century. We have to consider how far the great political and religious movements of the century, or that great but indefinable movement which we call the Renaissance, may have brought with them new conceptions of the nature and principles of political society and authority. If, however, we are to approach the subject seriously, we must begin by putting aside all preconceptions and must not allow our judgment to be swayed by any traditional notions, or assume that those great movements were or were not important in the development of political ideas or principles.

We have a work of the early years of the sixteenth century which is of the highest importance both as representing the experience of the past and as anticipating future developments. This is the work entitled 'La Grant Monarchie de

France,' which was written in the first quarter of the century by Claude de Seyssel, the Archbishop of Turin, who, though a noble of Savoy, had been for many years, from 1497 to 1517, in the service of the French Crown, under Louis XII. It is the work, therefore, of a man who had a large practical political experience, and though it may be described as a work of political theory, it is rather of the nature of the recorded observations of a practical statesman on what he had seen.

This is indeed a remarkable work, both for its shrewd and penetrating observation of the actual character of the political system, and for the sharp contrast it presents to the work of another important French writer, of the latter part of the century, that is the 'De la République' of Jean Bodin, first published in 1576. We shall have much to say about this in a later chapter, but we may at once contrast Bodin's dogmatic and abstract conception of the nature of the political authority, which he calls "Majestas," which we should call Sovereignty, with the cautious and tentative conception of de Seyssel, that in the actual fact of human experience, political authority is conditioned and limited by forces, sometimes intangible, but none the less real.

At the outset of the work de Seyssel says that the French monarchy was the best of all monarchies, because it was neither completely absolute, nor too much restrained; it was regulated and restrained by good laws, ordinances, and customs which were so firmly established that they could scarcely be broken. The absolute power of the kings of France was regulated by three restraints (freins), Religion, Justice, and what de Seyssel calls "la police."<sup>1</sup> In a later passage he says that it is by these "freins" that the absolute power of the monarch, which is called tyrannical when it is exercised

<sup>1</sup> De Seyssel, 'Grant Monarchie de France,' i. 8: "Et neantmoins demeure toujours la dignité et autorité royale en son entier, non pas totalement absolue, ne aussy restraincte par trop: mais reglee et refrenee par bonnes lois, ordonnances et coustumes, lesquelles sont establies de telle sorte que a peine se peuvent rompre et

adnichiler, iacoit que, en quelque temps et en quelque endroit, il y adviegne quelque infraction et violence.

Et pour parler desdicts freins par lesquels la puissance absolue des rois de France est reglee, jen trouve trois principaulx. Le premier est la religion, le second la justice, et le tiers, la police."

against reason, is reduced to "civilité," and if he sets aside these limits, and follows his uncontrolled will, he is held to be an evil tyrant, cruel and intolerable, and earns the hatred of God and of his subjects.<sup>1</sup>

We must consider these "freins" a little more closely. About Religion he does not say much which is of importance for our present subject except that the people would hate the king if he were notoriously irreligious, and would hardly obey him.<sup>2</sup> Of the second, "la justice," he has much to say which is of the greatest importance. This, he says, was more highly developed in France than in any other part of the world, under the form of the "Parlemens" which had been created chiefly for the purpose of restraining the absolute power which the king might desire to exercise. In respect of distributive justice the kings had always been subject to this, so that in civil matters every man could obtain justice against them, just as much as against other subjects, and the king's letters and rescripts are subject to the judgment of the "Parlemens." In regard to criminal matters the kings' "graces et remissions" are subject to such discussion in these courts, that few would venture to do evil in hope of them.<sup>3</sup>

<sup>1</sup> Id., ii. 6: "Et premièrement touchant les troys freins dont jay parlee dessus par lesquels la puissance absolue du prince et monarque, laquelle est appelee tyrannique, quant l'on en use contre raison, est refrenee et reduite a civilité. . . . Et par le contraire, des qu'il se desnoye desdits troys limites et veult user de volonte desordonnee, il est tenu et reputé mauvais tyrant et cruel et intolerable, dont il acquiert la hayne de Dieu et de ses subjects."

<sup>2</sup> Id., i. 9.

<sup>3</sup> Id., i. 10: "Le second frein est la justice, laquelle sans point de difficulté est plus autorisee en France que en nul autre part du monde que lon sache, mesmement a cause des parlemens qui ont este instituez principalement pour ceste cause et a ceste fin, de refrener la puissance absolue

dont voudroyent user les rois. Et si furent des le commencement establis de si grans personages en tel nombre et avec telle puissance et pouvoir que les rois y ont, quant a la justice distributive, toujours este subjectz: tellement que lon a justice et raison à l'encontre deulx, aussi bien que à l'encontre des subjects es matieres civiles. Et entre les parties privees leur auctorite ne peut prejudicier au droit daultuy. Ains sont leurs lettres et rescriptes subjects au jugement desdits parlemens en tel cas: non pas touchant obreption et subreption seulement, comme ceulx des aultres provinces selon les lois Romaines, mais touchant la civilité et incivilité. Et quant aux matieres criminelles leurs graces et remissions y sont tellement debattues et ceulx qui les obtiegnent mis à telle discussion que peu se

And then, lest it should be imagined that judges are after all under the king's control, he adds that their office was not temporary but perpetual, and that the king could not remove them "sinon par forfaiture," and that judgment upon them belonged to the courts themselves. And thus, the judges, knowing that they could not be removed, except for a definite fault, can give themselves with more confidence to the administration of justice, or are inexcusable if they do not do so.<sup>1</sup> The significance of this will be obvious to all who remember the importance of the principle of the mediæval constitutional system of the supremacy of the law and the courts over the prince.<sup>2</sup>

We must turn to de Seyssel's treatment of the third "frein" upon the royal authority in France, that is, "la police." It is difficult to define in precise terms what he means by this, but it would appear that he uses it to describe the system and order of the State (probably as equivalent to "Politia"). He describes, as belonging to it, first the laws and ordinances which had been made by the kings themselves, and confirmed from time to time, and which tend to the preservation of the kingdom. These had been observed for so long a time that the princes do not attempt to "derogate" from them; if they did, they would not be obeyed.<sup>3</sup> He returns to the subject

trouvent de gens qui sous esperance ne confiance de cela, osent faire chose mal faicte et sur tous cas exécérable."

<sup>1</sup> Id. id.: "Et dautant est icelle justice plus autorisee que les officiers deputes pour la faire et administrer, sont perpetuels, et nest en la puissance des roys les deposer, sinon par forfaiture, dont la cognoissance est reservee quant aux suppos des cours souveraines à icelles commis en première instance, et quant aux autres inférieurs par appel. Et si par volunté desordonnee aucun a este quelque foys prive et deboute sans garder le dit ordre, ceulx qui en ont este cause, ou ont prins et occupe leur lieu, en ont apres rendu compte et reliqua. Dont il advient que iceulx juges et officiers

sachant non pouvoir estre deposees sils ne meffont, plus asseurement saquittent à l'exercice de la justice; ou sils ne le font sont inexcusables. Et veritablement cestuy frein et retenail et moult grant et louable en France plus que en nul autre pays, comme dict est."

<sup>2</sup> Cf. esp. vol. iii., part i., chap. 4.

<sup>3</sup> Id., i. 6: "Le tiers frein est celui de la police. C'est à scavoir de plusieurs ordonnances qui ont este faictes par les rois mesmes, et apres confermees et aprouvees de temps en temps, lesquelles tendent à la conservation du royaume en universel et particulier. Et si ont este gardées pour tel et si long temps, que les princes nentrepreignent point dy

in a later chapter, when he says that the king knows that it is by means of the laws, ordinances, and laudable customs of France concerning the "police," that the kingdom has come to its greatness, and the king must keep them and cause them to be kept, to the utmost of his power, remembering that he is bound to do so by the oath which he swore at his coronation. If he were not to do so, he would offend God and his own conscience, and would incur the hatred and ill-will of his people.<sup>1</sup>

This, however, is not all that de Seyssel treats of under "la police." There are, he says, three estates in the kingdom besides that of the Church—the nobles, the middle classes (le peuple gras), and the lower classes (le peuple menu), and each of these has its own "preheminences" according to its quality, and these must be carefully preserved.<sup>2</sup>

In the second book of the treatise he goes on to say that the king should take counsel, and he describes the Great Council, which he distinguishes from the ordinary Council. The Great Council is composed of the good and notable men

deroguer: et quant le voudroyent faire lon nobeist point à leur commandemens. Mesmement quant au fait de leur demaine et patrimoyne royal quil's ne peuvent alier sans necessite."

<sup>1</sup> Id., ii. 17: "Quant au tiers point de la police, portant que tout ce que je diray, cy apres depend dicele, nen diray sur ce propos aultre chose que le roy et monarque cognoissant que par le moien des lois ordonnances et louables coustumes de France concernant la police, le royaume est pervenu à telle gloire, grandeur et puissance que l'on voit; et se conserve et entretient en paix prosperité et reputation; les doit garder et faire observer le plus qu'il peult, attendu mesmement qu'il est astraint par le serment qu'il faict à son couronnement de ce faire. Pourquoy faisant le contraire offense Dieu et blesse sa conscience et si acquiert la hayne et mal vieillesse de son peuple, et autre

ce, affoiblist la force et par consequence diminue sa gloire et sa renommee."

<sup>2</sup> Id., i. 13: "Il va outre à un aultre ordre et une aultre forme de vivre en ce royaume tendant à cette mesme fin, que moult faict à louer et entretenir pour l'union et accord de tous les Estats dicelluy. Car ilz ont este si bien introduits et continuez que à grant peine peult venir le royaume en grande decadence tant quil's seront bien entretenus, pour autant que ung chescun des dictes Estats à ses droits et preheminences selon sa qualité, et à peine peult l'ung opprimer l'autre, ne tous trois ensemble conspirer contre le chief et monarque. Et en ces trois Estats ie ne comprends point celui de l'Église dont je parlera après. Ains les prens ainsy que lon faict en aucuns aultres pays. C'est à scavoir la noblesse, le peuple moyen que lon peult appeler le peuple gras, et le peuple menu."

Cf. ii. 17.

of the various estates, both secular and ecclesiastical, the Princes of the Blood, the Bishops, the chief officers, and, if the business is important, the Presidents of the Sovereign Courts (Parlemens), the principal counsellors of those courts, and other wise and experienced persons. This is not a body which should be called together frequently, but only when there are some grave and important matters to consider, such as the declaration of war, the making of laws and ordinances for the whole kingdom, and other like matters. He adds, a little grudgingly apparently, that it is sometimes expedient to summon to the Council some small number of men from the most important cities of the kingdom.<sup>1</sup>

It will be observed that this can hardly be described as the "States General," it is more of the nature of an Assembly of Notables, and it is evident that de Seyssel had no great interest in strictly representative institutions, but he is clear that the king should be advised by a body of men who represented the political intelligence of the community.

We have said enough to indicate why it is that this treatise is of great importance, for it expresses the judgment of an experienced officer of the French Crown on the nature of what we should call the constitutional system of France. It is

<sup>1</sup> Id., ii. 5: "Tout ainsi je dis que le roy doit les grans et communs affaires du royaume communiquer à ung grant conseil assemblee de bons et notables personnages de divers estats tant d'eglise que séculiers, et tant de robe longue que de robe courte. C'est a savoir ceulx qui sont qualifiés a cause de leur degre, estat, ou office, comme sont en France les Princes du sang, les évesques, les chefs d'office, les chambellans, les maitres des requestes et maitres d'hotel qui se trouvent en Court. Et encore selon l'importance des affaires y doit lon appeler des presidens des courts souveraines et principaux conseillers dicelles, des prelatz absens, et autres notables personnages que lon sait estre sages et experimenes. Mais cela de con-

voquer tels personnages absens ne se fait ne doit faire guieres souvent pour eviter confusion et despense. Ains tant seulement quant il occourt quelque chose qui nadvient pas souvent et est de grande consequence a toute le royaume, comme d'entreprendre une guerre et conquete nouvelle. De faire loix et ordonnances generalles concernant la justice ou la police univorselle du royaume, et aultres cas semblables, aux quels cas il est quelque foyz expedient d'appeller quelque petite nombre de gens des cites et villes capitales du royaume. Et en ceci n'est pas appelle conseil ordinaire. Ains est une assemblee casuelle. Laquelle comme dicte est ne se doit faire sinon quant les cas le requierent."

evident that its emphasis lies just on those principles of political order which had been most characteristic of the Middle Ages, that the king was controlled by the Law, and that in all matters concerning the rights of his subjects he could only act by process of law and in the courts. If de Seyssel does not express the first principle in the precise terms of Bracton or Fortescue, his meaning is clear, and the second principle is stated by him in terms which are not far removed from those of Magna Carta and the great Feudal Lawyers. It is indeed the confidence with which he affirms the complete independence of the courts from the authority of the king, which is most remarkable.

It is interesting and important to observe that the most famous political writer of the sixteenth century, that is, Machiavelli, made some observations on the government of France, which correspond in important points with the opinion of de Seyssel. In one place in his Discourses on Livy, he contends that when a people knows that the prince will not on any account violate the law, they will live secure and contented, and he gives as an example the kingdom of France which lives in security because the kings were bound by many laws which formed the security of all their people.<sup>1</sup> In another place he points out the good effects in France of this; that kingdom lived more completely under law than any other, for their laws were maintained by the Parlements, and especially by that of Paris, which would deliver judgment even against the king.<sup>2</sup>

<sup>1</sup> Macchiave'li, 'Discorsi Super la prima Decade di Tito Livio,' i. 16: "E quando un principe faccia questo, e che il populo vegga che per accidente nessuno ei non rompe tali leggi, comincerà in breve tempo a vivere sicuro e contento. In esempio ci e il Regno di Francia, il quale non vive sicuro per altro che per essersi quelli Re obligati ad infinite leggi nelle quali si comprende la sicurtà di tutti i suoi populi."

<sup>2</sup> Id., iii. 1: "Hanno ancora i regni bisogno di rinnovarsi e ridurre le

leggi di quelli verso il suo principio. E si vedi quanto buono effetto fa questa parte nel regno di Francia, il quale regno viva sotto le leggi e sotto gli ordini piu che alcun altro regno. Delle quali leggi e ordini ne sono mantentori i Parliamenti, e massime quel di Parigi; le quali sono da lui rinnovate qualunque volta, e fa una esecuzione contra ad un principe di quel regno, e che ei condanna il Re nelle sue sentenze."

These conceptions of the nature of the French monarchy may seem at first sight rather strange; they do not correspond with the impressions of Sir John Fortescue, as we have seen, but after all de Seyssel was in a better position to judge the real nature of that government than an observer in England, however intelligent he might be.

It is clear that in the judgment of de Seyssel the French monarchy was a monarchy limited by law and custom. We shall have to consider the development of the theory of an unlimited monarchy, so far as it is to be found in the sixteenth century, but it is clear that it was unknown to de Seyssel.

## CHAPTER II.

### THE SOURCE AND AUTHORITY OF LAW.

WE have, in the last chapter, drawn attention to the work of de Seyssel, because it seems to us important as representing the judgment of a man of affairs, an experienced official of the French Crown, on the real nature of the government of France. Our task is, however, to examine the political theory which lay behind the actual institutions of European society, and we must therefore turn to a more detailed examination of the various aspects of this.

We must begin with an examination of the theory of the nature, the source, and the authority of law. As we have often said, and we are convinced that it is a right judgment, the supreme authority in the Mediæval State was the Law, not the prince, and as we have seen in the earlier parts of this volume, this continued to be the normal judgment of the fourteenth and fifteenth centuries; we must now consider whether this continued in the sixteenth century, or how far it gave place to that theory of the supremacy of the monarch which became common in continental Europe in the seventeenth and eighteenth centuries.

We have not found, in the literature of the earlier part of the century, very much discussion of the nature of law in general, but there is enough to indicate its general character, and to illustrate the continuance of the tradition of St Thomas Aquinas. We find examples of this in the work of an eminent English Jurist, St Germans, writing about 1539, in that of the Dominican Professor of Salamanca, Soto, who had been the confessor of Charles V. and in that of Calvin.

St Germans' work is in the form of a dialogue between a Doctor of Civil Law and a Student of English Law, and he begins with a brief statement by the Doctor on the first and general principles of all law. The Eternal Law, he says, is nothing else but the supreme reason of the Divine Wisdom, by which God wills that all things should be moved and directed to their good and proper end.

God reveals the Eternal Law to the rational creature in three ways: first, by the light of the natural understanding; secondly, by Divine Revelation; and thirdly, by the reason in the prince or other ruler, who has power to impose law upon his subjects. The "Lex Naturæ" is that which belongs to the rational human being; the "Lex Divina" directs men to eternal felicity; while the "Lex Rationis" directs men to felicity in this life. The "Lex Humana," in order to be just, requires two things in the legislator: "prudence," that he may direct the community in accordance with right practical reason; and authority, for he must have authority to make law. The Lex Humana will be called just, "ex fine," when it is directed to the common good, "ex auctore" when it does not go beyond the authority of him who made it, "ex forma" when it imposes burdens on the subjects in due proportion to the end of the common good, for if these burdens are unequally imposed upon the multitude, the law, even if it is directed to the common good, will not be binding upon men's consciences. He adds finally, that, as Aristotle had said, it is better that all men should be ruled by a certain and positive law, than that the judgment should be left to man's will.<sup>1</sup>

<sup>1</sup> Christopher St Germans, 'Dialogus de Fundamento legum Angliæ,' cap. 1. (folio 11). "Doctor. Lex eterna nihil aliud est, quam ipsa summa ratio gubernationis rerum in Deo, sive illa summa ratio Divinae Sapientiae, qua vult Deus omnia a se condita moveri et dirigere ad bonum et debitum finem."

Id. id., fol. 11. "Tribus igitur modis revelat Deus hanc legem

eternam et notam facit eam creaturæ rationali. Primo modo, per lumen naturalis intellectus, secundo per revelationem divinam, tertio per rationem in principe sive in alio quocunque secundo gubernante, qui habet potestatem legem imponere subditis suis."

Id. id., cap. 11 (fol. 14). "Lex vero naturæ specialiter considerata respicit solum ad creaturam rationalem

It is not necessary to illustrate at length the relation of the general theory of law in Soto to that of St Thomas Aquinas, as it is obvious that in his treatise, 'De Justitia et Jure,' he was illustrating and expounding the principles of St Thomas; as, however, the question of the continuity of these conceptions is highly important in the history of political theory, we may take note of a few passages.

The Eternal Law of God is, he says, nothing else than the eternal reason by which he governs the whole world; and the Eternal Law governs man by the Natural Law, which is a participation of it. The Natural Law is written in man's mind, without any process of argument; the Jus Gentium is derived from it by a process of reasoning, but without any assembly of men; while the Civil Law is derived from the judgment of men assembled in Council, that is, from the Commonwealth or from him who is its Vicar, and has its authority.<sup>1</sup>

humanam ad imaginem Dei creatam, quae a quibusdam etiam dicitur Jus Gentium."

Id. id., fol. vi.: "Lex divina de propinquo et de se ordinat ad felicitatem eternam, lex rationis vero, ad felicitatem hujus vitae."

Id., chap. iv. fol. xi.: "Et ut lex humana sit justa requiruntur in legislatore duo, scilicet prudentia et auctoritas. Prudentia, ut secundum rectam rationem practicam dicat quid faciendum sit pro communitate. . . Auctoritas, ut scilicet habeat auctoritatem legis condendae qua dicitur lex a ligando."

Id. id., fol. xii.: "Dicitur enim lex humana justa, ex fine, ex auctore et ex forma. Ex fine quando ordinatur ad bonum commune. Ex auctore quando non excedit auctoritatem ferentis. Ex forma quando secundum proportionem imponuntur subditis onera in ordinem ad bonum commune: etsi onera inequaliter imponuntur multitudini, licet ordinetur ad bonum commune, in foro conscientiae non ligat."

Id. id., fol. xii.: "Dicit itaque

philosophus in secundo Ethicorum; quod melius est omnes ordinari lege certa et positiva quam dimittere iudicium arbitrio, propter tria."

<sup>1</sup> Soto, 'De Justitia et Jure,' 1. 3, 2: "Fit ut lex eterna in Deo nihil aliud sit quam sempiterna ratio suae sapientiae, qua mundi universitatem regit."

Id. id., 1. 4, 1. "Ad primum igitur argumentum respondetur, quod etsi eterna lege gubernemur id tamen fit per naturalem, quae participatio illius est. . . . Quin, vero. . . inde lex naturalis in nobis, prae brutorum instinctu, legis rationem habet, quod ratione nos ipsi ducimur, illa vero per impetum formisecus aguntur."

Id. id., 1. 5, 3 (p. 40): "Itaque jus naturale absque ulla ratiocinatione scriptum est in mentibus nostris: jus autem gentium naturali ratiocinatione, absque hominum conventu et longo consilio inde elicitur, jus autem civile arbitrato hominum in unum coeuentium concilium constituitur."

Cf. 11, 1, 3.

Id. id., 1, 1, 3: "Leges condere non cujusque, sed reipublicae est,

The general correspondence of these principles of St Germans and of Soto with these of St Thomas Aquinas is obvious.<sup>1</sup>

The terms in which Calvin states his general conception of law are not formally the same, but it appears to us that they are not substantially very different. The Moral Law which is the true and eternal rule of justice is binding upon men in all places and times, who desire to order their lives by the will of God. Subject to this, every nation is at liberty to establish laws for itself, as it finds best; they may vary in form, but they must have the same principle (*ratio*).<sup>2</sup> This, he says, will be done if we will distinguish between law and equity (*aequitas*) upon which law depends. Equity, because it is natural, is the same among all men; constitutions (*i.e.*, positive laws), because they are determined at least in part by particular circumstances, may well differ, so long as they are directed to the same end, of equity. The Moral Law of God is nothing else than the testimony of Natural Law, and the whole principle of equity is contained in it.<sup>3</sup>

*ejusque vicem gerentis, seu curam habentis. . . . Lex est regula dirigens in commune bonum: dirigere autem in commune bonum proprium est reipublicae, cujus ejusmodi bonum proximum finis est; ergo penes ipsam tantum, ac penes illum qui ejus habet curam, potestas est ferendarum legum. . . . Subnectitur autem et secunda ratio: lex enim vim habet coercivam . . . vis autem haec et vigor in sola republica et principe existit sicuti totius animalis virtus est membra movere."*

<sup>1</sup> Cf. vol. v. pp. 36-44.

<sup>2</sup> Calvin, 'Institutio,' iv. 20, 15 (p. 555): "Lex itaque moralis (ut inde primum incipiam) quum duobus capitibus contineatur, quorum alterum pura Deum fide et pietate colere, alterum sincere homines dilectione complecti simpliciter jubet: vera est justitiae regula, gentium omnium ac temporum hominibus prescripta, qui ad Dei voluntatem vitam suam componere volunt. Siquidem haec eterna

*est et immutabilis ejus voluntas, ut a nobis ipse quidem omnibus colatur; nos vero mutuo inter nos diligamus. . . . Quodsi verum est, libertas certe singulis gentibus relicta est condendi, quas sibi conducere providerint leges, quae tamen ad perpetuam illam charitatis regulam exigantur, ut forma quidem varient, rationem habent eandem."*

<sup>3</sup> Id. id. id.: "Id quod dixi planum fiet, si in legibus omnibus duo haec, ut decet, intuemur, legis constitutiones et aequitatem, cujus ratione constitutio ipsa fundata est ac nititur. Aequitas, quia naturalis est, non nisi una omnium esse potest, ideo ut legibus omnibus, pro negotii genere, eadem proposita esse debet.

Constitutiones, quia circumstantias aliquas habent, a quibus pro parte pendeant, modo in eundem aequitatis scopum omnes pariter intendant, diversas esse nihil obest. Jam, quum Dei legem, quam moralem vocamus, constet non aliud esse quam naturalis

We must turn to the consideration of the Positive Law of the State or Commonwealth, and we begin by discussing the conception of the nature of this, as it appears in the proceedings of the Cortes of Castile and Leon, in the last years of the fifteenth century and the first part of the sixteenth. The Introduction, or Preface, to the proceedings of the Cortes, called by Ferdinand and Isabella at Toledo in 1480, seems to us to set out very clearly the recognised principles of the method of legislation. The Sovereigns, it says, have found it necessary to provide for the circumstances of the time, by making new laws, as well as by securing the execution of the old ones, and they have therefore summoned the "procuratores" of the cities and "villas" of their kingdoms, not only to take the oath to their eldest son, but to provide by legislation for the good government of the kingdoms. The "procuratores" have presented various petitions, and in accordance with these petitions Ferdinand and Isabella, with the consent of their Council, order and establish the laws which follow.<sup>1</sup>

This seems to us to be a very clear recognition of the

*legis testimonium, et ejus conscientiae, quae hominum animis a Deo insculpta est, tota hujus, de qua haec loquimur, aequitatis ratio in ipsa praescripta est. Proinde sola ipsa legum omnium et scopus et regula et terminus sit oportet. Ad eam regulam quaecunque formatae sunt leges, quae in eum scopum directae, quae eo termino limitatae, non est cur a nobis improbentur, utcumque a lege Judaica, vel inter se ipsae alias differant."*

<sup>1</sup> 'Cortes of Castile and Leon,' vol. iv. Toledo, 1480. Preface: "E nos conociendo que estos casos occorrian alo presente en que esce necessario y provechoso provear de remedio por leyes nuevamente fechos, ansi para executar las passadas, como para proveer et remediar los nuevos casos, acordamos de enbiar mandar a las cibdades e villas de nuestros reynos que suelen enbiar procuradores de Cortes en nombre de

*todos nuestros reynos, que enbiasen los dichos procuradores de Cortes asi para jurar al principe nuestro fijo primogenito heredero destes reynos, como para intender con ellos e platicar e proveer en las otras cosas que saran nescessarias de se proveer por leyes para la buena gouernacion destes dichos reynos.*

*Los quales dichos procuradores . . . nos frequentaran e dieron ciertas peticiones, e nos supplicaran que sobrellas mandassemos proveer e remediar como viesemos que complia a servicio de Dios e nuestro e bien de la republica e pacifico estado destes dichos reynos, sobre las quales dichas peticiones y sobre las otras cosas que nos entendimos ser complideras, con acuerdo delos perlados e caualleros e doctores del nuestro Consejo, proueinimos e ordinamos e statuimos las leyes que se siguen."*

necessity of consulting the Cortes before legislation and a statement of the normal method of such legislation.

In the proceedings of the Cortes, which met at Valladolid in 1506, under Queen Juana, we have an explicit statement of the same principle. The Cortes maintained that the former kings had laid it down that when new laws had to be made, the Cortes should be summoned, and it was then established by law that no laws could be made or revoked except in Cortes, and they therefore petition that from henceforth this rule should be kept. They complain that many "Pragmatics" had been issued without this process, by which the kingdoms felt themselves aggrieved, and ask that these should be revised and the grievance removed. The Queen assented to the petition.<sup>1</sup> This statement of the proper method of legislation is not only important in itself, but as affirming that this was traditional and legal.

With this we may compare a clause in the proceedings of the Cortes of Valladolid in 1523, in the reign of the Emperor Charles V. This provides that the answers made by the King (Charles V.) to the petitions of the Cortes were to be registered (yncorporados) and observed and executed as laws made and promulgated in Cortes.<sup>2</sup> And again we may compare a petition made by the Cortes of Madrid in 1534, and

<sup>1</sup> Id., vol. iv. Valladolid, 1506, 6: "Y par esto los rreys establecieron que, quando diesen de hazer leys, para que fuesen provechosas a sus rreynos a cada provincia fuese bien probeyda, se llamasen Cortes e Procuradores y entendiesen enellos, y por esto se establecio ley, que no se figiesen, ni rrevoeasen, leys sy no in Cortes: suplican a vuestras Altezas que agora e de qui adelante se guarda e faga asy, e quando leys se obiesen de hazer, mandan llamar sus rreynos e procuradores dellos, porque para las tales leys saran dellos muy mas ynfamados, y vuestros rreynos juste e derechamente proveydas: e porque fuera desta horden, se an fecho muchas prematicas, de que estos vuestros rreynos, se

synten por agrabiados, mande que aquellas ssean rrebistas e probean e rremedian los agrabios que las tales prematicas tienen. R. (reply) Que quando fuere necessario, su alteza lo mandara proveer de manera que se de acuerdo dello."

<sup>2</sup> Id. id., Valladolid, 1523 (p. 402): "Porque vos mandamos a todos e a cada uno de vos, segund dicho es, que veays las respuestas que por nos alas dichas peticiones e capitulos fueron dadas, que de suso van yncorporadas, y las guardays e cumpleys y executeys, e hajays guardar e cumplir e executar en todo e por todo, segund e como le suso se contiene, como nuestras leys e prematicas sançiones par nos hechas, y promulgadas en Cortes."

accepted by Charles V., that the "Capitula" made in former Cortes, and in the present one, were to be held as laws, and put together in one volume with the laws of the "Ordinamiento," and that a copy of this was to be kept in every city and "villa."<sup>1</sup> It seems to be clear that in Castile, in the early sixteenth century at least, it was assumed as a normal constitutional principle that legislation was a function not of the king alone, but of the king in, and with, the Cortes, as the representative body of the kingdom.

It is equally clear that the King of Castile had no authority to ignore or set aside the laws. We find repeated examples of the tenacity with which this principle was held, in the repeated protests made by the Cortes in the sixteenth, as in earlier centuries, against the issue of royal briefs which interfered with the ordinary course of justice. At Valladolid in 1518 and 1523 the Cortes petitioned King Charles V. to revoke all "Cartas e cédulas de suspensyon" whether granted by himself or by the Catholic Kings (Ferdinand and Isabella), and not to issue them in the future. The King complied with their request, and this was repeated in the Cortes of Madrid in 1534.<sup>2</sup>

<sup>1</sup> Id. id., Madrid, 1534: "1. Primera- mente supplicamos a vuestra majestad que de todos los capitulos proveydos en las Cortes pasados, y delos que en estas se proueyeren, se hayen leys, juntandolas en un volumen, con las leys del Ordinamiento emendado y corregido . . . y que cada ciudad e villa tenga un libro, y el regimiento tenga especial cuydado de hazer guardar las leys dél. . . ."

R. A esto vos repondemos que ya auemos proeydo y nombrado persona qual conviene para effectuar lo en vuestra supplicacion contenido."

<sup>2</sup> Id. id., Valladolid, 1518: "(23) Otrosy, supplican a vuestra Alteza mande rrevocar e rrevoque qualesquier cartas e cedulas de suspensyon que esten dadas, ansy por vuestra alteza, ansy por los reyes Catholicos vuestros aluelos, y de aqui adelante

non se de, por el prejuyzio que dellos siguen alas partes."

Id. id., Valladolid, 1523 (p. 373) (62): "Otrosy: supplicamos a vuestra alteza mande rrevocar qualesquier cartas e cedulas de suspenciones de pleytos que estan dadas ansy por vuestra alteza como por los Reyes Catholicos, pues es denegar justicia y abdiencia alas partes en prejuyzio de su derecho."

R. A esto vos rrespondemos que no se den suspensyones de aqui adelante, y mandamos que las dadas sean en sy ningunas, e de ningund efecto."

Id., Madrid, 1534 (42): "Otrosi, porque acaece dar cedulas para que los oydores enbien relacion de algun pleyto que ante ellos pende, diciendo que la parte se quiesca que no los pertinesce il conosciemento, y entretanto se los manda sobreseer, e

When we turn from Castile to England it is obviously unnecessary to illustrate in detail the normal methods of legislation. We have, however, a very important discussion of the subject in that most interesting treatise on English Law by Christopher St Germans, to which we have already referred in dealing with the theory of the nature of law in general.

This treatise is in the form of a dialogue between the "Doctor," that is, the Civilian, and the "Student," or representative of English Law, who gives an account of the nature of this. He enumerates the six foundations of English Law—the Law of Reason, the General Customs of the Country, certain "Principia" which are called "Maxima," certain particular Customs, and, finally, the Statutes made by the Common Council of the Kingdom, that is, the Parliament.<sup>1</sup>

One of the most important aspects of St Germans' work is his treatment of law as custom, for he includes under this not only the general customs of the country and the particular customs of different localities, but also the "Maxims" of the courts, for he says of these that they might be reckoned among the general customs of the kingdom—their sole authority was ancient usage.<sup>2</sup>

He defines the general customs as being those which from ancient times had been used by the king and his councillors, and had been accepted and approved by their subjects. These are neither contrary to the Divine Law, nor to Reason, and as they are considered to be necessary for the common good of the kingdom, they have the force of law, and it is these which are properly called the common law (*Lex Com-*

qual es daño conoçido, supplicamos vuestra majestad, que no se den con suspension a unque sea temporal, y se si dieren, sean obedescidas y no complidas.

A esto vos respondemos que nuestra merced y voluntad es de no dar las tales schedulas de suspension, y declarando vosotras en qué casos ynegocios se an dado, mandaremos lo que convenga."

Cf. *Id.*, Madrigal, 1476, 2; Toledo, 1480-84.

<sup>1</sup> *St Germans*, 'Dialogue,' cap. iv.-x.

<sup>2</sup> *Id. id.*, cap. viii. (fol. 27): "Et licet omnia illa maxima inter predictas consuetudines generales regni convenienter enumerari possint, quia antiqua consuetudo est hinc et illis sola auctoritas."

munis). It is the judges who decide what are general customs, and it is these, together with the "Maxims," which form the greater part of the law of England, and the king, therefore, at his coronation, swears that he will faithfully obey them.<sup>1</sup>

The fifth foundation of the law of England St Germans finds in the local customs of different parts of the country, and these have the force of law even against the general customs and maxims, inasmuch as they are not contrary to Reason and the Divine Law. They are determined not by the judges but by the "Patria," and he cites as examples the customs of Gavelkind and Borough English.<sup>2</sup>

It is deserving of notice that St Germans maintains that it is from custom that the great Courts, the Chancellor's, the King's Bench, the Common Pleas, the Exchequer, and also certain lesser Courts such as those of the manor and the county, have their origin and authority; there is, he says, no written law concerning their institution, but they belong to the ancient custom of the country and could not be changed

<sup>1</sup> *Id. id.*, cap. vii. (fol. 21): "Tertium fundamentum legis Angliae habetur ex diversis consuetudinibus generalibus per totum regnum Angliae ex antiquo tempore usitatis, per dominum regem et progenitores suos, et eorum subditis, acceptis et approbatis. Et quia consuetudines illae nec contra legem divinam, nec contra rationem in aliquo existunt, et pro bono communi totius regni, ex earum diuturnitate censentur fore necessaria, vim legis retinent. Et haec sint illae consuetudines quae proprie dicuntur lex communis. Et semper determinari oportet per iudices utrum sit talis lex sive consuetudo generalis, ut pretenditur vel non, et non per patriam. Et ex istis consuetudinibus generalibus et aliis principiis sive maximis legis Angliae de quibus inferius dicitur, dependit maxima pars legis Angliae. Et ideo Dominus rex in coronatione sua, inter alia, sacramentum praestat speciale

quod omnes consuetudines regni fideliter observet."

<sup>2</sup> *Id. id.*, cap. ix. (fol. 32): "Quintum fundamentum legis Angliae stat diversis consuetudinibus particularibus in diversis patriis, villis, dominis et civitatibus regni usitatis; quae quidem consuetudines particulares, quia non sunt contra rationem, neque contra legem divinam, licet predictis generalibus consuetudinibus sive maximis legis contrariantur, tamen vim legis retinent. Sed si dubium insurgat; inter partes in Curia Regis, utrum talis sit consuetudo particularis, vel non, non debet semper determinari per iudices utrum sit talis consuetudo vel non, ut de predictis consuetudinibus generalibus sive maximis superius dictis fieri debet, nisi in paucis consuetudinibus particularibus sufficienter ex recordo in Curia Regis conditis et approbatis, set debet triari per patriam."

except by Parliament.<sup>1</sup> And it is equally important to notice that he maintains that it was by the custom of the kingdom that no one could be judged except according to the "lex terrae." This custom was confirmed (not made) by Magna Carta.<sup>2</sup>

Finally, St Germans states the sixth foundation of English law as consisting of various statutes made by the king and his ministers, the Lords Spiritual and Temporal, and the "Comunitas" of the whole kingdom in Parliament, when the Law of Reason and the Law of Customs and Maxims are not sufficient.<sup>3</sup>

St Germans' treatment of English law is then highly important for several reasons. He has the same conception as Bracton that law is not primarily an enactment, but a custom; and while he is clear, with Bracton and Fortescue, that the deliberate judgment and will of the whole community, the king and nobles, with the representatives of the people in Parliament, can make laws, and can change ancient customs, it is only the whole community which can do this; the king has indeed his part, but he cannot legislate alone.<sup>4</sup>

When we turn to France, the evidence is more complicated,

<sup>1</sup> Id. id., cap. vii. (fol. xxiii.): "De earum institutione ut scilicet tales Curiae fiant, nulla lex scripta in legibus Angliae habetur, nam earum institutio solum ex antiqua consuetudine Regni dependit, quae etiam consuetudo tantae auctoritatis habetur, quod non possunt Curiae illae, nec earum auctoritates alterari, nec earum nomina mutari absque Parlamento."

<sup>2</sup> Id. id. id. (fol. xxiii.): "Item ex antiqua consuetudine Regni habetur quod nullus mittetur ad respondendum, nec iudicetur nisi secundum legem terrae. Et haec consuetudo firmatur per Magnam Cartam, cap. xxvi., ubi sic habetur. Nullus liber homo capiatur, aut imprisonetur, aut dissiciatur, aut alio modo destruetur, nec super eum ibimus nec super eum mittemus, nisi per legale iudicium

parium suorum, et per legem terrae."

<sup>3</sup> Id. id., cap. x. (fol. xxxiv.): "Sextum fundamentum legis Angliae stat in diversis Statutis per dominum Regem et progenitores suos, et per dominos spirituales et temporales, et per communitatem totius regni, in parliamentis editis, ubi lex rationis, lex divina, consuetudines, maxima, sive alia fundamenta legis Angliae prius sufficere minime videbantur. Et ultra haec fundamenta legis Angliae alia me legisse non meminer."

<sup>4</sup> There are a few but important references to the principle of the supremacy of law in Thomas Starkey's 'Dialogue between Cardinal Pole and Thomas Lupset,' but it will be more convenient to deal with these in a later chapter, when we consider the nature and source of the authority of the Ruler.

especially for the reason that in France we must always take account of the Provincial Estates as well as of the States General.

We may at once notice some references to the customs and constitutions of the great provinces. In the Letters Patent, issued in 1498 by Louis XII. on the occasion of his marriage with Anne of Brittany, he confirms the rights and liberties of the Duchy, and assures them that if there were good reason for making some change in their customs and constitutions, it should be done by the "Parlements" and assemblies of its Estates as had always been the custom.<sup>1</sup>

In the Ordinances issued by Louis XII. in 1499 for the reorganisation of the Exchequer Court of Normandy, it is said that for this purpose he had summoned an Assembly of prelates, barons, lords, the greater part of the "Baillifs" of the province, and the men of the three Estates.<sup>2</sup> In 1501 Louis XII. issued an ordinance about "Weights and Measures" in Languedoc, after deliberation with his Council, by his full power and royal authority, but it should be observed that he does this on the petition of the three Estates of Languedoc.<sup>3</sup>

<sup>1</sup> 'Ordonnances,' vol. xxi. Jan. 7, 1498 (9) (p. 151): "C'est à savoir que en tant que touche de garder et conduire le pays de Bretagne et les sujets d'iceux en leurs droits, libertez, franchises, usaiges, coustumes et tailles, tant aux frais de l'Eglise, de la Justice, comme Chancellerie, Conseil, Parlement, Chambre de Comptes, Trésorerie générale, et autres de la noblesse et comun peuple, en manière que aucune nouvelle loi ou constitution n'y soit faite, fors en la manière accoustumée par les rois, et ducs prédecesseurs de notre dite cousine, la Duchesse de Bretagne . . . (7.) Item, et en tant que peut toucher s'il advenist que de bonno raison, il y eut quelque cause de faire mutacions, particulièrement en augmentant, diminuant, ou interpretant lesdits droits, coustumes, constitutions ou établissemens, que ce soit par les

parlements et assemblées des Estats dudit pays, ainsi que de tout tems est accoustumé, et que autrement ne soit fait; nous voulons et entendons que ainsi se fasse, appelez toutes voyes les gens des trois estats de Bretagne."

<sup>2</sup> Id. id., April 1499 (p. 215): "Pour pourveoir à laquelle chose ayons mandé, assemblé plusieurs prélats barons, seigneurs, et la plus grande partie des baillifs dudit pays, avec les gens des trois Estats d'iceluy."

<sup>3</sup> Id. id., July 1501 (p. 279): "Nous avons receu l'humble supplication de chiers et bien amez gens des Trois Estats de Languedoc. . . Par la tenue de ces présentes, de notre grace especial, plein pouvoir et auctorité royal, statuons et ordonnons par edict, statut, et ordonnance perpetuelle et irrevocable, que desormais

Perhaps, however, the most significant reference to the nature and source of law in France is contained in the Ordinances of Charles VIII. and Louis XII., providing for the collection and publication of the customs of the different parts of the kingdom. Charles VIII. in 1497 appointed a Commission to collect, correct, and adapt these customs, but they were to be collected with the advice of the men of all classes in each district, and to be published with the consent of the three Estates of each district or the larger and wiser part of them.<sup>1</sup> In 1505 Louis XII. again appointed a Commission to carry this out, for it apparently had never been completed. The three Estates were to be called together in each Bailliage, and the king declared by his full power and royal authority that the customs, as agreed upon by these Estates, should be perpetually kept and observed as laws.<sup>2</sup>

This treatment of the customs of different parts of France, as determined by the representatives of the different

en tous et chacune des villes, lieux et places de notredit pays de Languedoc, soit usé desdits poix de balance, &c."

<sup>1</sup> Id., vol. xxi., September 1497 (p. 7): "Eussions despieça, mandé aux baillifz, seneschaux et autres juges de notre royaume, appelez avec eux chacun en sa jurisdiction les gens d'Eglise, nobles, nos officiers, praticiens et aultres gens de bien en ce cognoissans, ils vissent et visitassent lesdites coutumes; et icelles, ensemble leur advis, de ce quil leur semblera y devoir estre corrigé, adjuté, diminué, nous envoyassent, ce que est été fait. . . . Et assemblement en a esté donné conclusion sur votre dit advis, et ne reste qua les faire publier en chascun desdits baillages, seneschauées et jurisdictions. . . . Et néanmoins s'en faisant ladicte publication y survenant aucune difficultez, nous, desirous ycelle estre vuydées, vous avons donné et donnons, et à ceux ainsi que vous esleuz pour faire ladicte publication, pouvoir, puissance et auctorité de les accorder,

du consentement toutes voyes desditz, trois Etats de chaques baillage, seneschauée et jurisdiction, ou de la plus grante et saine partie d'iceulx."

<sup>2</sup> Id., vol. xxi., March 4, 1506 (p. 332): "Et neantmoins voulons tous et chascuns les articles qui seront accordez par les-dits des Etats assemblez, comme dit est, ou la plus grande et saine partie d'iceux, et ceux d'entre vous qui serez commis à la publication desdits coutumes estre publiez, et dès maintenant pour lors, et dès lors pour maintenant les coutumes contenues en iceux articles accordez en la manière dessusdite, de nostre science, propre mouvement, pleine puissance et auctorité royale, nous avons decreté et auctorisé, decretons et auctorisons par ces présents, et icelles voulons inviolablement estre gardées et observées, sans enfreindre, comme loi perpetuelle, sans qu'aucun doresnavant soit recu à poser ni prouver coutumes contraires, ne desrogant à icelles coutumes ainsi publiées."

localities and acknowledged as laws by the king, would seem to show that in France, even in the sixteenth century, the source of legislation must not be thought of as being simply the royal authority.

We must, however, notice that we find some indications of another conception of the relation of the King of France to the law. There is a well-known declaration of the President of the Parlement of Paris made in the year 1527 at a "Lit de Justice" held by Francis I. The occasion of this was a complaint made by the Parlement about the evocation of cases, which had been brought before it, to the Great Council of the king. The President maintained that this was an innovation of the reign of Louis XI., which had been condemned by the States General of Tours in 1484; but, he went on to say, the Parlement did not intend to throw any doubt upon the royal authority; this would be a kind of sacrilege, for they knew well that the king was above the laws, and that laws and ordinances could not constrain him. They did, however, intend to say that the king ought not to do anything that he had the power to do, but only that which was reasonable, good, and equitable—that is, Justice.<sup>1</sup> The king commanded the Parlement not to meddle with anything except matters of justice, and not to impose any modifications upon royal ordinances, edicts, or briefs.

We find, however, another example of the relation of the King of France to the law, in a letter of Louis XII. of December 1499, which expressly forbade the Parlements of Paris, Toulouse, and other Courts to pay attention to any dispensation which he might grant from the terms of the Ordonnance for the administration of justice, which he had issued in March 1499. They were to ignore such dispensations, and in virtue of the authority of this Declaration,

<sup>1</sup> 'Recueil des Loix Anciennes,' vol. 12, No. 145 (July 1527): "Nous ne voulons revoqués en doute ou en dispute de votre puissance, ce serait espèce de sacrilege, et savons bien que vous êtes posé sur les lois, et que les lois et ordonnances ne vous peuvent

contraindre. et n'y être contrainct par puissance co-active; mais entendons dire que vous ne devez, ne voulez pas devoir, tout ce que vous pouvez, ains seulement, ce qui est en raison, bon et equitable qui n'est autre chose que justice."

to annul them, as he himself now declared them annulled and revoked.<sup>1</sup> This is clearly parallel to similar provisions in Spain.

<sup>1</sup> 'Ordonnances,' vol. xxi., December 1499 (p. 217): "Nous voulons et ordonnons que à telles lettres on n'ait aucun regard, et défendons expressément à nos amés et feaux les gens tenons nos cours de Parlement à Paris, Toulouse, Bordeaux, Dijon, eschiquier de Normandie, et semblablement à tous nos justiciers et officiers, que, par vertu ou sous couleur de telles nos lettres de dispense, ils ne contrarient ou contreviennent, fassent, souffrent, ni permettent contrarier, ou contrevénir à nos dites ordonnances,

en quelque manière que ce soit, sur peine d'estre eux-mesmes réputés à nous disobeissans et infracteurs d'icelles ordonnances; mais nos dites lettres de dispense et dérogeantes, en usant de notre présente declaration et intention, cassent annullent et déclarent nulles, et de nul effet et valeur; lesquelles à cette fois pour quelconque cause qu'elles soyent expediés, nous, dès maintenant et pour lors, avons cassées revoquées et adnullées."

Cf. 'Ordonnances,' vol. xxi., March 1499, 40.

### CHAPTER III.

#### THE SOURCE AND NATURE OF THE AUTHORITY OF THE RULER.

WITH the principles of the nature and supremacy of the Law, which we have considered in the last chapter, in our minds, we can now turn to the conception of the source and nature of the authority of the Ruler or Rulers, as we find it in the earlier part of the sixteenth century in France, in Italy, in Spain, and in England.

One of the most interesting writers, for our purpose, is James Almain of Sens, whose work seems to us to have been somewhat overlooked. Little seems to be known of him, except that he was a teacher in the College of Navarre in the University of Paris, and that he received the Doctor's degree in 1511 and died in 1515.<sup>1</sup>

In various treatises he dealt not only with the particular question with which we are now concerned but with the whole nature of political society and authority, and in order to do justice to his principles we must take some account of his political theory as a whole.

He distinguishes between that "Dominium Naturale" which was given to men by God over all things, and the "Dominium Civile" which was added after sin came into the world, by which man has "civil" property and "jurisdiction," that is, the authority to use the material sword.<sup>2</sup>

<sup>1</sup> "Biographie Universelle," from 'Opera,' ed. 1606. Prima Pars): 'Dupin, Bibliothèque des Auteurs 'De Dominio Naturali Civili et Ecclesiastico' (col. 687).  
Ecclesiastiques.'

<sup>2</sup> Jacobus Almain (in J. Gerson, "Dominium naturale, quod homini

It is interesting to observe that Almain represents the Stoic and Patristic conception of the origins of political society, for he thinks of political authority and property as consequences of sin.

This does not, however, mean that Almain denied that political society and authority were of Divine institution. On the contrary, he insists dogmatically in another treatise that the lay power was just as truly derived from God as the ecclesiastical.<sup>1</sup> The sacred character of political institutions was not confined to Christian communities, and he repudiates contemptuously and as savouring of heresy the theory, which he attributes to Innocent, that there was no legitimate political authority outside of the Church.<sup>2</sup> Political society and authority were then in the view of Almain consequences of sin, but also, as the Patristic tradition held, a Divine remedy for sin.

Almain had, however, no belief in the absolute King, or in the "Divine Right" of the monarch. On the contrary, he develops the conception of the constitutional authority of the Community very dogmatically. In the treatise which we cited first he maintains that a Community of men, united with each other to form one body, has by natural law the power of removing, even by death, any person who disturbs the Community; and no Community can abdicate this power any more than the individual can renounce his right of self-preservation; the prince cannot slay any man

convenit ex dono Dei, simpliciter est inabdicabile quantum ad cuncta, similiter et quantum ad certam speciem cibi et potus in omni eventu. cui domino post peccatum conveniens fuit superaddere dominium civile proprietatis, similiter et jurisdictionis, quo fungentes, executionem gladii materialis habent."

<sup>1</sup> Id., 'De Potestate Ecclesiastica et Laica,' Q. 1 (col 752) "Hac occasione quaeritur, utrum talis potestas laica sit a Deo, et videtur quod sit, ad Rom. xiii 'Omnis anima sublimioribus potestatibus subjecta sit,' et

sequitur in textu, 'Non est potestas nisi a Deo,' ideo talis potestas laica est aequae bene a Deo, sicut potestas spiritualis."

<sup>2</sup> Id. id., Q. 11 (col 8415): "Et ad verba Innocentii, si intelligantur quod extra ecclesiam nullus habet legitimam potestatem qua utatur gladio materiali, illa sapienter haeremus, nam et apud fideles et apud infideles, est vera potestas laica, idem parum curandum est de auctoritate Innocentii in proposito."

(Innocent IV in his 'Apparatus' says the opposite Cf vol. v. p. 34.)

by his own authority; as William of Paris had said: the "dominium jurisdictionis" of the prince in relation to the Community is a ministerial authority, as the authority of the priest is in relation to God. The Community cannot renounce the authority which it possesses over the prince whom it has established, and by this authority it can depose him if his rule is not for edification, but for destruction, and he cites a gloss on the "Decretum" of Gratian. He concludes that the Community cannot in any case bestow a monarchy, "pure regalis," that is, a monarchy in which one alone rules, and is subject to none.<sup>1</sup>

The same conception of political authority, as not merely derived from, but inherent in the Community, is repeated by Almain, in the first chapter of his work, 'De Auctoritate

<sup>1</sup> Id., 'De Dominio Naturali Civili et Ecclesiastico' (col 689) "Tertia pars conclusionis est, quod conveniens fuit tam dominium civile proprietatis quam jurisdictionis superaddi domino naturali. Pro cuius probatione, quaelibet communitas ad invicem conversantium est velut unum corpus cuius singuli alter alterius sunt membra, juxta illud dictum Pauli ad Rom. xii

Secundo supponendum est, quod in illa communitate jure naturali est potestas quaedam qua licet illos, quorum vita est in perturbationem ejus, potest a corpore praescindere, etiam per mortem, et istud deducitur a priori ex ratione Sancti Thomae, 2<sup>a</sup> 2<sup>a</sup> Q. 64 . . . Secundum corollarium nulla communitas perfecta hanc potestatem a se abdicare potest, sicut nec singularis homo potestatem quam habet, ad se conservandum in esse

Tertium corollarium, Princeps non occidit auctoritate propria, nec illam potestatem potest ei conferre republica. Hinc dicit Gulielmus Parisiensis, quod dominium jurisdictionis Principum est solum ministeriale in ordine ad communitatem, sicut dominium sacerdotis, respectu remis-

sionis peccatorum, est solum ministeriale in ordine ad Deum.

Quartum corollarium, non potest renunciare communitas potestati quam habet super suum Principem, ab ea constitutum, qua scilicet potestate eum (si non in aedificationem sed destructionem regat) deponere potest, cum talis potestas sit naturalis et istius sententiae est glossa xxiii Q. iii. Can. ostendet (Gratian, Decretum, C. xxiii Q. iii. 11) ubi dicit, "populus habet jurisdictionem, licet, dicat lex, quod eam transtulit in imperatorem" Nam, si civitas vel populus non haberet jurisdictionem, quare puniretur propter delictum iudicis, xxiii 2<sup>a</sup> Can. Dominus (Gratian, Dec. C. xxiii. Q. 2), ubi dicitur sic, "Gens et civitas petenda est bello, quae vel vindicare neglexerit quod a suis improbe factum est, non enim punendus foret civitas nisi jurisdictionem haberet ad compellendum. Et item sequitur, quod non est dabilis, in quocunque casu naturaliter, monarchia puro regalis, prout visus est capere quidam istis diebus, quando unus praest, et nullis subest nam apud philosophum non ita capitur politia timocratica sicut ipso capiebat."

Ecclesiae,' where he adds a more developed statement of the principle that the prince has no authority of himself, nor from God immediately, but only from the Community.<sup>1</sup> In the first chapter of his work, 'De Potestate Ecclesiastica et Laica,' he affirms in more general terms that the secular power is derived from the people, whether it passes by hereditary succession or by election; in some exceptional cases God may have bestowed it upon some man, but, regularly, God does not do this.<sup>2</sup> In another place in this work he asserts, incidentally, that the legitimate kingdom in France was established by the agreement of the people.<sup>3</sup>

These conceptions of Almain are obviously very significant; he does not merely repudiate the theory of what we call the "Divine Right," but he looks upon political authority as properly inherent in the Community, in such a sense that it is really inalienable, and that an absolute monarchy cannot properly be created by the Community. The Community always has such authority over the prince whom it has created that it can depose him if his rule is for destruction, otherwise it would not have power adequate for its self-preservation. It was this authority which the Community of the Gauls

<sup>1</sup> Id., 'De Auctoritate Ecclesiae,' I. (col. 707): "Communitas confert principi auctoritatem occidendi eos, quorum vita in perniciem reipublicae cedit; ergo illa auctoritas est per prius in communitate, cum nemo alteri det quod non habet et antecedens notum est, cum princeps a se auctoritatem illam non habeat, nec habet eam immediate a Deo, saltem ut in pluribus. Nam, ut dicunt doctores, praesertim Durandus in Tractat. De Jurisdictione Ecclesiastica, non est intelligendum quod auctoritas regis secularis sit a Deo sic, quod eam immediate alicui commiserit regulariter, sed quia secundum rectam rationem quam Deus hominibus indidit, est alicui commissa. Et non videtur (cum non sit a Deo immediate commissa) a quo sit principi collata nisi ab ipsa communitate."

<sup>2</sup> Id., 'De Potestate Ecclesiastica et Laica,' Q. i. cap. 1 (col. 752): "Sed potestas laica sive secularis est potestas a populo, ex successione hereditaria, vel ex electione alicui vel aliquibus tradita regulariter, ad aedificationem communitatis, quantum ad res civiles secundum leges civiles, pro consequentione habitationis pacificae. Primo tangitur causa efficiens et origo hujus, scilicet 'a populo regulariter' et licet aliquando Deus specialiter dederit aliquibus hanc potestatem laicam, ut Sauli . . . et Davidi . . . et aliquibus qui utebantur ista potestate super Israel, ut patet Judicium I., tamen regulariter neminem Deus instituit."

<sup>3</sup> Id. id., Q. 4 (col. 871): "Dico quod incoepit esse legitimus rex in Gallia, ex consensu populi, quia consensit populus in aliquem ut regeret."

used when they deposed the king (Chilperic), not so much for any crime as because he was incapable. And it was the same authority which the Israelites used against Rehoboam, for even when God had given authority immediately, as seems to have been the case with Saul and David, such princes remained subject to the whole Community if they used their authority to the destruction of the Community.<sup>1</sup>

This does not mean that Almain was an enemy of monarchy. In another treatise he cites the usual definition of the various forms of government, but adds that of these the best is the monarchy, the worst what he calls the "Censupotestas." And again he adds that there is no form of government which may not be changed into another, for the form of government belongs to the "Jus Positivum."<sup>2</sup> A little further on, he goes some way towards defining what he understood by the monarchy. A monarchy is that form of government in which normally one man rules, but this does not mean that there is no assembly which is over him, and can depose him, but while in the "Communitates" the assembly is constantly in being, and ruling, that is not so in the monarchy.<sup>3</sup>

<sup>1</sup> Id., 'De Auctoritate Ecclesiae,' I. (col. 708): "Secundum corollarium est, nulla communitas perfecta hanc potestatem a se abdicare potest. . . Tertium Corollarium, tota communitas potestatem habet super principem ab ea constitutum, qua eum (si non in aedificationem sed in destructionem politicae regat) deponere potest, alias non esset in ea sufficiens potestas se conservandi: et ista potestate Gallorum communitas quondam usa, regem suum deposuit, non tam pro criminibus, quam pro eo quod tantae regimini inutilis esset, ut habet glossa Can. alius 15 Q. 6 (Gratian Decretum, C. 15 Q. 6), ubi dicitur quod Zacharias Regem Francorum deposuit, habet glossa, id est, deponentibus consensit. Hac eadem potestate usi, filii Israel recesserunt a Rehoboam. . . . Et quamvis super aliquem populum a Deo acceperint aliquam jurisdictionem

civilem immediate, ut videtur probabile de Saule et Davide, nihilominus semper toti communitate fuerunt subjecti, casu quo in destructionem communitatis regerent."

<sup>2</sup> Id., 'De Potestate Ecclesiastica et Laica,' Q. i. 5 (col. 766): "Et inter has, summa et ultima est regnum, infima autem censupotestas. . . . Ultra supponitur quod nulla est politia pure civilis, et nulla regalis, quin posset mutari in aliam speciem, puta timocratiam vel aristocratiam, quia quaelibet talis est instituta jure pure positivo, ergo quaelibet potest in aliam mutari."

Cf. Id., Q. iii. 7 (col. 867).

<sup>3</sup> Id. id., Q. i. 16 (col. 824): "Sed illa (politia) dicitur regalis, quando unus solus dominatur, et non plures; verum est regulariter, nam in civilibus non dicitur politia regalis ex eo quod nulla congregatio sit super regem,

In a later passage he sums up some of the functions and limitations of the best prince. He is to render to every man what belongs to him, that is, to administer justice, to establish law, to appoint the inferior judges and officers, but especially to correct and punish the transgressors. The prince must rule for the common good, he must remember that he reigns over free men and not slaves; it is inconsistent with the best princely authority that he should have absolute power (*plenitudo potestatis*), that is, that he should have authority to transfer one man's property to another, without fault or cause, or to do whatever he pleases, so far as it does not conflict with the laws of nature and of God.<sup>1</sup>

It is perhaps worth while to notice that Almain in the same chapter represents the person whom he cites as "Doctor" as saying that it was not inconsistent with the best "principatus" that there should exist in the Community a juridical (legal) authority, which in no way depends upon, or is created by, the Supreme Prince; and he mentions, as an illustration of this, that, in some countries, in Aragon, as it is said, there are jurisdictions which the king does not create but which descend by hereditary succession; the

*nam congregatio nobilium politiae civilis, immediate est super regem, et pro idoneitate possunt deponi reges, ut patet in Childerico et Zacharia. Non vocatur ergo regalis, eo quod nulla congregatio sit super illum qui gubernat. Sed in communitatibus est congregatio super regem, et semper manet in esse congregatio. Sed in politia regali non sic est, quia non est semper congregatio nobilium congregata, quae sit super regem."*

<sup>1</sup> Id. id., Q. iii. 6 (col. 865): "Consequenter restat inquirere quae possunt adesse et abesse optimo principatui; et breviter dicitur quod ad optimum principatum spectat unicuique quod suum est reddere, hoc est justitiam ministrare, leges condere, iudices inferiores et alios officiales, delegere et constituere, operationes

*quarumcunque virtutum praecipere; et quilibet princeps ex officio ad ista tenetur: sed tamen ad hoc videtur esse principalissime constitutus ut corrigat et puniat delinquentes. . . . Ex his patet quae sunt optimo principatui necessario annexa, et quae impossibilia et quae impertinentia, et dictum est quod ad optimum principatum necesse est quod sit ad bonum commune, et quod principans principetur liberis, et non servis, et quod sit unus principans et non plures. Item repugnat optimo principatui habere plenitudinem potestatis, puta quod possit ad placitum suum transferre rem meam in alterum, sine quocunque meo peccato, vel causa, et facere quidquid non repugnat juri naturae et divino; et visum est etiam quo modo praecipuus actus principalis est malorum punitione intendere."*

sons succeed the fathers as judges and the king cannot deprive them of their authority; rather, they are over the king, in respect of this jurisdiction.<sup>1</sup>

The whole position of Almain is exceedingly interesting. He has the same preference for the monarchy as that which we normally find in the mediæval world, but he is also quite clear not only that the source of political authority is the Community, but that the ultimate authority always remains in it and must in the nature of things do so, and though the monarchy is the best form of government, it is strictly limited by the purpose for which it exists, the furtherance of the common good and the maintenance of justice; an absolute monarch is to him impossible.

The character of the political theory of John Major is very close to that of Almain; indeed, it would seem that he was either directly influenced by Almain or that they were both under the influence of some common tradition. John Major was a Scotsman, but taught for many years in the University of Paris, and the work with which we are now dealing was apparently published in 1518. It is primarily concerned, like those of Almain, with the ecclesiastical questions of the relation between the Pope and the General Council, but we are here only concerned with its political principles.

The king has no authority except that which is derived from the kingdom, for he himself or his first predecessor was elected by the people; the king is over every individual person in the kingdom, but he is not over all the kingdom, "regulariter et casualiter," he is "regulariter" over the

<sup>1</sup> Id. id. id. (col. 865): "Jam Doctor infert aliqua corollaria—Primo non repugnat optimo principatui supremo, optimo ordinato, aliquem esse potestatem juridicam alicujus, vel aliquorum de communitate illa, quae nullo modo ab ipso supremo principante dependeat, et quae non sit ab ipso instituta, hoc est, quae non dependeat ab ipso, nec quoad institutionem nec ad destitutionem saltem

*regulariter. . . . . Hinc est quod in aliquibus regnis, ut fertur in regno Arragoniae, rex non habet instituere jurisdictiones, imo habet aliqua potestas juridica, quae habetur ex successione parentum. Ita quod post patres, filii sunt iudices . . . nec illos rex potest destituere, imo sunt supra regem quantum ad illam jurisdictionem."*

whole kingdom, while the kingdom is over him "casualiter."<sup>1</sup> This is sharply stated, but the principle is even more completely expressed in another passage. The King of France is over all France, but the "praecipua pars" from which he derives his authority is over him, and can depose him for reasonable cause. The people is "virtualiter" over the king, and in difficult matters the three Estates of the Realm are called together and direct him, and a free people has the power, for reasonable cause, to alter the form of the Constitution.<sup>2</sup>

He expresses the same principle again in another place. In France and Scotland it may be said that the supreme power is in the king, but it would be better to say that there are two powers of which one is supreme and more unlimited than the other. In the kingdom and in the whole free people

<sup>1</sup> John Major, 'De Auctoritate Concilii super Pontificem maximum.' (In J. Gerson, Opera, vol. i., ed. 1606) (col. 881): "Rex utilitatem reipublicae dissipans et evertens incorrigibiliter, est deponendus a communitate cui praeest. . . . Rex non habet robur et auctoritatem nisi a regno, cui libere praeest."

(Col. 888): "Rex tamen non est super omnes in regno regulariter et casualiter, quia vel electus est, vel enim primus predecessor erat electus a populo, pro communi populi utilitate, et non pro suo. . . . Ad politiam vero regalem, non requiritur quod rex sit super omnes sui regni tam regulariter quam casualiter, ut ex dictis liquet: sed sat est, quod rex sit super unumquemlibet; et super totum regnum regulariter; et regnum sit super eum casualiter, et in aliquo eventu."

<sup>2</sup> Id. id. (col. 886): "Exemplum in simili, Franciscus dicitur communiter rex totius Franciae, et non modo est super unam provinciam Galliae, sed super totam categoremate, non obstante quod praecipua pars est super ipsum, a qua auctoritatem habet, quae non potest to lere ab eo regnum suum,

sine rationabili et arduissima causa. . . . Si contradicat, in hoc solum est discrimen, pontificatus est de jure divino et ex institutione Christi, et rex habet regnum a toto populo. . . . respondeo, sed auctoritas communicata est ecclesiae a Christo, sicut summus pontificatus, et auctoritas illa non dependet ab auctoritate summi pontificatus, sed immediate a Deo, et sic aliquo modo convenit potestas ecclesiae, cum potestate populi unius regni et aliquo modo differt; nam quoad superioritatem convenit, ita quod sicut populus virtualiter est super regem, et in casu, ut in rebus arduis in quibus convocantur tres status regni, qui regem in casibus ancipitibus habeant dirigere; sic, in casibus arduis Concilium rite congregatum, habet leges obligatorias pontifici imponere, quoad ejus personam, et non quoad dignitatem ipsum. Hoc pro tanto dico, quod corpus ecclesiae non potest mutare politiam regalem ecclesiae in aristocraticam vel timocraticam, quia tunc contraveniret institutioni Christi: populus autem liber, pro rationabili causa potest politiam mutare."

there is a supreme power which is the ultimate source of all authority, and which cannot be abrogated, while the king holds a power, honourable, indeed, but ministerial.<sup>1</sup>

It is interesting to compare the position of Almain and John Major with that of Machiavelli in Italy. We are not here discussing the character and significance of his discussion of statecraft in the administration of government as it is set out in 'The Prince.' Indeed, we venture to say that there is but little relation between this and the history of the development of political civilisation as embodied in the laws and institutions of the countries of Western Europe.

It must not be thought that we are undervaluing the importance of Machiavelli in history, or attempting to estimate the significance of his penetrating analysis of the forces which, rightly or wrongly, consciously or unconsciously, have determined in so great a measure the relations of the autonomous Communities of Europe; but the history of these relations does not come within the scope of this work, and it would be absurd to discuss them merely incidentally. We deal, therefore, with certain aspects of his political theory which are to be found mainly in the 'Discourses on Livy,' and these are for our purposes very interesting and significant.

Machiavelli sets out the traditional definition of the three good forms of State, Monarchy, Aristocracy, and popular government, and their three corrupt counterparts, the Tyranny, the Oligarchy, and the corrupt Democracy. He adds that the good forms of government had a fatal tendency to turn into the corrupt ones, and points out that the wise founders of States had therefore endeavoured to establish a constitution

<sup>1</sup> Id. id. (col. 889): "Similiter in regno Francorum vel Scotorum est suprema potestas etiam in eorum regibus; melius dicantur duae potestates realiter, quarum una est superior et illimitatior quam alia, ad quam alia subordinatur, et sic est quodammodo una. . . ."

(Col. 890): "Similiter in regno et in toto populo libero, est suprema et fontalis potestas inabrogalis; in rege vero, potestas ministerialis honesto ministerio: et sic aliquo modo sunt duae potestates, sed quia una ordinatur propter aliam, potest vocari una effectualis."

which had something of all the good forms, something both of monarchy, aristocracy, and popular government; and he cites, as examples, Sparta and Rome.<sup>1</sup> This conception of the virtue of a mixed constitution was, as we have seen, not only known to the ancient writers, but was also current among the mediæval.

We come to a more complex subject when we endeavour to ascertain what it is that Machiavelli meant by Liberty. He looks upon it as being among the chief ends of government; in one place he says expressly that to those who ordered the Commonwealth with prudence, among the most necessary things was the establishment of a protection for liberty.<sup>2</sup>

What liberty meant to Machiavelli is not easy to define, but it is possible to arrive at some conclusion as to his meaning by putting together various passages. The words we have just cited are followed by a discussion of the question whether it is better to entrust the protection of liberty to the nobles (Grandi), or to the people (Populari); and he concludes that it is clearly better to put it in the hands of the people, for the nobles desire "dominare," while the people only desire not to be dominated, and have therefore a greater desire to live in freedom.<sup>3</sup>

<sup>1</sup> Machiavelli, 'Discorsi sopra la prima Deca di Tito Livio' ('Opera' ed., Milan, 1772), i. 2: "Dico adunque che tutti i detti modi sono pestiferi per la brevità della vita che e ne tre buoni, e per la malignità che e ne' tre rei. Talchè avendo quelli che prudentemente ordinano leggi conosciuto questo difetto, fuggendo ciascuno di questi modi per sè stesso, ne elessero uno che partecipasse di tutti, giudicandolo più fermo e più stabile, perchè l'uno guarda l'altro, sendo in una medesima città il principato, gli ottimati, ed il governo popolare."

<sup>2</sup> Id. id., i. 5: "Quelli che prudentemente hanno costituita una repubblica, in tra le più necessarie cose ordinate da loro, e stato costituire una guardia alla libertà, e secondo che questa è

bene collocata dura più o meno quel vivere libero."

<sup>3</sup> Id. id., i. 5: "E venendo alle ragioni dico (pigliando prima la parte de Romani) come e' si debbe metterlo in guardia coloro d'una cosa che hanno meno appetito d'usurparla. E senza dubbio se si considera il fine de nobili e degl' ignobili, si vedrà in quelli desiderio grande di dominare, e in questi solo desiderio di non essere dominati, e per consequente maggior volontà di vivere liberi, potendo meno sperare d'usurparla che non possono i grandi; talche essendo i popolari preposti a guardia d'una libertà, è ragionevole ne abbiano più cura, e non la potendo occupare loro, non permettano che altri l'occupi."

Cf. on the need of equality in a

Machiavelli does not, so far as we have seen, relate the conception of liberty directly to that of the supremacy of Law, but we may reasonably judge that he implies it. He compares the character of the good Ruler, who lives according to the law, with that of the tyrant,<sup>1</sup> and in another place he says that Tarquin was driven from Rome, not because Sextus had violated Lucretia, but because he had broken the laws of the kingdom and ruled as a tyrant, and had thus deprived Rome of that liberty which it had possessed under the earlier kings.<sup>2</sup>

Machiavelli certainly looked upon the subordination of the Rulers to the Law as a matter of the first importance to a free Commonwealth. We have pointed out in a previous chapter that Machiavelli refers to France as an example of the good results of this, and we repeat this here. The kingdom of France lives in security, for the kings are bound by many laws. Those who ordered that State provided that the king should have the control of arms and money, but that in all other matters they should only act as the Laws directed.<sup>3</sup> In another place he deals with this in more detail, and points out how good was the effect in France, that that kingdom, more than any other kingdom, lived under the control of the laws. The "Parlemens," and especially that of Paris, enforced these, and even delivered judgments against the king.<sup>4</sup>

republic, and the incompatibility of a "vivere politico" with the existence of a class of "gentiluomini," i. 55.

<sup>1</sup> Id., i. 10.

<sup>2</sup> Id., iii. 5: "Non fu adunque costui (i.e., Tarquinius Superbus) cacciato per avere Sesto suo figliuolo stuprata Lucretia, ma per aver rotte le leggi del regno e governatolo tyrannicamente, avendo tolto al senato ogni autorità e riddotola a sè proprio; e quelle facende che nei luoghi pubblici con soddisfazione del senato Romano si facevano, le ridusse a fare nel palazzo suo con carico ed invidia sua. Talche in breve tempo egli spoglio Roma di tutta quella libertà che ella aveva sotto li altri re

mantenuta."

<sup>3</sup> Id., i. 16: "In esempio ci è il regno di Francia, il quale non vive sicuro per altro che per essersi quelli re obligati ad infinite leggi nelle quali si comprende la sicurtà di tutti i suoi populi. E chi ordinò quello stato volle che quelli re, dell' arme e del danaio facessero a loro modo, ma che d'ogni altra cosa non ne potessero altrimenti disporre che le leggi si ordinassino."

<sup>4</sup> Id., iii. 1: "E si vede quanto buono effetto fa questa parte nel regno di Francia, il qual regno vive sotto le leggi e sotto le ordini più che alcun altro regno. Delle quali legge, e ordini ne sono mantenitori i parla-

It seems to us to be clear that Machiavelli held that the prince should be subject to the Law, and that he related this to the conception of liberty.

We find also in Machiavelli a very interesting discussion of the ultimate foundations of a healthy political system. He contrasts the success of Rome, in establishing and maintaining liberty after the expulsion of the Tarquins, with its inability to restore it when the opportunity was given by the deaths of Cæsar, or Caligula, or Nero, and he contends that the reason of this was that in the time of the Tarquins the Roman people was not yet corrupt, while in the later times it was most corrupt. And he adds that the same thing could be said of his own time. Nothing, he says, could ever restore liberty in Naples or Milan, the corruption of the people had gone too far, and this could be seen in the fact that, on the death of Filippo Visconti, Milan wished to recover its liberty, but could not maintain it.<sup>1</sup>

We must not, indeed, interpret Machiavelli's conception of the corruption of the Community as related to what we should call private morals; it has reference rather to what we might call public spirit and honour. The importance of Machiavelli's conception, from the point of view of our subject, is that he is clear that the prosperity of a State and the character of its government depends in the long-run on the qualities, not merely of the Ruler but of all the members of the Community.

menti, e massime quel di Parigi; le quali sono da lui rinnovate qualunque volta e' fa una esecuzione contro ad un Principe di quel regno, e che ci condanna il Re nelle sue sentenze."

<sup>1</sup> Id., i. 17: "Ma non si vede il piu forte esempio che quello di Roma, la quale cacciati i Tarquinii potette subito prendere e mantenere quella liberta; ma morto Cesare, morto Caligula, morto Nerone, spenta tutta la stirpe Caesarea, non potette mai, non solamente mantenere ma pure dare principio alla liberta; ne tanta diversita di evento in una medesima città nacque da altro, se non da non

essere dei tempi de Tarquinii il popolo Romano ancora corrotto, e in questi ultimi tempi essere corrottissimo. . . . E benchè questo esempio di Roma sia da proporre a qualunque altro esempio, non di meno voglio a questo proposito addurre inanzi popoli conosciuti ne nostri tempi. Pertanto dico che nessuno accidente, benchè grave e violento, potrebbe ridurre mai Milano o Napoli libere, per essere quelle membra tutte corrotte. Il che se vide dopo la morte di Filippo Visconti, che volendosi ridurre Milano alla liberta non potette e non seppe mantenerla."

The truth is, that though he asserted the principle that the mixed or tempered constitution was the best, he held that the people as a whole, if they accepted the control of the Laws, were wiser and more prudent and less variable than a prince. In one chapter he discusses at some length the opinion of Livy and other historians that the multitude is inconstant, and declares that this might be said equally of princes, when they are not restrained by the Laws. A people which is well ordered will be constant, prudent, and grateful as much as, or more than, a prince, even a wise prince; while a prince, who is not subject to the Laws, will be more ungrateful, more variable, and more imprudent than the people. There is some ground for the comparison of the voice of the people to the voice of God.<sup>1</sup>

The people is much wiser than the prince in the appoint-

<sup>1</sup> Id., i. 58: "Nessuna cosa esser piu vana e piu inconstante che la moltitudine, così T. Livio nostro come tutti li altri Istorici affermano. . . .

Dico adunque como di quello difetto di che accusano li scrittori la moltitudine, se ne possono accusare tutti gli uomini, particolarmente, e massime i principi. . . e de' buoni e de' savi ne sono stati pochi; io dico de' principi che hanno potuto rompere quel freno che li puo correggere; tra i quali non sono quelli Re che nascevano in Egitto quando in quella antichissima antichità si governava quella provincia con le leggi, ne quelli che nascevano in Isparta, ni quelli che a nostri tempi nascono in Francia, il qual regno è moderato piu delle leggi che alcun altro regno di che ne' nostri tempi si abbi notizia. E questi Re che nascono sotto tali costituzioni, non sono da mettere in quel numero donde si abbia a considerare la natura di ciascuno uomo per sè, e vedere se egli è simile alla moltitudine; perche all' incontro loro si debbe porre una moltitudine medesimamente regolata dalle leggi come sono essi, e si troverà in lei essere quella medesima bontà che noi

veggiamo essere in quelli.

Conchiudo adunque contra alla commune opinione, la qual dice come i Popoli, quando sono principi, sono vari, mutabili, ingrati, affermando che in loro non sono altrimenti questi peccati che si sieno ne Principi particolari. Ed accusando alcuno i Popoli e i Principi insieme, potrebbe dire il vero; ma traendone i Principi, s'inganna: perchè un Popolo che commanda e sia bene ordinato, sarà stabile, prudente, o grato, non altrimenti che un Principe, o meglio che un Principe, eziandio stimato savio; E dal altra parte, un Principe sciolto dalle leggi sarà ingrato, vario, e imprudente piu che un Popolo. . . . Ma quanto alla prudenza e alla stabilità, dico come un Popolo è piu prudente, piu stabile, e di miglior giudizio che un Principe. E non senza cagione si assomiglia la voce d'un popolo a quella di Dio; perche si vede una opinione universale fare effetti maravigliosi ne' pronostici suoi, talchè pare che per occulta virtù e' prevegga il suo male e il suo bene."

ment of the magistrates, and is more constant in its opinions. The truth is that the government by the people is better than that of the prince; if we compare the government of a prince bound by the Laws with that of a people equally bound, there is more excellence (virtu) in the people than in the prince; while, if we compare the errors of the prince with those of the people, the errors of the people are fewer and less serious, and more easily remedied. The truth is, Machiavelli adds, that the common depreciation of the people arises from the fact that everyone speaks evil freely, and without fear, of them, even when they govern, while of princes, men only speak with fear and deference.<sup>1</sup>

It is clear that Machiavelli's political conceptions, as represented in the 'Discorsi,' are related primarily to the tradition of the Italian City States, but it is significant that he represents the same position as other mediæval writers, that the foundation of a civilised political life is the supremacy of Law.

We turn to Spain, where we find in Soto a writer whose work was not indeed published till after the middle of the century, but who seems to us to belong in character to its earlier part; for he does not seem to be affected by the great political movements of the latter part of the century. Indeed, the work of Soto is in the main a careful restatement of some of the principles of St Thomas Aquinas, with occasional modifications, no doubt.

<sup>1</sup> Id. id. id.: "Vedesì ancora nelle sue elezioni a i Magistrati fare di lungo migliore elezione che un Principe, ne mai si persuaderà ad un popolo che sia bene tirare alla dignità un uomo infame e di corrotti costumi, il che facilmente e per mille vie si persuado ad un Principe; vedesi un popolo cominciare ad avere in orrore una cosa, e molti secoli stare in quella opinione; il che non si vede in un principe. . . . Il che non puo nascere da altro se non che sono migliori governi quelli de' popoli che quelli

de' Principi. . . . Se adunque si ragionerà d'un Principe obligato alle leggi, e d'un popolo incatenato da quelle, si vedrà piu virtu nel popolo che nel Principe; se si ragionerà del uno e del altro sciolto, si vedrà meno errori del popolo che nel Principe, e quelli minori e arrano maggiori remedi. . . . Ma l'opinione contra ai popoli nasce perchè de' popoli ciascun dice male senza paura, e liberamente ancora mentre che regnano; de Principi si parla sempre con mille paure e mille rispetti."

We have already noticed Soto's conception of Law in general; we are now concerned with his conception of the prince. Kings, he says, do not derive their authority immediately or directly from God, except in some special cases, such as those of Saul and David; they are normally created by the people, and their authority is derived from the people. Such words as those of the Proverbs, "By me kings reign," only mean that God, as the source of Natural Law, has granted to mortal men that every Commonwealth has the right to govern itself, and if reason, which is itself an inspiration (spiramen) of the Divine, demands it, to transfer its authority to another.<sup>1</sup>

The authority of the king is, however, conceived by Soto as being very great. In a passage dealing with the practice of selling public offices, he is met with the contention that the king cannot do this, for he is merely "dispensator officiorum"; he emphatically disputes this, and says that the king is not merely a "dispensator," but he is the Respublica, not a mere vicar of the Respublica, like the Doge of Venice. The people, in Ulpian's phrase, has conveyed to him all its authority and force, and neither he nor his heirs can be deprived of this, except for manifest tyranny. Therefore, the kingdom is his, as the house of a private citizen belongs to the citizen, and every power and right (Jus) of the Respublica belongs to him. Only, the Respublica was not made for him, but he for the Respublica, and he must therefore consider everything from the point of view of its good.<sup>2</sup> In another

<sup>1</sup> Soto, 'De Justitia et Juro,' i. 1, 3 (p. 9): "Haud enim a Deo proxime, et quod aiunt immediate creati sunt, præter Saulum et Davidem eorumque prosapiam, cui sceptrum ipso commisit, sed, ut habetur l. quod placuit ff. de Consti. prim ('Digest,' i. 4, 1), reges ac principes a populo creati sunt, in quas suum transtulit imperium ac potestatem. . . . Unde verbum illud apud sapientem ex Proverb: viii. supra citatum, 'Per me reges regunt, etc.' non aliter intelligendum est quam quod ab ipso, tanquam naturalis juris

auctorem, donatum mortalibus est, ut unaqueque respublica se ipsam regendi habeat arbitrium; ac subindo, ubi ratio, quod spiramen etiam est divini numinis, postulaverit, in alium suam transmittat potestatem, eujus legibus providentius gubernetur."

<sup>2</sup> Id., iii. 6, 4 (p. 273): "Attamen obiectio hæc nisi fallor nullatenus conclusionem nostram expugnat. Rex enim non tanquam dispensator, sed tanquam ipse eadem respublica repandus. Enim vero non est estimandus tanquam reipublicæ vicarius, sicuti

passage Soto speaks of the power of the prince in making laws; and says emphatically that he is superior, not only to all individuals, but to the whole State.<sup>1</sup>

It should be observed that with all his emphasis on the authority of the king, he is equally clear that he must use it for the good of the State, and if he uses it tyrannically he may be deposed. This is not merely an incidental judgment, but is carefully developed, with due qualifications, in another passage, where he discusses the question of tyrannicide. He makes a distinction, with which we are by this time familiar, between the tyrant by usurpation and the tyrant by practice. As to the first there is no doubt; he may be slain by anyone, for he is making war on the Commonwealth. The case of the second is more difficult, as he has a lawful right to the kingdom; he can therefore only be deprived of this by public judgment, but when this has been pronounced, anyone may be appointed to carry it out. If the Commonwealth has a superior, he should be requested to provide a remedy, but if there is none, the Commonwealth may take arms against the tyrant. It is noteworthy that he interprets the Decree of the Council of Constance concerning tyrannicide as referring to the action of a private person.<sup>2</sup> It is clear that, with all his reverence for

Venetorum dux, qui est a republica pendens, sed tanquam plenissimam habens potestatem reipublicae, eandem scilicet quam ipsa habebat. Sic enim expresse habet lex illa, quod principi, ff. de Constit. prim. (Dig. i. 4, 1) Quod principi placuit, legis habet vigorem, utpote cum lege regia quae de imperio lata est, populus ei et in eum omne suum imperium et potestatem contulerit. Hac enim lege atque hac de causa non potest illum ullo pacto dimovere, neque filios jure hereditario regnandi expoliare, si illud semel illi contulerit, nisi ubi aperta tyrannide regnum pessundaret. Et tunc solo beneficio naturalis juris, quo vim vi repellere licet. Itaque regnum est suum, sicut cujusque civis sua est domus, atque adeo quaecunque facultas et jus reipublicae penes

ipsum est. licet non respublica propter ipsum, sed ipse propter rempublicam sit institutus. et ideo omnia debet in publicum commodum referre."

<sup>1</sup> Id., iv. 4, 1 (p. 309) "At hinc sit, ut lib. i. Quest. vi dicebamus, principem potestate fungi ferendarum legum, quibus rempublicam coerceat. Fitque praeterea ut non solum singulis reipublicae membris superior sit, verum et totius collectim corporis, caput, totique adeo sic eminens, ut totam etiam simul punire valeat. Quare neque per rempublicam rex potest regni expoliari, nisi fuerit in tyrannidem corruptus"

<sup>2</sup> Id. id., v. 1, 3 (p. 400). "Primum de tyranno, an cuius civium licet eum privatim interficere. Apparet enim id esse, natura magistrata, legitimum. Nam unicuique conceditur jus defendendi sese. De hoc D. Thom. ii

the authority of the king, Soto holds that, as it is derived from the Community, he may justly be deprived of it by the Community if he uses it unjustly and tyrannically.

Soto's treatment of the relation of the king to the Law is rather different. He discusses this in detail in a chapter in which he asks whether all are subject to the Law, and points out the difficulty raised by the words of St Paul, "Law is not made for the righteous man" (1 Tim. i. 9), and by those of Ulpian, "Princeps legibus solutus est" (Dig. I. iii. 31). We cannot here enter into his discussion of the first passage, but his observations on the second are important for our purpose. The prince is subject to the directing force (vis directiva) of the Law, but is not subject to its coercive force; this, he says, is obvious, for he cannot apply force to himself; the prince should not, however, think of this as a privilege, but rather as an unhappy circumstance, for subjects are both illuminated by the light of the Law and driven by its penalties; the prince lacks the second, for there is no one who can compel him or even dare to reprove him. And, therefore, the king should be the more careful to listen to reason and the Divine voice, and to hearken to the laws which he has made for others, and Soto cites the words of the Imperial Constitution, "Digna

Sent. Dist. 64 Q. ii Art. ii, et opus xx De Regimine Principis C. vi. optime disserit. Summa autem disputationis secundum quosdam ejus interpretes, atque alios doctores, haec est, bifarium quempiam contingit esse tyrannum, videlicet, aut potestatis acquisitione, aut sola administratione quem juste adeptus fuit. Atque in hoc secundo casu, communis consensus est, nemini licere ipsum privatim interficere. Et ratio est, quod quum jus habeat ad regnum, non est illo nisi per publicum judicium expoliandum, ut s. audiatur. Lata vero in eum sententia, quisque potest institui executionis minister.

Praeterea dum particulariter civem quempiam aggreditur, ut vel ipsum

trucidet, vel sua rapiat, potest civis ille, vim vi repellendo, eum interficere, dum tamen constantissimum sit, esse tyrannum. . . . Quare si respublica superiorem habet, ille adeundus est, ut remedio succurrat. sin vero, illa potest in eum coarctari. . . . Atque in hoc casu intelligenda est sanctio Concilii Constantiensis, Sess. 15, ubi tanquam haereticis condemnatur eorum error qui affirmabant cuilibet licere tyrannum occidere. Si vero tyrannide invasam, rempublicam obtinuit, neque unquam ipsa consensit, tunc quisque jus habet ipsum extinguendi, nam vim vi repellere licet; et quandru ille rempublicam sic obtinet, perpetuum gerit in ipsam bellum."

vox est majestatis regnantis, legibus alligatum se principem profiteri" (Cod. I. xiv. 4).<sup>1</sup>

Soto then, on the one hand, ascribes to the prince a great authority; he looks upon him as normally the source of Law, and as, technically, above it, though he is conscious of the danger of this conception; but, on the other hand, he maintains very emphatically that it is from the Community that his authority is derived, and that if he abuses this authority he may be deposed.

It is hardly necessary to point out that in England St Germans represents the tradition of Bracton and of Fortescue, that the authority of the king was limited by the Law, and that the Law was not made by him alone. It is obvious, from what we have said in an earlier chapter, that in the opinion of St Germans it was from the custom of the Community that the Law was originally derived, and that the only authority which could change these customs was that of Parliament, including, no doubt, the king, but also representing the whole community. The sixth foundation, as he says, of the law of England was to be found in the Statutes made by the king or his ancestors, by the Lords Spiritual and Temporal, and by the community of the whole kingdom. He knows no source

<sup>1</sup> Id. id., I, 6, 7 (p. 65): "Sit ergo prima conclusio, universi qui subditi sunt potestati, legibus subinde ipsius; quia vero et princeps quantum ad vim directivum subicitur. . . Huic autem subiicimus similem ei tertiam: princeps quantum ad vim coercivam non subditur legi. Conclusio est aperta, quoniam coactio ejusdem ad se ipsum esse non potest: non enim est intellectu possibile, ut vim quisquam sibi ipse inferat atque adeo se sua lege cogat. . . Quod autem sua principem lex non cogat, non inde venit quod ipse non egeat, sed quod lex natura sua nequeat. At vero hanc principes exemptionem non inter privilegia ducere debent, immo est illis iniqua conditio. Subditi enim qui non solum legis luce ducuntur,

verum etiam ejus penis stimulantur, duobus subsidiis ad virtutem utuntur; princeps autem altero destitutus est, dum nullus est qui illum cogere posset, aut reprehendere audeat; immo vix ullus qui veritatem doceat. . . . Quapropter rex quo eum Deus liberiolem fecit, legumque coactioni longius exemptum, eo debet esse ipse rationi vigilantius, divinoque nutui audiens esse, ac subinde legibus quas aliis ponit, ipso auscultare: no in illum Christi improprium impingat, 'qui dicunt et non faciunt' . . . et C. De Leg: et Constit. 4. Aiunt imperatores ipsi 'digna vox est majestatis regnantis, legibus alligatum se principem profiteri.'" (Cod. I. xiv. 4.)

of English law except the Divine Law, the Law of Reason, the general and particular customs of the country, and the Statutes of Parliament.<sup>1</sup> To the observance of these laws the king is bound by the oath which he takes at his coronation,<sup>2</sup> and it is by the customs embodied in Magna Carta that the person and property of the Englishman is legally protected.<sup>3</sup>

There is, however, another English work of this time which deserves some notice. This is the 'Dialogue between Cardinal Pole and Thomas Lupset,' written by Thomas Starkey, not later than 1538, for he died in that year.<sup>4</sup> The greater part of this work is indeed occupied with a description and discussion of the social and economic conditions of England with which we cannot deal here, but from time to time there are important observations on the authority of law and of the Ruler.

Pole is represented as saying that originally "man wandered abroad in the wild fields and woods, none otherwise than you see now the brute beasts to do" (page 52). At last certain wise men persuaded them to forsake this rude life and to build cities in which they might live. "Thereafter they devised certain ordinances and laws whereby they might be somewhat induced to follow a life convenient to their nature and dignity" (page 52).

The forms of government, Pole defines in the Aristotelian tradition, as that of one, a king or prince, or a few wise men, or that of the whole body and multitude of people, "and thus it was determined, judged, and appointed by wisdom and policy, that ever, according to the nature of the people, so,

<sup>1</sup> St Germans, 'Dialogus,' cap. x. (fol. 34): "Sextum Fundamentum legis Angliæ stat in divorsis statutis per dominum Regem et progenitores suos, et dominos spirituales et temporales, et per communitatem totius regni in parlamento editis, ubi lex rationis, lex divina, consuetudines, maxima, sive alia fundamenta legis Angliæ prius sufficere minime videbantur. Et ultra hæc funda-

menta legis Angliæ alia me legisse non meminer."

<sup>2</sup> Id. id., cap. vii. (fol. 22).

<sup>3</sup> Id. id. id. (fol. 23).

<sup>4</sup> We refer our readers for details about Thomas Starkey and his work to the edition published for the Early English Text Society in 1878. The work was never published before. We have modernised the spelling in our references.

by one of these politic manners, they should be governed, ordered, and ruled" (page 53). He also repeats the Aristotelian principle of the difference between a bad and a good government; the good government is that which is directed to the wellbeing of the whole Community, while the evil government is that which is directed to the advantage of the Ruler (pages 53, 54).

So far there is nothing of much importance, but in the last paragraph of the third chapter Pole turns from the discussion of the economic and social evils of England to the "misorderings and ill-governance which we shall find in the order and rule of the state of our country" (page 99). And in the next chapter he begins the consideration of this subject by saying "that our country has been governed and ruled these many years under the state of Princes which by their royal power and princely authority have judged all things pertaining to the State of our Realm to hang only upon their will and fantasy, insomuch that whatsoever they ever have conceived in their minds, they thought by-and-by to have it put in effect, without resistance to be made by any private man and subject; or else by-and-by they have said that men should diminish their princely authority. For what is a Prince (as it is commonly said) but he may do what he will. It is thought that all wholly hangs on his only arbitrament. This hath been thought, yea, and this is yet thought, to pertain to the Majesty of a Prince—to moderate and rule all things according to his will and pleasure; which is, without doubt, and ever hath been, the greatest destruction to this Realm, yea, and to all others, that ever hath come thereto. . . . ."

For Master Lupset this is sure, and a Gospel word, that country cannot be long well governed nor maintained with good policy where all is ruled by the will of one, not chosen by election, but cometh to it by natural succession; for seldom seen it is, that they which by succession come to kingdoms and realms, are worthy of such high authority" (pages 100 and 101).

Lupset is greatly alarmed, and warns Pole that many

people will think that this sounds very like treason, for "it is commonly said (and, I think, truly) a king is above his laws, no law binds him" (page 101).

The words attributed to Pole clearly express the opinion that the royal authority had tended to become absolute, and that a government of this kind was a great evil in England or any other country. It must be noticed, however, that Pole's words here suggest that this might be different if the prince were elected instead of hereditary, and he develops the criticism of succession by inheritance. Lupset replies that experience had shown that hereditary succession was necessary to prevent civil war, and Pole admits that it was better to have it in England (pages 104-108).

Pole returns to the subject in the Second Part, and again expresses his preference for an elective monarchy, but he now adds that even the prince thus elected "should not rule and govern according to his own pleasure and liberty, but ever be subject to the order of his laws" (page 168).

He turns, however, immediately to the question of the method of government if the prince succeeds by inheritance, "if we will that the heirs of the Prince shall ever succeed, whatsoever he be, then to him must be joined a Council by common authority; not such as he wills, but such as by the most part of the Parliament shall be judged to be wise and meet thereunto" (page 169).

He assumes the existence of the "Great Parliament," as he calls it (page 169). It is not to meet continually, but to be called together for the election of the prince and for other matters "concerning the common state and policy," and is to appoint a Council which should sit continually in London and represent the authority of Parliament, and "should be ready to remedy all such causes, and repress seditions, and defend the liberty of the whole body of the people, at all such times as the king or his Council tended to anything hurtful and prejudicial to the same" (page 169). This Council is to be wholly distinct from the ordinary Council of the king, and it is to be composed of four nobles, two bishops, four judges, and four citizens of London, and they should have

the authority of the whole Parliament when it was not meeting. The end and purpose of this Council is, "to see that the king and his proper Council should do nothing against the ordinance of his Laws and good Policy, and should also have power to call the Great Parliament whensoever to them it should seem necessary for the reformation of the whole State of the 'Commynalty.' By this Council, also, should pass all acts of Leagues, Confederations, Peace, and War. All the rest should be administered by the king and his Council" (pages 169, 170).

In another place Pole is represented as dogmatically repudiating the conception that the authority of Government, whether it is evil or good, is derived from God. "Even as every particular man, when he followeth reason, is governed by God, and contrary, blinded with ignorance by his own vain opinion; so whole nations, when they live together in civil order, instituted and governed by reasonable policy, are then governed by the Providence of God and be under His tuition. As, contrary, when they are without good order and politic rule, they are ruled by the violence of tyranny; they are not governed by His Providence, nor celestial ordinance, but as a mass governed by 'affectis,' so they be tormented infinite ways, by the reason of such tyrannical powers; so that of this you may see that it is not God that provideth tyrannies to rule over cities and towns, no more than it is He that ordaineth ill 'affectys' to overcome right reason" (page 166).

He again insists that the law must be supreme even over the prince, "seeing also that Princes are commonly ruled by 'affectys' rather than by reason and order of justice, the laws which be sincere and pure reason must have chief authority. They must rule and govern the State, and not the Prince, after his own liberty and will" (page 181). And he contends that, "For this cause the most wise men, considering the nature of Princes, yea, and the nature of man, as it is indeed, affirm a mixed state to be of all other the best and most convenient to conserve the whole out of tyranny" (page 181).

It would no doubt be impossible to attach very much importance to a work which was not published till three centuries after it was written, if it were not that its judgments coincide, in a large measure, with those of other important writers of the time. It is clear that Pole, as represented by Starkey, absolutely refuses to acknowledge that the prince has any absolute authority derived from God; he maintains emphatically that the prince is not above the Law but under it, and he conceives of the best government as being mixed or constitutional, and as representing the authority of the whole community.

We must finally consider, and carefully, what was the position of that great Frenchman, John Calvin, who exercised so immense an influence not only in France but throughout Europe. It appears to us that there has been some misunderstanding about this, and we must therefore examine it with some care.

Calvin has not, either in the 'Institutio' or elsewhere, set out any complete system of political thought, but he states with care some important principles both of a general and a particular kind. His treatment of politics in the 'Institutio' was, at least in part, intended as a defence of the Reformers against the charge that they held doctrines which were subversive of all political and civil order. Indeed, he says this explicitly in the Preface to the 'Institutio' addressed to Francis I. in 1536,<sup>1</sup> and it seems to us that his treatment of political authority was largely determined by the need to repudiate those who did hold such subversive views, that is, especially, some Anabaptists.<sup>2</sup> This is why Calvin so em-

<sup>1</sup> Calvin, 'Institutio Christianae Religionis,' Preface: "Ne quis haec injuria nos queri existimet: ipse nobis testis esse potes rex nobilissime, quum mendacibus calumniis quotidie apud te traducatur, quod non aliorum spectet nisi ut regibus sua sceptrum e manibus extorqueat, tribunalia, judicium omnia precipitet, subvertat ordines omnes et politias, et quietem

populi perturbet, leges omnes abrogat, dominia et possessiones dissipet, omnia denique sursum deorsum volvat."

<sup>2</sup> Id. id., iv. 20, 1 (p. 549): "Illi enim, quum in evangelio promitti libertatem audiunt, quae nullum inter homines regem, nullumque magistratum agnoscat, sed in Christum unum intueatur: nullum libertatis suae fructum capere se posse putant,

phatically and repeatedly lays down the principle of the Divine source and nature of political authority, and the religious obligation of obedience to it. In one passage of the 'Institutio' he shows that the function of the magistrate is not only approved by God, but that the Scriptures speak of this authority in the strongest terms. The magistrates are even called "gods," and this not without significance, for they have received their authority from God, they are endowed with the authority of God, they bear the person of God, for they act in His place. This is what St Paul meant when he called the Power the Ordinance of God, and said that there was no Power which was not ordained by God.<sup>1</sup>

We may compare this with a passage in one of his homilies on the First Book of Samuel, in which, like Gregory the Great, he treats the conduct of David in refusing to lift his hand against the Lord's Anointed as an example to Christian men, and argues, like Gregory, that we must obey the rulers, even when they abuse their authority, and that we must render honour to the king or prince, even when he unjustly imposes tributes and taxes upon his subjects, or otherwise gravely oppresses them.<sup>2</sup>

quamdiu aliquam supra se eminere potestatem vident. Itaque nihil fore saluum existimant, nisi totus in novam faciem orbis reformetur ubi nec judicia sint, nec leges, nec magis tratus, et si quid simile est, quod officere suae libertati opinantur. At vero qui inter corpus et animam, inter presentem hanc fluxamque vitam, et futuram illam aeternamque discernere noverit, neque difficile intellet spirituale Christi regnum et civilem ordinationem res esse plurimum sepositas."

<sup>1</sup> Id id, iv 20 4 (p 550) "Magis tratum functionem non modo sibi probar, acceptaque esse testatus est Dominus, sed honorificentissimis in super elogis ejus dignitatem prose quutus, mirifice nobis commendat. Ut pauca commemorem. Quod Du nuncupantur, queunque magistratum

gerunt, nec in ea appellatione leve inesse monumentum quis putet. Ea enim significatur mandatum a Deo habere, divina auctoritate praeditos esse, ac omnino Dei personam sustinere, cujus vices, quodammodo agunt. . . . Quod et Paulus aperte docet, dum prefecturas inter Dei dona enumerat. . . . Nam et potestatem Dei ordinationem esse tradit: nec potestates esse ullas, nisi a Deo ordnatas. Ipsos autem principes ministros esse Dei, bene agentibus in laudem, malis ad iram ultores."

<sup>2</sup> Id, 'Homilies on 1 Samuel,' xxiv. 7, 8 (p 483). "Nos igitur debitos honores tribuere discamus in quibus Deus peculiarem quandam notam dedit, quum eos ad rerum gubernacula sedere voluit, et justitiam administrare quisquis enim, ut ait Paulus, dignitati superiori resistit, Deo ipsi resistit

This is not, however, all that Calvin said. In another place in the 'Institutio' he warns subjects that they must not meddle in public matters; but then he adds that while they must not interfere with the function of the magistrate, nor tumultuously raise their hands against him, if there is something in the public order which should be corrected, they should bring this to the knowledge of the magistrate whose hands are free to deal with the matter.<sup>1</sup> Here, it is evident, is another mode of conceiving the position of the king or prince; private persons, indeed, may not resist, public persons or officers, to whom this does not apply. The truth is that Calvin makes a sharp distinction between the position of private persons and that of those who held a public and constitutional office in the State. In an earlier passage in the 'Institutio' he had said that it would be idle for private persons to dispute about the best form of the State, for they have no right even to deliberate about any public matter,<sup>2</sup> but it should be observed that it is "private" persons of whom he speaks. We must therefore bear this in mind when we turn to the well-known passage in which Calvin speaks of the possibility of a constitutional

. . . (p 487) Quo exemplo (i e, that of David) docemur, magistratibus et primariae dignitatis viris et ad rerum gubernacula sedentibus suum officium non facientibus, sed auctoritate abutentibus, nihilominus obtemperandum. . . . Exempli gratia, si quis rex aut princeps subditos tributis et vectigalibus injuste premit, et alius gravioribus erroribus graviter laedat, dignitas tamen et potestas illa semper est honore efficienda. Quamobrem ad Deum respiciendum norimus, quum tanta inter homines violentia passum regnet, tantoque odio nos etiam ultro persequatur, ut patientia nostra laesa, nos ad ordinem, a Deo prescriptum, turbandum impellat.

<sup>1</sup> Id, 'Institutio,' iv 20, 23 (p 558) Sed hac praeferea obedientia,

moderationem comprehendo, quam sibi in publico imperare debent privati homines, ne se ultra admisceant publicis negociis, aut temere irrumpant in partes magistratus, ac ne quid omnino publice moliantur. Si quid in publica ordinatione corrigi interent, non tumultuentur ipsi, nec admoveant operi manus, quas illis omnibus ligatas esse in hac parte decet, sed ad magistratus cognitionem deferant, cujus unius hic soluta est manus."

<sup>2</sup> Id id, iv. 20 8 (p 551). "Et sane valde otiosum esset, quis potissimus sit polittae, in eo quo vivunt loco, futurus status, a privatis hominibus disputari. quibus de constituenda re aliqua publica deliberare non licet."

Cf 'Hom on 1 Samuel,' xxiv and 'Comm on Romans,' xiii.

method by which the unjust ruler might be restrained. He had, in this passage, been saying that if men are cruelly treated, plundered, or neglected by their prince, they must consider that God is no doubt visiting their sins with punishment, and that they can only look to God, in whose hand are the hearts of kings; while God has sometimes raised up deliverers for the oppressed, they must not imagine that they are entrusted with God's vengeance, they can but suffer and obey.<sup>1</sup> There is then, however, a sudden turn; in saying this, he is speaking always of private persons. If there are magistrates of the people who have been created to restrain the arbitrary will of kings, such as were formerly the Ephors in Sparta, or the Tribunes of the People in Rome, or the Demarchs in Athens, or in modern times perhaps the three Estates in their Assemblies, these, he asserts, may legitimately intervene to restrain the license of kings; indeed, he maintains that if they should connive at the violence of the kings, they are guilty of treachery, for they betray the liberty of the people of whom they are, by God's ordinance, the guardians.<sup>2</sup>

It is quite evident that while Calvin repudiates in the strongest terms all revolutionary and unconstitutional movements against the existing political authority, his words have no reference to the propriety of constitutional restraints on the ruler. We can, therefore, now take account of some observations which he makes upon the proper functions of government and its various forms.

He refuses to determine which is the absolutely best form

<sup>1</sup> Id. id., iv. 20, 51 (p. 561) "Neque enim si ultio domini est effrenatae dominationis correctio, ideo protinus demandatam nobis arbitremur quibus nullum aliud quam parendi et patiendi, datum est mandatum"

<sup>2</sup> Id. id., iv. 20, 51 (p. 561). "De privatis hominibus semper loqui. Nam si qui nunc sint populares magistratus ad moderandum Regum libidinem constituti (quales olim erant, qui Lacedaemomis regibus oppositi erant, Ephori, aut Romani Consules, Tribuni plebis, aut Atheniensium

Senatus, Demarchi: et qua etiam forte potestate, ut nunc res habent, funguntur in singulis regnis tres ordines (quum primarios conventus peragunt), adeo illos ferocienti Regum licentiae, pro officio, intercedere non veto, ut si Regibus impotenter grassantibus, et humili plebeculae insultantibus conniveant, eorum dissimulationem nefaria perfidia non carere affirmem, quia populi libertatem (cujus se, Dei ordinatione tutores postos norunt) fraudulenter produnt."

of government; the monarchy is liable to turn into a tyranny, the aristocracy into a faction, the democracy to become seditious, but he admits that he would himself prefer either an aristocracy or a government combining the elements of aristocracy with those of the constitutional commonwealth (politia). Experience had shown that this was the best, and it was also the government which God Himself had instituted among the Israelites. That seemed to Calvin the happiest form of government, where liberty was moderated, and which tended to continuance. The magistrates of such a State ought to be diligent to see that its liberty was not violated or diminished.<sup>1</sup>

From the discussion of the best form of Government he turns to the nature of the law of the State. He begins by laying down the general principle that without laws there can be no magistrates, as without magistrates there are no laws. He repudiates with great energy the notion that the political laws of Moses were binding upon the State; the moral law, however, which is the true and eternal law of justice, is binding upon men of all places and times who desire to order their life by the will of God, for it is His eternal and immutable will that men should worship Him and love each other. Subject to this, every nation is at liberty to establish laws for itself, as it finds best; they may vary in form, but they must have the same principle (ratio).<sup>2</sup>

<sup>1</sup> Id. id., iv. 20, 8 (p. 552). "Equidem si in se considerantur tres illae, quas ponunt philosophi regimnis formae, minime negaverim vel aristocratiam, vel temperatam ex ipsa et politia statum alius omnibus longe excellere. Id cum experimento ipso semper fuit comprobatum tum suo quoque auctoritate Dominus confirmavit, quum aristocratiam politiae vicinam apud Israelitas instituit, quum optima constitutione eos habere vellet, donec imaginem Christi produceret in Davide. Atque ut libenter fateor, nullum esse gubernationis genus isto beatius, ubi libertas ad eam quam decet moderationem est composita, et ad duturnitatem vitae constituta sic

et beatissimos censeo, quibus hac conditione frui licet, etsi in ea conservanda, retinendaque strenue ac constanter laborant, eos nihil ab officio alienum facere concedo. Quum etiam huc summa diligentia intenti magistratus esse debent, ne qua in parte libertatem, cujus praesides sunt constituti, minus nedum violari patiantur. Si in eo sunt segniores et parum solliciti, perfidi sunt in officio, et patriae suae proditores."

<sup>2</sup> Id. id., iv. 20, 14 (p. 555) "Proximae sunt magistratui in politis leges, validissimi rerum publicarum nervi sine quibus consistere nequit magistratus, quemadmodum nec ipsae ius sum sine magistratu quicquam vigoris

This, Calvin says, will be clear, if we will distinguish between law and equity (*aequitas*), upon which law depends. Equity, because it is natural, must be the same among all men; the constitutions (*i.e.*, positive laws), because they depend upon circumstances, may well differ, as long as they look to the same end of equity. The moral law of God is nothing else than the testimony of natural law, and the whole principle of equity, which is the rule and end of all law, is contained in it. Laws which are directed to this end are not to be condemned by us, even though they differ from the Jewish Law, and from each other.<sup>1</sup>

It is clear that substantially Calvin was restating the principles of St Thomas Aquinas, and other great mediaeval political writers, both with regard to the nature of positive law, and its relation to reason, the moral law, and the natural law, and also with regard to the nature and limitations of the authority of the prince. It is evident that, like St

habent. Proude nihil dici verius poterat, quam mutum esse magistratum legem, magistratum, legem esse vivam. . . . Sunt enim qui recte compositam esse rempublicam negant, quae neglectis Moysae politis, com munitibus gentium legibus regitur. Quae sententia quam periculosa sit et turbulenta, viderint alii; mihi falsam esse ac stolidam demonstratam satis erit. . . .  
15 Lex itaque moralis (ut inde primum incipiam), quum duobus capitibus contineatur quorum alterum pura Deum fide et pietate colere, alterum sincere homines dilectione complecti, simpliciter jubet, vera est aeternaque iustitiae regula gentium omnium ac temporum hominibus praescripta, qui ad Dei voluntatem vitam suam componere volunt. Siquidem haec aeterna est et immutabilis eius voluntas, ut a nobis ipse quidem omnibus colatur, nos vero mutuo inter nos diligamus. . . . Quod si verum est libertas certe singulis gentibus relicta est condendi quas sibi conducere providerunt leges: quae tamen ad perpetuam illam charitatis regulam exigantur, ut forma quidem varent, rationem habent eandem."

<sup>1</sup> Id. id., iv. 20, 16 (p. 555): "Id quod dixi planum fiet, si in legibus omnibus duo haec (ut decet) intuemur, legis constitutionem, et equitatem, cujus ratione constitutio ipsa fundata est ac nititur. Equitas quia naturalis est, non nisi una omnium esse potest, ideo et legibus omnibus, pro negotii genere, eadem proposita esse debet, Constitutiones, quia circumstantias aliquas habent, a quibus pro parte pendeant, modo in eundem equitatis scopum, omnes pariter intendant, diversas esse nihil obest. Jam, cum Dei legem, quam moralem vocamus, constat non aliud esse quam naturalis legis testimonium, et eius conscientiae, quae hominum animis a Deo insculpta est tota hujus, de qua nunc loquimur, equitatis ratio in ipsa praescripta est. Proude, sola quoque ipsa legum omnium et scopus et regula et terminus sit oportet. Ad eam regulam quaecumque formatae sunt leges, quae in eum scopum directae, quae eo termino limitatae non est cur a nobis improbentur, utcumque vel a lege Judaica vel inter se ipsae alias differant."

Thomas, his own preference was for a mixed or constitutional government.<sup>1</sup>

We may finally ask whether Calvin's opinions or advice on the actual events of his time throw any further light upon his conception of government. It would seem that so far as they go, they correspond very closely with the principles which we have just set out. Calvin lived through the period when the Protestant Princes of Germany, reluctantly in some cases, took up arms against the authority of the Emperor, Charles V., and his letters show that he found no reason to criticise their action; indeed, in a letter to Farel of 1539, he seems formally to approve.<sup>2</sup>

This contrasts with the tone of some letters of 1560, which seem to refer to the conspiracy of Amboise, in France. To Bullinger he says that he had acted rightly in repudiating the charge of responsibility for the tumults in France. He (Calvin) had known of the deliberations about this matter eight months before, and had interposed his authority to prevent them going any further.<sup>3</sup> And to another correspondent he says that he had from the beginning anticipated what would happen, but he had been unable to restrain them (the conspirators). Formerly, they had allowed themselves to be governed by his advice, but when they saw that their design was displeasing to him they had deceived him. He never approved of the enterprise, for in his judgment they were attempting more than God permitted.<sup>4</sup>

<sup>1</sup> Cf. vol v pp 94 97

<sup>2</sup> Calvin, 'Epistolae' (ed 1575, p 18). (April 1539). "Foedus Germanicum nihil habet quod debeat primum pectus offendere. Cur enim, quaeso, quas dedit eis Dominus vires, non conjungant ad communem Evangelii defensionem."

Cf id., page 6

<sup>3</sup> Id id., p 229 (May 1560). "Quod Gallici tumultus a nobis depellere non dubitasti, tute id poteras. Quum ante octo menses agitari consilia haec inciperent, meam auctoritatem interponere ne longius progredi tentarent."

<sup>4</sup> Id. id., p. 230 (June 1560). 'Gallis

infeliciter cecisse inconsideratum suum ardorem, ad vos perlatum esse non dubito. Ab initio vaticinatus sum quod accidit, sed nescio quo fascino genere sic captae erant multorum mentes, ut frustra impotum illorum sedare conatus sim. Antea meis consiliis se regi passim fuerant sed quum intelligerent totam hanc actionem mihi non placere, nullum putarunt esse molius compendium quam si me fallerent. . . . Sicut autem earum expeditio nunquam mihi probata fuit, quia plus meo iudicio tentabant quam Deus permitteret, ita consilio destituti, rem non legitimam stulte et pueriliter aggressi sunt."

The difference between this and Calvin's judgment on the action of the German Princes serves to illustrate his theory. And our judgment is confirmed by that important letter to Coligny, of 1861, which Professor Allen has cited in his learned work, for, while Calvin condemns forcible resistance to persecution by the reformed party in France, he admits that such action would be lawful if it were taken by the Princes of the Blood and the Parlement.<sup>1</sup>

We have then, we hope, said enough in this chapter to make it clear that by some of the most important writers of the earlier part of the sixteenth century, not in one country only, but in all the great countries of Western Europe, the mediæval principle of the limitation of the authority of the ruler, Emperor, King, or Prince, was firmly and intelligently maintained.

We have also pointed out that this coincides both with the general evidence of constitutional practice and principles. In the last section of this chapter, however, in discussing the position of Calvin, we have referred to the question of the Divine authority of the ruler, and while we are clear that Calvin's own interpretation of this was not in any way inconsistent with the principle of the constitutional limitation of that authority, we must now turn to the consideration of the reappearance in the sixteenth century of the theory that the Divine authority of the ruler was unqualified and unlimited.

<sup>1</sup> Calvin, 'Lettres Francaises,' ed Jules Bonnet, vol. II. p. 382. "C'est que sept ou huit mois auparavant (i.e., before the attempt at Amboise), quelqu'un ayant charge de quelque nombre de gens, me demanda conseil s'il ne seroit pas licite de resister a la tyrannie dont les enfans de Dieu estoient pour lors oppriméz, et quels moyens il y auroit. . . . Je respondi simplement à telles objections, que s'il s'espandoit une seule goutte de sang, les rivieres en decouleroyent par toute l'Europe. Ainsi qu'il

valoit mieux que nous perissions tous cent fois, que d'estre cause que le nom de Chrestienté et l'Evangile fust exposé a tel opprobre. Bien lui accorday je que si les princes du sang requorroyent d'estre maintenus en leur droit pour le bien commun, et que les cours de Parlement se joignissent à leur querelle, qu'il seroit licite a tous bons subjects de leur prêter mainforte." Cf J. W. Allen, 'History of Political Thought in the Sixteenth Century,' p. 59.

## CHAPTER IV.

### THE THEORY OF THE DIVINE RIGHT.

WE have in the first volume of this work endeavoured to trace the appearance in Western thought of the conception that the Ruler was in such a sense representative of God that he could in no circumstances be resisted, however oppressive and tyrannical he might be. We have pointed out that while there may be some tendency towards this in earlier Christian writers, it was St Gregory the Great who first definitely formulated and enunciated this doctrine. We have ventured to suggest, and we still think it is true, that this conception was substantially alien to Western thought, and that it was an orientalism which was derived from an interpretation of some parts of the Old Testament.<sup>1</sup> We have also pointed out that this must be quite clearly distinguished from the conception of St Paul, that political authority is derived from God, because it exists for the maintenance of justice.<sup>2</sup>

We have also pointed out that while the conception of St Paul became the normal doctrine of mediæval civilisation, the doctrine of St Gregory the Great had no real place in the political ideas of the Middle Ages, not only because, as the cynic might say, the recurrent conflicts between the ecclesiastical and secular powers made such a doctrine inconvenient, but much more because it was completely incompatible with the fundamental principle of the Middle Ages, that human society was governed by law, which was the expression of justice, and not by the arbitrary will of any ruler. There

<sup>1</sup> Cf vol. I chap. 13.

<sup>2</sup> Cf. vol. I. p. 90.

were indeed a few writers, such as especially Gregory of Catino in the twelfth century, who reaffirmed the view of St Gregory the Great, but they were insignificant in number and in authority. In the first and second parts of this volume we have cited the interesting but isolated restatements of St Gregory the Great, by Wycliffe in the fourteenth century and by the Cortes of Olmedo and by Æneas Sylvius (Pope Pius II.) in the fifteenth century.

It was not till the sixteenth century that, as far as we can see, this conception came to have any importance. How far, indeed, it had any real importance even then we shall have to consider, but we have first to endeavour to trace the appearance and development of the conception, and to discuss so far as possible what we are to understand by it.

As far as we have been able to discover, the first writer of the sixteenth century of whom we can say that he, at one time, held and affirmed the conception that the temporal ruler was in such a sense representative of God that under no circumstances he could be resisted, was Luther. For there can be no doubt that this was his conviction till about 1530. We have, in spite of our best efforts, been quite unable to discover how Luther came to entertain so eccentric an opinion, whether directly from the tradition of Gregory the Great or from some other unknown influence. It is no doubt obvious that he endeavoured to find sufficient authority for it in the well-known words of St Paul in Romans xiii. and of St Peter in his first Epistle (iii. 13, 14), and like St Gregory the Great he was also clearly influenced by the conception of the king, the Lord's Anointed, as represented especially in the stories of the relation of David to Saul in 1 Samuel.

It is, however, difficult to imagine that these alone would have induced him to adopt an attitude so extreme, and which was so contrary, as we have seen, to the general tendency of thought in Germany and in Western Europe, not only in the Middle Ages, but in the fifteenth century.

We would begin by pointing out that it appears evident

that Luther was not a systematic political thinker, that indeed he can hardly be described as a political thinker at all. There are, however, some general conceptions expressed in his writings which it may be well to notice, for they may serve at least to indicate some of the presuppositions with which he approached political questions.

In his treatise, 'Von Weltlicher Obrigkeit,' after citing St Paul's words, "The powers that be are ordained of God" and the parallel words in the first Epistle of Peter, he discusses the apparent conflict between the Old Testament and the Sermon on the Mount, with regard to the use of force to maintain justice. He contends that the coercive authority of society is required because men are not all true Christians; if they were, there would be no need of kings and princes, of law or of the sword.<sup>1</sup> If it is then asked why the Christian man should be obedient to the coercive authority, the answer is, that while the true Christian does not need this for himself, he must obey it for the sake of his neighbours.<sup>2</sup>

The same conception is expressed in different terms in Luther's tract, written in July 1525, in defence of the harsh and violent terms which he had used against the peasants, in May of the same year. There are, he says, two kingdoms: the one is the kingdom of God; the other, the kingdom of the world. The kingdom of God is a kingdom of grace and mercy, the kingdom of the world is a kingdom of wrath, of punishment, and of judgment, to coerce the wicked and to defend the godly, and therefore it has the sword; the prince represents the wrath and the rod of God.<sup>3</sup>

<sup>1</sup> Luther: Works, vol. xi., 'Von Weltlicher Obrigkeit,' p. 247: "Und wenn alle welt rechte Christen, das ist rectgleubigen weren, so were keyn Fürst, Kunig, Herr, Schwerd, noch Recht noth oder nutze."

<sup>2</sup> Id. id., p. 253: "Antwortt; itzt hab ichs gesagt, das die Christen unter einander und bey sich und fur sich selbs keyns Rechten und Schwerds durrffen, denn es ist yhn keyn noth noch nutz, aber were eyn rechter Christen auff Erden, nicht yhm selbst

sondern seynten nehisten lebt und dienet, sso thut er von art seynts geystes auch das, des er nicht bedarff, sondern das seynten nehisten nutz und noth ist."

<sup>3</sup> Id. id., vol. xviii.: "Ein sendbrief von der harten Buchlein wdder die Bauern," p. 389.

"Es sind zweyerley Reich. Eyns ist Gottis Reich, das ander ist der welt Reich . . . Gottis Reich ist eyn Reich der gnaden und Barmhertzickout, und nicht eyn Reich des Zorns odder

The same principles are again set out by Luther in a Treatise written in 1526, on the position of soldiers and their relation to the Christian religion. This, he says, is the conclusion of the whole matter: the office of the sword is lawful and a godly and useful ordinance. For God has established two governments in the world, the one is spiritual, the other is the worldly government of the sword, which has been set up, that those who will not live religiously and justly, and in obedience to the word of God, may be compelled to be religious and just in this world. God is the Founder and Lord of both forms of righteousness, both of the Spiritual and of the Temporal; they are not merely human ordinances, nor are they founded merely upon human power, but they are Divine.<sup>1</sup>

It is the same conception of the two kingdoms which is expressed in the Tract which Luther wrote, apparently in April 1525, in answer to the demands of the Suabian peasants, when he deals with the question of serfdom. They wished, he says, to make all men equal, but this would be to try to convert the spiritual kingdom of Christ into a visible and earthly kingdom, which was impossible. For the earthly kingdom could not exist without inequality; some must be free, others in bondage, some, lords and some, subjects.<sup>2</sup>

Straffe. . . . Aber das weltlich Reich ist eyn Reich des zorns und ernsts, denn daselbst ist eytel straffen, weren, richten und urtheylen, zu zwingen die bösen und zu schutzen die fromen, darumb hat es auch, und furet das Schwerd, und ein Furst odder Herr heyst Gotte zorn odder Gott's rute ynn die Schrift."

<sup>1</sup> Id., Works, vol. xix.: "Ob Kriegs Leute auch in selgẽm Stande sein können," p. 29.

"Denn das ist summa summarum davon: Das amt des Schwerds ist an yhm selber recht, und eine Gottliche nutzliche ordnung. . . . Denn er hat zweierley Regiment unter den menschen auffgericht. Ems geistlich . . . das ander ist ein weltlich Regiment durch's Schwerd, auff das diejenigen so

durch's wort, nicht wollen frum und gerecht werden zum ewigen Leben, dennoch durch solch weltlich Regiment gedrunge werden, frum und gerecht zu sein fur der Welt. . . . Also ist Gott selber, aller beyden gerechtikeit, beide geistlicher und leiblicher, Stifter, Herr, Meister, Födderer und Belohner. Und ist keine menschliche ordnung odder gewalt drinnen, sonder eytel Götlich ding."

<sup>2</sup> Id., Works, vol. xviii.: "Ermanung zum Frieden, auf die zwolf Artukel der Bauerschaft in Schwaben," p. 326.

"Es will disser artickel alle menschen gleich machen, und aus dem geistlichen Reich Christs eyn weltlich eusserlich Reich machen, wilchs unmöglich ist.

Denn weltlich Reich kann nicht

It seems to us clear that while Luther's words have a character of their own, he was, in principle, so far simply restating the Stoic and Patristic doctrine, that the coercive authority of the Political Society is a consequence of sin, that it is made necessary by the moral infirmity and defect of human nature. It is a consequence of sin, but also, as in the Patristic tradition, a Divine remedy for sin, created by God, and deriving its authority from Him. And we should conjecture that Luther's development of this, into the conception of the two kingdoms, is probably derived, ultimately, from St Augustine, and especially from the 'De Civitate Dei,' although we have not actually observed any direct reference to this.

The Political Order, then, is the result of human sin, and is appropriate to the sinful nature of man, but it is a Divine institution, and its authority is a Divine Authority.

So far, we have nothing, or little more, than the traditional conceptions of the Middle Ages. We can now approach Luther's interpretation of the conception of the Divine origin of political authority as meaning that the Temporal Ruler must always be obeyed, except in spiritual matters, as holding the authority of God.

The first reference we have found to the subject of the necessity of implicit obedience to the Supreme Ruler, is in a letter written by Luther to the Elector Frederic of Saxony in 1522, after the decision of the Diet of Worms. Luther proposes to return to Wittenberg, but he urges upon the Elector that he must not resist any action taken by the Emperor, or attempt to defend Luther; the only thing he suggests that the Elector might do was to "leave the gates open," so that Luther might, if necessary, escape.<sup>1</sup> The impression

stehen, wo nicht ungleichheit ist ynn Personen, dass etliche frey, etliche gefangen, etliche Herron, etliche Unterthan "

<sup>1</sup> Luther, 'Brieffe,' &c. Ed. De Wette, vol. II p 140

We desire to acknowledge our very great obligations to the admirable Essay of Professor K. Muller, entitled 'Luther's Ausserungen uber das Recht

des Widerstands," published in the Transactions of the Bavarian Academy for 1915.

Without this most careful collection and comment upon the many references to the subject which are to be found in Luther's works and correspondence, we should have had the greatest difficulty in dealing with them.

which this leaves is confirmed by the more formal "Bedenken" or opinion, written by Luther in 1523, in which he very clearly condemns all forcible resistance to the Emperor.<sup>1</sup>

It is the same principle which is expressed in a letter of 1525 to the Count of Mansfeld, in answer to a question, whether it would be lawful for the Reformed princes to form a league and defend themselves against the Emperor. Luther answers unequivocally that this would be absolutely wrong, for God requires men to honour the supreme authority, whether it is good or bad.<sup>2</sup>

For the full development of this conception we must, however, turn to his pamphlets or tracts. We have already cited some important passages from the tract, 'Von Weltlicher Obrigkeit,' and we should observe that this tract not only asserts the Divine origin of the Temporal Power, but also says very emphatically that no prince may fight against his king or emperor or his feudal lord, for the Supreme Lord must not be resisted by force but only by confession of the truth.<sup>3</sup>

It was, however, in the tracts dealing with the Rising of the Peasants that Luther developed this theory most completely. In the first of these, written in April 1525, Luther said that the peasants in Suabia claimed to be defending their religion and to be Christian men, but he replied that they were taking God's name in vain. St Paul had bidden every man to be subject to the authority (Oberkeit), the man who resists God's Ordinance will be damned. They may say that the authority was wicked and intolerable, that it endeavoured to take the Gospel from them and oppressed them in body

<sup>1</sup> Luther, 'Briefwechsel,' Ld. Enders, vol. iv. No. 76.

<sup>2</sup> Luther, 'Briefe,' &c. Ed. De Wette, vol. iii. p. 73. "Das ander, ob man sich verbinden moge unter, hinter, oder wider die Oberkeit, oder wie ihm zu thun sey, dass man solchen Tyrannen widerstehe. Aufs erste weiss er wohl, dass wider die Oberkeit, kein Verbindung gult. Denn Gott will die Oberherren, ie seyn böse

oder gut, geehret haben, Rom xiii. 1, 1 Peter v."

<sup>3</sup> Id., Works, vol. xi, 'Von Weltlicher Obrigkeit,' p. 276. "Das kein Furst, wider sein Oberherrn, als den König und Kaiser oder sonst seynen Lehenherrn kriegen soll, sondern lassen nehmen, was da nympt. Denn die Oberkeit soll man nicht widerstehen mit gewalt, sondern nur mit bekenntniss der wahrheit."

and soul, but this was no excuse, for to punish the wicked was not the right of any man but only of the Temporal Authority.<sup>1</sup>

If every man took the law into his own hands, there would be no law or order in the world, but only slaughter and bloodshed,<sup>2</sup> and Luther bids them remember that Christ taught men not to resist evil but to submit to injuries; the only right of the Christian is suffering and the Cross.<sup>3</sup> Luther does not, indeed, deny that the Lords had behaved like tyrants, and would be judged by God, but the peasants had transgressed against God by their insurrection.<sup>4</sup>

So far, Luther's theory was extreme, but his language was moderate; in two later tracts of the same year he seems to lose all sense of proportion and restraint and decency. In one of these, written in May 1525, he says that the peasants had broken their oath of obedience to the authorities; they had robbed and plundered, they had made the Gospel a cloke for their sin, and he calls upon the princes and lords to take the most violent and ruthless measures against them.<sup>5</sup> And

<sup>1</sup> Id., Works, vol. xviii., 'Ermahnung zum Frieden, auf die zwolf Artikel der Bauernschaft in Schwaben,' p. 303. "Sondern, wie S. Paulus sagt, Ein igliche Seele solle der Oberkeit untertan sein, mit furcht und ehren."

Wie kindet yhr doch fur diesen Gottes spruchen und Rechten uber, die yhr euch rhumet, Götlichen Recht nachzufahren, und nehmet doch das Schwert selbst, und lehnet euch auff widder die Oberkeit von Gotts recht geordnet? Meynet yhr nicht, das urtheil S. Pauli werde euch treffen. 'Wer Gott's ordnung widerstrebt, den wird das verdammis uberkommen . . . Zum dritten: Ja, sprecht ihr, die Oberkeit ist zu böse und unleidlich. Denn sie das Evangelion uns nicht lassen wollen, und drucken uns allzu hart ynn zeitlicher guter Beschwerung, und verderben uns also an Leyb und Seele. Antworte ich, Dass die Oberkeit böse und unrecht ist, entschuldigt keyn rotterey noch

aufruhr, denn die bosheit zu straffen, das geburt nicht eym iglichen, sondern der weltlichen oberkeit, die das Schwert furet.'"

<sup>2</sup> Id. id., p. 306.

<sup>3</sup> Id. id., p. 301: "Leyden, Leyden, Kreutz, Kreutz is des Christen Recht, das, und keyn anders."

<sup>4</sup> Id. id., p. 329.

<sup>5</sup> Id. id., vol. xviii. 'Wider die Rauberschen und Mörderischen Rotten der Bauern,' p. 358. "Drumb sol hie zuschmeyssen, wurgen und stechen heymlich oder offentlich, wer da kann, und gedencen, das nicht giftigers, schedlichers, teuffelschers seyn kan, denn eyn auffrurscher mensch, gleich als wenn man eynen tollen hund todschlahen mus, schlegstu nicht, so schlegt er dich und em gantz land mit dyr."

Id. id., p. 361: "Drumb, liebe Herren, loset hie, rettet hie, helfft hie, erbarmt euch der armen Leute, steche schlahe hie, wer da kann, bleybstu druber tod, wol dyr."

in another tract, written probably in July 1525, he attempted to defend the language and attitude of the first, especially by means of that distinction between the two kingdoms—God's kingdom of mercy and the earthly kingdom of wrath and punishment, which we have already discussed.<sup>1</sup>

We come back to a more restrained tone of discussion in the little work, 'Ob Kriegsleute auch im Seligen Stande sein können,' written in 1526, to which we have already referred. Here he discusses the principles of political obedience with greater fulness, but with equal decision. He admits that in the ancient world men had not hesitated to depose and even to kill useless or wicked rulers. The Greeks set up monuments to the Tyrannicides, the Romans murdered many of their emperors; but these, he says, were heathen who did not know God, and that the temporal authority was God's Ordinance.<sup>2</sup> This was incompatible with the Christian Faith; even if the rulers do what is unjust it is not lawful to be disobedient to them, and to destroy the Ordinance of God; men must endure injustice.<sup>3</sup> Luther was aware of the fact that the Swiss had emancipated themselves, and that, not long before, the Danes had deposed their king, but, he says, he is not speaking of what had been done, but of what ought to be done.<sup>4</sup> Men must submit to the tyrant, they must not resist him, they must leave him to God's judgment, and he cites the example of David's conduct to Saul.<sup>5</sup>

This is sufficiently clear, but it is not all. Luther was aware, even then, of what we may call constitutional tradition, but he sets this aside. It may be contended, he says, that a king or lord had sworn to his subjects to reign according to definite conditions, and that, if he violated these, he forfeited his authority, as it is said that the King of France must reign in accordance with the judgment of his Parlement, and that

<sup>1</sup> Cf. p. 273, note 3

<sup>2</sup> Id. id., vol. XIX, 'Ob Kriegsleute,' &c., p. 633.

<sup>3</sup> Id. id. id., p. 634 "Aber ich hab solchs verantwortet, dass obgleich die Herrn unrecht daran theten, were drum nicht billig noch recht, auch

unrecht zu thun, das ist ungehorsam sein und zerstören Gotts Ordnung, die nicht unser ist, sondern man solle das unrecht leiden"

<sup>4</sup> Id. id. id., pp. 635 to 637.

<sup>5</sup> Id. id. id., p. 640.

the King of Denmark had sworn to observe certain constitutional articles. Luther answers that it is good and reasonable that the Supreme Ruler should reign according to law, and not merely according to his capricious will, and should swear to do this. But, if he did not do so, are his subjects to attack him and sit in judgment on him? Who, he says, has commanded this? This could only be done by some superior power who could hear both parties and condemn the guilty.<sup>1</sup> He adds, in reply to those who might say that he was flattering the princes, that this was not true, for what he had said applied to all alike, peasants, burghers, nobles, lords, counts, and princes, for they all have a superior lord to whom they are subordinate.<sup>2</sup>

Luther's conception is thus far perfectly clear and unambiguous. 'Die Obrigkeit' has an absolute authority, and God requires of men an unconditional obedience to it, for it is God Who has set it up. It would no doubt be well that the ruler should govern justly and according to law, but if he does not do so, his subjects must still submit and leave it to God to punish him. The principle is clear and unqualified, but we have made no progress in tracing the sources of Luther's opinion. It may be suggested that it was in the main

<sup>1</sup> Id. id. id., p. 640. "Ja sprichstu, wie aber, wenn ein König oder Herr sich mit Eyden seifen unterthanen verpflichtet, nach furgestellten artikel zu regirn, und helt sie nicht, und damit schuldig sein wil, auch das Regiment zu lassen, wie man sagt, dass der König zu Frankreich nach den Parlamenten seines reichs regieren musse. Und der König zu Denemark auch schworen musse, auff sonderlich artikel

Hie, antworte ich. Es ist fein und billig, das die Oberkeit nach Gesetzen regire und die selbigen handhabe und nicht nach eygenem mutwillen. Aber thu das noch hinzu, das ein König nicht alleine sein Landrecht odder Artikel gelobt zu halten, sondern Gott selber gebeut yhm auch, er solle frum

sein, und er gelobets auch zu thun. Wohlan, wenn nu solcher König der keins helt, widder Gotts Recht, noch sein Landrecht? Soltestu yhn drum angreifen, solchs richten und rochen? Wer hat dir befohlen? Es musste ja hie zwischen euch ein ander Oberkeit kómen, der euch beide verhórt und den schuldigen verurteilt. Sonst wirstu dem urtheil Gotts nicht entlauffen, da er sagt, 'Die Rache ist mein,' Item, 'Richtet nicht,' Matt. vii."

<sup>2</sup> Id. id. id., p. 643 "Nicht also. sondern was ich von der unter person sage, das soll treffen beyde, Bauer, Burger, Eddel, Herrn, Graven und Fursten. Denn diese alle haben auch Oberherrn, und sind Unterperson eines andern."

a violent reaction against the danger of anarchy, as represented by the revolt of the Peasants, but this is not really consistent with the facts, for the statements of Luther, which we have cited from the years 1522, 1523, show clearly that he held the same opinions before the Peasants' Revolt.

We must now turn to the development of Luther's later views, for it is quite clear that these were not the same as his earlier views. As late as May and November 1529, we find him solemnly warning the Elector of Saxony against the formation of a League for the protection of the Reformers, and against any attempt to resist the Emperor if he endeavoured to seize Luther.<sup>1</sup> But, as Professor Muller thinks, even in December 1529 there are some indications of a change,<sup>2</sup> and in March 1530 Luther and some others in a letter to the Elector of Saxony gave a formal opinion which has a very different character from Luther's earlier views. This letter was written in reply to one from the Elector, and Luther said that it might perhaps be true, that, according to the Imperial and Secular Law, it was in some cases lawful to defend oneself against the Emperor, especially as the Emperor had sworn to maintain his subjects in their ancient liberty. Scripture, however, Luther says, does not permit Christian men to set themselves against the Supreme Authority, but requires them to submit to injustice and violence from him. Secular and Papal Laws do not consider that the Supreme Authority is an Ordinance of God; but the Emperor remains Emperor, and the Prince remains Prince, even if he transgresses all God's commands—yes, even if he were a heathen. Then, however, Luther comes to the rather surprising conclusion that there is only one remedy, and that is that the Empire and the Electors should agree to depose him.<sup>3</sup>

<sup>1</sup> Luther, 'Briefe,' Ed. de Wette, vol. III pp. 454 and 526.

<sup>2</sup> Cf. K. Muller, 'Luther's Ausserungen über das Recht des Widerstands gegen dem Kaiser,' pp. 26-29.

<sup>3</sup> Luther, 'Briefe,' Ed. de Wette, vol. III. p. 560: "Und befinden,

dass vielleicht nach Kaiserlichen und weltlichen Rechten, etliche mochten schliessen, dass man in solchem Fall mochte wider Kaiserliche majestat sich zur Gegenwehr stellen, sonderlich weil Kaiserliche majestat sich verpflichtet und veredelt, niemand mit

It is clear that in this formal statement of opinion we have something which is very different from Luther's earlier judgments. In the first place, we have an indication that Luther was beginning to take some account of the Constitutional Law of the Empire, and that he recognised that some jurists at least maintained that if the Emperor violated the obligations of the oath which he had sworn at his election, it was lawful to resist him. In the second place, he still maintained that the Holy Scriptures did not permit any such resistance, however unjust the Emperor's conduct might be. But in the third place, we come upon the surprising view that although, while the Emperor continued to be Emperor, he could not be resisted, it might be lawful for the Empire and the Electors to depose him. We have already observed a conception analogous to this in several earlier writers.<sup>1</sup>

In October of the same year, 1530, the question of resistance to the Emperor was formally put before Luther and others of the Reformers at Torgau, and there was laid before them a statement on the subject drawn up by some jurists, showing in what circumstances it would be lawful to resist the Supreme Authority (Obrigkeit), and declaring that such circumstances were now present. Luther and his colleagues answered that they had not known that the Law itself recognised the right

gewalt anzugreifen, sondern bei aller vorigen Freyheit zu lassen, wie denn die Juristen handeln von den Repressalien und Diffidation. Aber nach der Schrift will sich in keinem weg ziemen, dass sich jemand, wer ein Christ sein will, wider sein Oberkeit setze, Gott gebe sie thun recht oder unrecht; sondern ein Christ soll gewalt und unrecht leiden, sonderlich von seiner Oberkeit. Denn obgleich Kaiserliche majestat unrecht thut und ihr Pflicht und Eid uebertrifft, ist damit sein Kaiserlich Obrigkeit und seiner unterthanen gehorsam nicht aufgehebt, weil das Reich und die Kurfursten ihn fur Kaiser halten und nicht absetzen ...

Weltliche oder Papstliche Recht sehen hierinnen nicht an, dass Oberkeit

ein gottliche ordnung sey, darum sie vielleicht die pflicht und eid so hoch achten dass sie die Obrigkeit in solchem Fall sollten aufhalten und wehren. Aber weil Kaiser Kaiser, und Furst, Furst bleibt, wenn er gleich all gebot Gottes uebertriat, ja ob er gleich ein heide ware: so soll er's auch seyn, ob er gleich sein Eide und Pflicht nicht halt, bis dass er abgesetzt, oder nummer Kaiser sei . . . und, summa, sunde hebt Oberkeit und gehorsamkeit nicht auf; aber die straffe hebt sie auf, das ist, wenn das Reich und die Kurfursten entrachtiglich den Kaiser absetzen, dass er nummer Kaiser Ware "

<sup>1</sup> Cf. 'Sachsenspiegel,' vol. III. p. 61, and in this volume, pp. 22, 23, 50.

of resistance in certain cases; they had always thought that the Law must be obeyed, and that the Gospel does not contradict the Secular Law; they could not therefore maintain that men might not defend themselves against the Emperor himself, or his representative; it was, therefore, also right that men should arm themselves, and thus be prepared to resist a sudden attack.<sup>1</sup>

The judgments expressed in this letter represent a different position from the letter of March 1530. Luther was even then aware that some jurists admitted the lawfulness of resistance;

<sup>1</sup> K Müller, 'Luther's Ausserungen,' Beilage 3 "Uns ist ein Zetel furgetragen, daraus wir befinden, was die Doktores der Rechte schlossen auff die Frage, in welchen fallen man muge der Oberkeit widerstehen. Wo nu das als bey den selbigen Rechtsdoktoren odder Verstandigen begründet ist, und wir gewislich ynn solchen fallen stehen, ynn welchen (wie sie anzeigen) man muge die Oberkeit widerstehen, und wir allzeit gelert haben dass man weltlich Recht solle lassen gehen, gelten und halten, was sie vermugen, und das Evangelion nicht widder die weltliche Recht leret, so konnen wir's mit der Schrift nicht anfechten, wo man sich des falls wehren musste, es sey gleich der Keiser ynn eigener Person, oder wer es thut unter seinen namen . . . So wil sichs gleichwol zimen, dass man sich ruste und als auff eine gewalt, so plotzlich sich erheben mochte, bereit sey, wo sichs denn nach gestaltt und leuffte der sachen leichtlich begeben kann

Denn das wir bisher geleret, stracks nicht widder zu stehen der Oberkeit, haben wir nicht gewust, das solch's der Oberkeit rechte selbs geben, welchen wir doch allenthalben zu gehorchen vleissig geleret haben"

Cf the formal statement signed by Luther, Justus Jonas, Bugenhagen and Melancthon in 1536

Melancthon, "Opera Omnia" in

'Corpus Reformatorum,' vol in Epistle, 1458, p. 129 (1536 A D) "Nu ist erstlich klar, dass jede Oberkeit uber andere gleiche Oberkeit, oder 'privatos,' schuldig ist ihre Christen und die Lehre zu schutzen. Hie ist weiter die Frage, was einem Fursten wider seinen Herrn, als den Kaiser, in solchem Fall zu thun gebühre Darauf ist auch gleiche antwort Erstlich, diewohl das Evangelium bestatigt weltliche leibliche Regiment, so soll sich ein idlicher Christlicher Furst gegen seinen Herrn oder Kaiser halten vermoge darselbigen naturlichen und weltlichen Regiment und Ordnung.

Wenn der Kaiser nicht Richter ist, und will gleichwohl Straf uben, als 'pendente appellacione,' so heisst solch sein thatlich Vornehmen, 'notoria injuria.' Nu ist dieses naturliche Ordnung der Regiment, dass man sich schutzen möge, und die gegenwehr gebrauchen wieder solche 'notoriam injuriam' Darum, so der Kaiser etwas thatig vornimmt vor dem Concilio 'pendente appellacione,' in sachen welche die Religion betreffen, und den zugesagten Frieden wahrhaftighen und ohne sophisterey belangen (so) ist er zu halten als eine Privat-person, und ist solche 'injuria,' wider die Appellation und zugesagten Frieden angenommen, eine offentliche 'notoria injuria.'

but he still maintained that Holy Scripture did not permit this. Now, Luther admitted that if, as the jurists said, the law of the Empire admitted the right of resistance, they could have nothing to say against it, for they had always taught that the law must be obeyed.

There are some letters written in the spring of 1531 which justified or explained this apparent change of position, but they do not add very much. In a letter addressed to Lazarus Spengler of Nuremberg, he says that he had heard that it was reported that he and the other Reformers had withdrawn their previous advice that the Emperor must not be resisted. The real truth was as follows: they were now informed that the Imperial Law permitted resistance in the case of obvious injustice. He himself had no opinion of his own on the law, but must leave that to the jurists to decide. If this was the Law of the Empire, they were no doubt bound to obey it. The other letters are in much the same terms.<sup>1</sup>

That this change in Luther's position was permanent seems to be clear: in 1531 he wrote a pamphlet entitled, 'Warnung an seine lieben Deutschen.' We are not concerned here with its general subject-matter, but with some passages in it which deal with the relations of those who accepted the Reformed opinions to the Emperor and the Roman Party. If, he says in one passage, it should come to war, he would not suffer those who defended themselves against the "murderous and blood-thirsty Papists" to be called rebels, but would refer them to the Law and the jurists; and in another place he says that his advice was that if the Emperor should summon them to fight against the Reforming Party no one should obey him.<sup>2</sup>

<sup>1</sup> Luther, 'Brief wechsel,' Ed Enders, vol viii pp 343, 344.

<sup>2</sup> Luther, 'Werke,' vol xxx part iii "Warnung an seine lieben Deutschen," p 282 "Weiter, wo es zum Kriege kompt, da Gott fur sei, so wil ich das nicht auffrurisch gescholten haben, noch schelten lassen, sondern wills

lassen gehen und geschehen, dass es es eine not were heissen, und wil sie damit ins Recht und zu den Juristen weisen.

Page 291 Das ist aber mein trewer Rat, das wo der Kaiser wurde auffbieten, und widder unser Teil, umb der Bapst's Sachen odder unser lere willen kriegene wolt. . . . Dass

We have dealt with Luther's position, not exhaustively, as has been done by Muller in his admirable monograph, but we hope, sufficiently to bring out his original opinions and the change after 1530. It seems clear that at first Luther maintained dogmatically that the king, whether he was good or bad, just or unjust, held his authority from God and could not be resisted, but must in all secular matters receive an unqualified submission. His judgment is clear, but we have not been able to find in his work any real light upon the source of his opinions, for his citations from St Paul and St Peter cannot be described as furnishing this adequately. No doubt his opinions were ultimately derived from those of St Gregory the Great, for these opinions had not completely disappeared in the Middle Ages, though they had been ignored or dismissed by all serious theological or political thinkers. We can only suggest conjecturally, that Luther may have come under the special influence of some abnormal teacher.

It is also clear that from about 1530 his opinions were completely altered, at least with regard to the Empire. Whether Luther fully understood the significance of the change in his conceptions may be doubted, but in fact the change was fundamental, for he was no longer maintaining the absolute authority of the Ruler, but the supreme authority of the Law; it is not necessary to explain the importance of this change.

It would seem that Melanchthon followed Luther, both in his earlier and later opinions. In a letter of 1530 to the Elector of Saxony, he speaks of resistance to the Emperor as being contrary to God's command,<sup>1</sup> but in 1536 he joined Luther in signing the Declaration which we have just cited.<sup>2</sup>

In a letter of 1539 he says plainly that the principle that subjects must not resist their superiors does not apply when the superior commits atrocious and notorious injuries.<sup>3</sup>

ym solchen Fall kein mensch sich dazu gebrauchen lasse, noch dem Kaiser gehorsam sei"

<sup>1</sup> Melanchthon, 'Opera Omnia' (in 'Corpus Reformatorum'), vol II Epist. 666 (p 20)

<sup>2</sup> Cf p 282, note 5

<sup>3</sup> Melanchthon, 'Opera Omnia,' vol III. Epist. 1767 (p 630) "Item quod dicitur, subditis non licere ut resistant superioribus, hoc dictum habet locum sicut in aliis causis civilibus, quando superior non infert injurias atroces et notorias."

In 1546 Melanchthon, along with Bugenhagen and others, signed a declaration that, in their opinion, it was lawful for the "Stände" to defend themselves against the Emperor, if he attacked them on account of their religion.<sup>1</sup> In a letter of the same year Melanchthon briefly, but clearly, criticised the argument for non-resistance, as drawn from St Paul's words in the Epistle to Romans xiii. 1. The Power, he says, is indeed an Ordinance of God, but only a just Power; unjust violence is not God's Ordinance; and he adds an important appeal to the principle that the relations of inferior authorities to the superior were determined by certain conditions and agreements, and refers to the mutual obligations of lord and vassal in Feudal Law.<sup>2</sup> Thirteen years later Melanchthon set out the same judgment in terse and significant

<sup>1</sup> Id. id, vol. vi. Epist, 3454 (p. 123). "Denn wenn es gewiss ist, dass der Kaiser diese Stände von wegen der Religion überziehen will, alsdann ist kein Zweifel, diese Stände thun Recht, so sie sich und die ihren ernstlich mit Gottes hulf schützen, wie S. Paulus spricht: die Obrigkeit fuhr das Schwert nicht vergeblich, sondern sie ist Gottes Dienern, und soll strafen diejenigen, so arges thun, als morder, und ist eine solche gegenwehr nicht anders, denn so man einen haufen morder wehren musste, es werde gefuhret vom Kaiser oder anderen Denn es ist eine öffentliche Tiranny und 'notoria violentia'"

<sup>2</sup> Id id, vol vi. Epist, 3477 (p 152). "Alud dictum Rom XIII. qui potestati resistit, Dei ordinationem resistit, et judicium sibi acquirit. Haec sententia precipue videtur prohibere defensionem contra magistratum sed ipsa sese declarat. Votat enim resistere in casu justae jurisdictionis, quia manifeste inquit ordinationi Dei resistit. Violentia autem injusta, non est ordinatio Dei, ut Theban, cum excusserunt Lacedaemonios, qui rapiebant civium conjuges et liberos, non resistebant

ordinationi Dei, sed manifestis furoribus Diaboli et manifesto latrocinio . . .

(P. 153): Postea etiam, et de imperis dici potest, quae etiam aliis subjecta sunt certa conditione, tamen habent suam jurisdictionem et administrationem gladii, ut principes certa conditione subjecti sunt regibus. Cum autem politicas ordinationes congruentes rationi approbat Deus, manifestum est, his quoque defensionem concedi, juxta ipsorum pacta Ideo in iure multa de mutuis obligationibus, domini et vassali, ut vocant, tradita sunt quae vera sunt, sed illa, quae supra diximus, ex lege naturae sumpta, illustriora et indubitata sunt

Addo tamen, et hanc manifestam regulam, ut judex inferior, juste uti jurisdictione sua debet (he contrasts this with the conduct of the judges in the Story of Naboth) . . . Et Trajani vox recte intellecta congruit cum hac regula, qui tradens gladium magistro equitum inquit, si justa imperabo, pro me utaris gladio, si injusta, contra me utaris" (p 155, he explains David's refusal to slay Saul as being due to his not wishing to set an example of slaying a king).

words. Resistance and necessary defence against the unjust and notorious violence of the superior is right, for the Gospel does not annul the political order, which is in accord with Law.<sup>1</sup>

It is here that we may appropriately notice an important statement of the year 1550, made by the parish Clergy of Magdeburg, which sets out dogmatically the principle that the inferior public authorities might rightly defend their subjects against the unjust attacks of the Supreme Authority upon their religion; this means that in such cases the Imperial cities and the Princes could lawfully resist the Emperor.<sup>2</sup> They refer to the doctrine that it was always unlawful to resist the Higher Powers, but they contemptuously reject it. It is admitted, they say, that the superior and the subjects are bound to each other by oaths, but princes and lords, some say, may deal as they like with their subjects, may forget their oaths and may do what they please, while the subjects may not protect or maintain their rights and liberties.<sup>3</sup>

The 'Obrigkeit' is an Ordinance of God, whose function it is to honour the good and to punish the evil, and therefore, when it persecutes the good and sets forward the evil, it is no longer an Ordinance of God, but of the Devil, and to resist it is to resist, not the Ordinance of God, but of the Devil.<sup>4</sup>

<sup>1</sup> Id id., vol. ix., 6886 (p. 937): "Aber von wahrhaftiger nöthiger Gegenwehr zu reden ohne Sophisterei, ist wahr das Gegenwehr und 'necessaria defensio' wider unrechte 'violentiam,' auch wider öffentliche 'notoriam violentiam superioris potestatis,' recht ist, denn das Evangelium verhilft nicht weltliche Ordnung, den Rechten gemass."

<sup>2</sup> 'Bekenntuss, Unterricht und Vermanung der Pfarrhern und Prediger der Christlichen Kirchen zu Magdeburg,' ed 1550, part II. (The pages are not numbered, but this is on the fourth page): "Wir wollen aber uns furnehmen zu beweisen dass eine Christliche Oberkeit mag und sol ihre Unterthanen verteidigen auch widder eine höhere Oberkeit, so die Leute mit gewalt zwingen, und Gottes wort

und rechte Gottes dienst zuverleugnen, und Abgötterey anzunehmen." Cf p 15.

<sup>3</sup> Id. id., p. 5: "Item: Oberkeit und unterthanen haben sich zusammen hart verpflichtet, und mit Eyden verbunden. Aber die Fursten und Herren mögen dennoch ihren muthwillen mit den untersassen uben, ihres Eydts vergessen und thuen was sie wollen. Dagegen haben die Untersassen nicht macht dawridder zu reden, ihre Recht und Freyheiten handtzuhaben. Der Furst mag kriegen widder die Rechte und seinen Eydt, aber die Unterthanen durffen ihm nicht widderstehen nach den Rechten."

<sup>4</sup> Id id., p. 16. Die Oberkeit ist ein Ordnung Gottes, das gute zu ehren, und zu straffen das Böse (Romans xiii.) Deshalben wenn die Obrigkeit anhebt,

If the superior authority attempts to suppress the lower authority, which will not follow it in evil, its action is null and void before God, and the lower authority is still bound to carry out its duty.<sup>1</sup> If the authority, prince, or emperor endeavours, against his oath, to destroy the lawful liberties of the lower authority, the latter may lawfully resist, though it may be wiser to submit; but if the higher authority endeavours to stamp out the true religion, the inferior authority must resist, and those who do this are not to be called rebels.<sup>2</sup>

The first English writer of the sixteenth century, as far as we have seen, who sets out the conception of the Divine Right and Non-Resistance was William Tyndale. It is carefully and clearly set out in his work called 'The Obedience of Christian Men,' published in 1528, and it is reaffirmed in his 'Exposition of Matthew v., vi., and vii.,' published in 1532.

We have already pointed out that the Reformers in France and Germany were anxious to show that they were in no way related to any movement of revolt or revolution, and that they had, still less, any sympathy with the Anabaptist movement. Tyndale's work, 'The Obedience of Christian Men,' shows the same concern. In the Prologue to this work he says that the occasion of the Treatise was the charge that the doctrine of the Reformers, and especially the preaching of the Word of God, tended to make men disobey and revolt against their rulers, and to set up a system of community of goods.<sup>3</sup>

das gute zuverfolgen und das Böse zu fodern, so ist sie nicht mehr (indem das sie also handelt und thut), ein Ordnung Gottes, sondern ein Ordnung des Teuffels. Und wer solchem Böse furhaben widerstehet, der widerstehet nicht der Ordnung Gottes, sondern der Ordnung des Teutels."

<sup>1</sup> Id., p. 17.

<sup>2</sup> Id., pp. 19, 20, 21.

<sup>3</sup> W. Tyndale, 'The Obedience of Christian Men' (Edition, London, 1573) Prologue (p. 104): "Forasmuch as our holy Prelates and our gnostly

Religious, which ought to defend God's Word, speak evil of it, and do all the shame they can to it, and rayle on it, and bear their captives in hand, that it causeth insurrection and teacheth the people to disobey their heades and governours, and moveth them to rise aganst their princes, and to make all common, and to make havoke of other men's goods, therefore have I made the little treatise that followeth contemyng all obedience that is oi God."

All this he indignantly repudiates, and suggests that it was rather the Pope and his followers who had taught men to resist their rulers.<sup>1</sup>

In setting out his own view, Tyndale begins by citing St Paul's words in Romans xiii., and concludes that it is God who has given laws to all nations, and who rules the world by means of the Kings and Rulers whom he has appointed, and that no subject may resist his superior for any cause whatsoever, for if he does this, he takes upon himself the authority which belongs to God only.<sup>2</sup> Again, rulers are ordained of God, whether they are good or evil, and what they do, whether good or bad, is done by God, for if they are evil, they are the ministers of God's punishment upon the sins of the people.<sup>3</sup> A Christian man is in respect of God, but as a "passive thing, a thing that suffereth only and doth nought."<sup>4</sup> This is sufficiently explicit, but he also says that the king in secular matters is outside of the Law, and whether he does right or wrong gives account to God only.<sup>5</sup> How far this is a reminiscence of the "legibus solutus" of the Roman Law, and how far it may be derived from other sources, we cannot say.

<sup>1</sup> Id. id., p. 106: "To disobey even father, mother, master, lord, king and emperor: yea, and to invade whatsoever land or nation that will not receaue and admit his God-head. Where the peaceable doctrine of Christ teacheth us to obey, and to suffer for the Word of God."

<sup>2</sup> Id. id., p. 109: "God therefore hath geuen lawes unto all nations and in all landes hath put kinges, governors and rulers, in hys oun stede, to rule the world through them. . . . (p. 110): Neither may the inferior person avenge himself upon the superior, or violently resist hym, for whatsoever wrong it be. If he doe, he is condemned in the deede doing; inasmuch as he taketh upon hym that which belongeth to God only, which sayth 'Vengeance is mine, and I will rewarde.'"

Id. id., p. 118: "Heades and

governors are ordeined of God, and are even the gift of God, whether they be good or bad. And, whatsoever is done unto us by them, that doth God, be it good or bad. If they be evill, why are they evill, verily, for our wickednesse sake. . . . Therefore doth God make his scourge of them, and turn them unto wild beastes . . . to avenge himself of our unnaturall and blind unkindnesse, and of our rebellious disobedience."

<sup>4</sup> Id. id., p. 119: "A Christian man in respect of God, is but a passive thing, a thing that suffereth only and doth nought, as the sick in respect of the surgeon or physitian doth but suffer only."

<sup>5</sup> Id. id., p. 111: "Hereby seest thou that the kyng is in this worlde without law, and may at his lust do right or wrong, and shall give accountes but to God only."

It may be urged, indeed, that these are somewhat abstract phrases, and must not be pressed, but in a later work, an exposition of the Sermon on the Mount, he discusses the relation of the subject to the Ruler in more concrete terms.

In commenting on the words of our Lord (Matt. v. 38, 42), Tyndale contends that these words do not mean that the Christian man is forbidden to go to law, but that, even if the law is administered by wicked and corrupt rulers, he must not take the law into his own hands, for to rail against his rulers is to rail against God, and to revolt against them is to revolt against God. This is sufficiently emphatic, but Tyndale was not satisfied till he had repudiated, what we may call, the traditional constitutional contention, that the king had on his accession sworn to maintain the laws, privileges, and liberties of his subjects, and that it was only upon this condition that his subjects had submitted to him, and that, therefore, if he misgoverned them, they were not bound to obey, but could resist and depose him. Tyndale answers contemptuously that this argument is of no force; a wife cannot compel her husband if he violates his oath to her, or a servant his master; this can only be done by some higher authority. Again, it may be contended that the subjects had chosen their ruler, and "Cujus est ligare, ejus est solvere"; but Tyndale answers that even though the people elect their ruler, it is God who has elected him through them, he is the Lord's anointed, and cannot be deposed without a special commandment from God; and he then cites the story of David and Saul, as Gregory the Great had done. He adds an ingenious parallel, that the citizens of London elected their Mayor, but could not depose him without the consent of the king, from whom they had received the power to elect, and concludes that if the highest authority does wrong, subjects can only complain to God.<sup>1</sup>

<sup>1</sup> Id., 'Exposition on Matthew v., vi., vii' (p. 213): "Wherefore the text meaneth this, that where the law is unjustly ministered and the governors and judges corrupt . . . there be patient and ready to suffer

ever as much more, whatsoever unright be done thee, rather than of impatience thou shouldst avenge thyself on thy neighbour, or rayle or make insurrection agaynst the superiors which God hath set over thee. For

It seems clear that Tyndale intended to repudiate all constitutional arguments for the restraint of the royal authority, and it is interesting to observe that in this same work he suggested that the evils which had befallen England in the fifteenth century were really the result of their action in slaying their rightful king, Richard II., whom God had set over them.<sup>1</sup>

to rise against them, is to rebell against God, and against thy father when he scourgeth thee for thyne offence, and a thousand times more sinne than to avenge thee on thy neighbour. And to rayle on them is to rayle on God, as though thou wouldest blasphememe Him, if He made thee sicke, poore, or of low degree, or otherwise than thou wouldest be made thyself.

Thou wilt happily say: the subjects ever choose the Ruler and make hym swear to keep their law and to maintain their privileges and liberties, and upon that submit themselves unto him. Ergo, if he rule amiss, they are not bound to obey, but may resist him and put him down again.

I answer, your argument is naught. For the husband sweareth to his wife, yet though he forswear himself, she hath no power to compel him. Also though a maister keep not covenant with his servaunt, or one neighbour with another: yet hath neither servaunt nor neighbour (though he be under none obedience) power to avenge: but the vengeance pertayneth ever to an higher office, to whom thou must complayne.

Yea, but you will say, it is not like. For the whole body of the subjects choose the Ruler. Now, 'Cujus est ligare, ejus est solvere,' ergo, if he rule amiss they may put him down agayne. . . . God (and not the common people) chusethe the Prince, though he chuse by them. For, Deut. xvi., God commandeth to chuse and set up officers, and therefore is God the chief chuser and setter-up of

them, as so must he be the chief putter down of them agayne, so that without his special Commandment they may not be put down agayne. Now hath God geven no Commandment to put them down agayne, but contrariwise, when we have anoynted a kyng at his Commandment, he sayth: touch not mine anointed. And what jeopardy it is to rise agaynst thy Prince that is anointed over thee, how evill soever he be, see in the story of King David, and throughout all the Bookes of the Kings. The authority of the King is the authority of God; and all the subjects compared to the King are but subjects still (though the King be never so evil). . . . And unto your argument, 'Cujus est ligare ejus est solvere,' I answer: he that bindeth wyth absolute power, and without any higher authoritie, his is the might to loose agayne. But he that bindeth at other men's commandment, may not loose agayne until the commandment of the same. As they of London choose them a Mayor: but may not put him down again, how evil soever he be, without the authority of him with whose licence they chose him. As long as the power of officers be one under another, if the inferior do thee wrong, complayne to the higher. But if the hyghest of all do thee wrong, thou must complayne unto God only. Wherefore the onely remedy against evil rulers is, that thou turne thine eyes to thyself, and thynne owne sinne, and then looke up unto God."

<sup>1</sup> Id. id., p. 207: "Let England looke about them, and marke what hath chaunced them since they flew

It would be difficult to find any stronger declaration of the conception that the king holds by Divine Right an absolute and unqualified authority, that he is above law and not under it, that all appeal to constitutional tradition is empty and void, that all resistance to his authority, however reasonable the cause for this might be, is an offence against God, and the authority which he has given to the king.

It is obvious, of course, that this is a restatement of the conceptions of St Gregory the Great, but we are strongly inclined to think that it is from Luther's earlier statements that Tyndale's opinions are derived, and especially from the "Ermahnung zum Frieden" of 1525, and possibly from the tract 'Ob Kriegsleute auch im seligen Stande sein können' of 1526. He does not, indeed, refer to them explicitly, but a comparison of Tyndale's arguments with those contained in Luther's tracts seems to us to make this highly probable.

There is not much to be said about R. Barnes, another of the English Reformers, who seems to us clearly to be on this subject a disciple of Tyndale. In the tract entitled 'A supplication to Henry VIII.' he is evidently concerned to show that, while the Reformers taught men that God commanded obedience to princes, it was the Pope who taught men to revolt. In another tract he sets out, in terms as strong as those of Tyndale, the duty of absolute submission to the king, however unjust and contrary to the law his action might be.<sup>1</sup>

their right kyng, whom God had anointed over them, King Richard II. Their people, townes and villages are diminished by the thirde parte."

Cf. Tyndale's 'Answer to More,' Book iv. chap. xiii., where he speaks of Henry V. as holding the kingdom against all right.

<sup>1</sup> R. Barnes' Works. Edition, London, 1573 (with Tyndale and Frith, paged with Frith's Works), p. 292: "In this article we must note that there be two manner of ministers or Powers: one is a temporal power, the other is called a spiritual power:

the Temporal Power is committed of God to Kings, Dukes . . . Mayors, Sherriffs, and all other ministers under them. . . . In thys power is the Kyng chief and full Ruler; all others be ministers and servaunts, as Paul doth declare, saying: 'Let every soul be subject unto the Higher Power,' &c. Also St Peter: 'Be subject unto the Kyng as unto the chief head . . .' unto this power must we be obedient in all thynges that pertain to the ministracion of the present life, and of the Commonwealthe. . . . So that, if this power commande anything of

The only thing that he will allow is, that the oppressed man may fly (he is evidently thinking primarily of a man persecuted for his religion).

We have thus endeavoured to set out the first development in Germany and in England in the sixteenth century of the theory of the absolute Divine Right of the monarch, and of the principle of non-resistance, but we shall return to this in another chapter, with regard to its development in the later part of the century.

tyranny against the Right and Law  
(always provided that it repugn not  
against the Gospell nor destroye our

Faythe) our charitie must needs suffer  
it, for, as Paule sayth Charitie suffereth  
all Thyng."

## CHAPTER V.

### THE POLITICAL THEORY OF THE CIVILIANS IN THE SIXTEENTH CENTURY.

WE have dealt with the conception of the source and nature of the authority of Law, as illustrated in the writers on Political Theory in the earlier part of the sixteenth century. In previous volumes and in the earlier parts of this volume we have found it necessary to distinguish sharply between the character of political theories in general and the conceptions of the Civilians, and it is necessary to continue this distinction, for, as we have said, the political conceptions which these jurists derived from their study of the Roman Law differed in many and important respects from the traditional conceptions and practice of mediæval Europe.

We cannot, indeed, pretend that we have been able to examine the political theory of the sixteenth century Civilians in as much detail as we have done those of the earlier periods: we have no longer the invaluable guidance of Savigny's great work, which terminates at the end of the fifteenth century.

We begin with the famous French humanist and jurist, Guillaume Budé, whose work belongs to the earliest part of the sixteenth century. It is, indeed, not very easy to bring Budé's conceptions into complete harmony with each other; when dealing with general principles, he seems to assert the absolute power of monarchy, and especially in France; while in other places he attributes to the "Parlement" of Paris a very large authority, even in relation to the king.

The first position is developed by him in his discussion of

the meaning of the phrase, "Princeps legibus solutus"; the second, in a passage in which he compares the Roman Senate with "Curia nostra suprema" (meaning clearly, the "Parliament" of Paris).

He begins the treatment of the meaning of "legibus solutus" by appealing to a famous passage of the 'Politics,' in which Aristotle speaks of the natural monarchy of a man who is incomparably superior to all other men in the state. Such a man, Budé maintains, cannot be treated as the equal of others, but must rather be regarded as a god among men; it would be absurd to impose law upon such a man, as he is a law to himself.<sup>1</sup> He goes on to assert that the Roman Emperors, at least at the time of Ulpian, and the Kings of France, had a pre-eminence of this kind; the Emperor ordered all things according to his will, and the Kings of France have all things in their power. They are like the Jove of Homer, and all things tremble at their nod: they are human Joves, but that, like other men, they die.<sup>2</sup>

<sup>1</sup> Budæus, 'Annotationes in Pandectas' (Dig. i. 3, 31), p. 67: "Princeps legibus solutus est. Aristoteles, Lib. Tertio, Politic. Hujus dicti rationem memorabilem afferre mihi videtur. . . . Is igitur in eo libro in hanc propemodum sententiam inquit, si tamen recte vertimus; in republica autem optime constituta is demum iuris esse dici debet, qui et regere et regi, et voluntate et aptitudine ad vitam paratus est secundum virtutem agendum. Agedum sit aliquis unus, aut uno etiam plures (pauciores tamen quam ut civitatis numerum implere possint), tanto ceteris virtutis exuperantia præstantes, si plures sint, aut præstans si unus sit, reliquorum ut universorum virtus cum illius aut illorum non sit comparabilis; dico, inquit, hujusmodi viros non jam civitatis partem existimandos esse, quippe injuriam illis haud dubie factum iri credendum est, si æquas ferre partes digni ipsi videbuntur, tanto

ceteris inæquales virtute civilique facultate. Hujusmodi enim quasi Deum quendam censerit inter homines par est. Proinde legum quoque rationem inter æquales necesse est esse et genere et facultate civili. In illos autem hujusmodi nulla est prorsus legislatio; quippe qui ipsis lex sunt, quia enim ridiculum fore putemus eum qui legem de huiusmodi ferre aggrediatur."

<sup>2</sup> Id. id., p. 68: "Age cum quinque sunt genera regni, quintum genus est quod *παμβασιλεία* dicitur, quasi dicas regnum numeris omnibus dominationis absolutum: cujusmodi erant Reges, Principes Romani, Ulpiani tempore, nihil jam priscae civilitatis retinentes, omnia arbitrio suo statuentes: ut nunc Reges nostri sunt, qui omnia in potestate habent, quique (ut Homericus ille Jupiter) quoquo sese verterint, omnia circumagunt, nutu etiam solo omnia quatentes:

Budé is, indeed, not satisfied that the words "legibus solutus" are adequate to express the relation of the prince to the Law; he prefers the phrase "Principem . . . etiam legibus non teneri." Laws, he says, are made for men who are equal in every political "facultas," but they cannot constrain those who are greatly superior; kings have no equals in the antiquity and dignity of their birth, in excellence of soul and body, and in the majesty of their bearing; they are, or should be held to be, equal to the heroes; and laws which are made for the people cannot control such sacrosanct beings.<sup>1</sup>

He suggests that there is no more reason why the laws should stand between the prince and the people than between a father and his children.<sup>2</sup> He carries, however, his conception of the supreme place of the prince still further. The prince is the minister of God for the welfare of men, and it is for him to distribute the good things which are given by God to the human race; and he cites a saying that justice is the end of the law, and this is the function of the prince, for the prince is the image of God, who orders all things aright. This, Budé says, agrees with the words of the apostle, "Let every soul be subject to the Higher Powers." Plutarch had, indeed, said

denique humani Joves, ut inquit Plautus in Casina, sed qui tamen hominum more emoriantur. Hoc autem regni genus est, inquit Aristoteles, cum unus omnium potestatem habet, tum communium tum publicarum rerum, non alter atque civitas una, aut populus unus habent."

<sup>1</sup> Id. id., p. 68: "Ex supradictis igitur demonstrari potest ut arbitror, Principem non modo legibus esse solutum, id quod Ulpianus dixit, sed etiam legibus non teneri. Jam primum cum leges ferri debeant in homines, genere facultateque omni politica æquales, nec legibus teneantur qui multo ceteros rebus his præstare videntur; reges autem generositate, id est opulentia, antiquitate, et claritate natalium nemo omnium

æquare possit aut contendat, virtute pono et animi et corporis, omnique morum majestate humanum captum modumque excedere, heroesque æquare aut debeant, aut credantur. Manifestum est legibus in cives, id est in populum latis, sacrosanctos homines non teneri, augusta illa designatione eximios."

<sup>2</sup> Id. id. id.: "Ad hæc cum nullum jus civile inter patrem et liberos et inter dominum et familiam intercedat, ut Aristoteles docet Lib. v. Ethicorum, et nos alibi diximus, sit autem eadem ratio inter Principem et populum; satis ut arbitror effectus est, quod efficere meditabamur, . . . et Principem non modo legibus solutum esse, sed etiam non teneri."

that the Law is the prince of princes, but he explained what he meant by the Law when he said that it is not that law which is written in books or on tables, but that living "reason" which is within the prince.<sup>1</sup>

It is obvious that Budé was anxious, at least as a general principle, to maintain the view that the king stood outside of, and above, the legal order of society.

It is, however, also clear that in another place Budé represents the actual constitutional practice of France in very different terms. In discussing the position of the Senate in Rome he compares it with "curia nostra suprema," and maintains that this Court had all the powers which had been in the Senate. The "Maiestas" and powers of the Roman people had been transferred to the prince by the "Lex Regia," while the Senatorial Power had been granted to the Curia—i.e., the "Parlement." It was this "Parlement" which declared the princes' "acta," "rata irritave," by it he willed that his Constitutions should be promulgated; and it was to the judgment of this Court alone that the princes, though "legibus soluti," submitted themselves ("a qua sibi jus dici, principes leges soluti civili animo ferant").<sup>2</sup>

<sup>1</sup> Id. id. : "Verius autem quis dixerit magistratus summos et principes Dei ministros esse in procuratione hominum et salute, ut quae bona generi humano divinitus donantur, ea ipsi partim distribuunt inter homines, partim asservent . . . tantorum porro bonorum divinatorum taliumque nullus esset hominibus fructus ususque commodus et rectus, sine lege, sine justitia, sine principe. . . . Deinde haec subdit; Justitia igitur finis est legis, lex autem officium est principis. At princeps ipse imago est Dei, qui omnia recte ordineque constituit. Convenit hoc cum precepto apostoli 'Ad Romanos' Decimo Tertio (Rom. xiii. 1). Plutarchus tamen, alibi in eodem tractatu ita inquit. . . . Quis igitur principi princeps erit? Nemphe lex quae omnium regina est mortalium atque immortalium, ut inquit Pindarus.

Quae verba esse consentanea cum lege, 'Digna Vox' (Cod. i. 14, 4). Sed quam legem Plutarchus principi imperitantem dixerit, ex iis quae sequuntur intelligemus. . . . Lex inquit principi imperatrix erit: non illa quidem aut in libris extrinsecus scripta, aut in tabulis, sed animata intus in ipso ratio, semper cum eo conversans, ejusdemque observatrix, quaeque eius animam nunquam sinit tutela sui esse vacuum."

<sup>2</sup> Id. id., Dig. i. 9, 12 (p. 96): "In ea igitur curia in qua summa jurisdictionis Gallicae atque etiam jurisdictionis imperii sita est, omnia inesse mihi videntur, quae et in senatu, et in centumviratu, et in areopago erant, dumtaxat quod ad jurisdictionem imperiumque jurisdictionale attinet. . . . Majestas vero populi apud Romanos dicebatur, et auctoritas Senatus.

This is, indeed, a very different conception of the relation of the prince to the Law from that expressed in the passages already cited; it is possible that Budé looked upon this relation of king and Parlement as arising from and depending upon the king's will and pleasure, but the discrepancy remains, and we shall find something very like it in Bodin.

We may put beside the opinions of Budé some statements of Jean Ferrault, in a work on the laws and privileges of the kingdom of France, published in 1515. He contends that the Kings of France have the same power of legislation as the Roman Emperor, and he seems, curiously enough, to hold that the Salic Law was strictly analogous to the Lex Regia of Rome, and that by it all power had been transferred to the King of France, who possessed all the rights of the Emperor.<sup>1</sup>

And, in another place, as we understand him, he seems to assert that the King of France can impose "novum vectigal," while other kings and lords can only exact the Regalia.<sup>2</sup>

Populus sciscere solebat et jubere, Senatus censere et auctor esse. Illa igitur popularia ad principem lege regia delata sunt, haec senatoria ad curiam translata esse creduntur. . . . In hujus acta referri diplomata regiaque beneficia solent, ut perpetua esse possint, ac nunquam antiquabilia. Hujus autoritate rata irritave principum acta, ne ipsis quidem recusantibus, fiunt. Una haec curia est, a qua sibi jus dici, principes legibus soluti civili animo ferant: quam auctorem fieri sacerandis promulgandisque sanctionibus suis velint: cujus consilii censurae, constitutiones suas eximi; edictaque sua nolint, imo cujus decretis hujusmodi sua acta conservari eternitati velint."

<sup>1</sup> Jean Ferrault, 'Tractatus de Juribus et Privilegiis Regni Francorum,' xxxv.: "Duodecim liliam jus aliqualiter respiciens est quod Rex iste solus facit constitutiones seu leges in Regno Franciae. . . . Est enim jure certissimum, quod populus regitur

solo rege, ille solus potest statuere, condere et instituere. Constitutio vel edictum est, quod tantum rex vel imperator constituit, II. Dist. c. Constitutio. Nam salutem republicae tueri nulli magis credidit, divus Augusti (nus) convenire, nec aliquem sufficere ei rei . . . quia antiqua lege regia quae salica nuncupatur omne jus omnisque potestas in regiam translata est: et sicuti imperatori soli hoc conveneret in subditis . . . ita regi; cum rex Franciae omnia jura imperatoris habeat, quia (ut dictum est) non recognoscit in temporalibus superiorem."

<sup>2</sup> Id. id., 41: "Decimum septimum jus regium est, quod ipse solus et nullus alius potest imponere novum vectigal . . . alii autem reges, et domini temporales possunt exigere; in Tit. quae sunt regalia X Coll. Sed nec imponere nec quocunque colore aliam exactionem facere etiam pro utilitate patriae." (We confess that we are not quite clear about this passage.)

We may also put beside Ferrault the opinions of Charles de Grassaille, in a work published in 1538.<sup>1</sup>

When, however, we turn to other and more important Civilians of the sixteenth century, we find judgments of a very different kind. We begin with Alciatus of Milan and Bourges, whose earlier years were spent in Milan, but who later migrated to France and taught in the Law School of Bourges in the earlier part of the century.

Alciatus, as was natural, held that the authority of the Emperor was derived from the Roman people, but he developed this into the doctrine that all political authority was and could only be derived from the people. The "Jus imperii Romani" belonged to the people until they transferred it by law to Augustus. God gave men lordship over all animals, but not over other men; kings were created, not by the Divine command, but by the consent of the people. Charles the Great was elected by the Roman people, and this authority is now exercised by the seven German Electors. Thus, also in France, Chilperic was deposed and Pipin elected king, and so with Hugh Capet; and thus also, in lesser kingdoms. Alciatus concludes that "he is a just prince who reigns with the consent of the people, and he is a tyrant who reigns over unwilling subjects." St Augustine rightly described kingdoms created by violence, without the consent of the subjects, as "magna latrocinia."<sup>2</sup>

<sup>1</sup> Cf J. W. Allen, 'A History of Political Thought in the sixteenth century,' p 284.

<sup>2</sup> Alciatus, Opera, vol II. col. 1047, 'Comm on Digest,' L. 16, 15: "Jus Imperii Romani ad populum pertinebat, donec per legem Rhemniam populus in Augustum Caesarem jus omne transtulit. . . Nam cum hominem creavit Deus, illi in cetera quidem animantia jus et dominium concessit, hominem autem ut alteri alteri serviret non indixit. Unde principio rerum non divina jussione, sed ex populi consensu reges

assumpti sunt; quod et, post Romani imperii occasum, servatum fuit, cum Carolus Magnus a populo Romano Augustus electus est, et a pontifice Leone sacro oleo inunctus, quod jus populi hodie Gregoriana lege in septem Germaniae principes translatum est. Sic et Franci, Chilperico ejecto qui regno idoneus non esset, Pipinum πανκελτικῶ consilio substituerunt. Et cum Pipini proles a majoribus degenerasset, rursus Odonem, mox eius fratrem Robertum et deinde Roberti nepotem Hugonem ad summum fastigium evexerunt. . . . Et quod de maximis

This is an interesting expansion of the tradition of the Roman Law, that all authority in Rome was derived from the people, for Alciatus enlarges this into the general principle, that without the consent of the community there is no legitimate authority.

He is almost equally definite in his repudiation of the conception that the authority which the people had granted to the prince was absolutely unlimited. He refers contemptuously in one place to the "hallucinations" of the theologians and the "adulation" of the jurists who maintained that the power of the prince was supreme and free, and that he could do whatever he pleased. This, he says, is certainly not true in Italy; it is absurd to say that bishops, dukes, or marquises have an authority over Italians which the Emperor himself does not possess.<sup>1</sup>

In another work he insists again upon the limited nature of the authority of princes. He has, he says, dealt at some length with this, in order that princes, whether they had reached the highest rank (he means the Empire) or are kings, dukes, or counts, might learn that they had not so great an authority as their flatterers tell them; and also in order that the doctrine of Martin (*i.e.*, that there was nothing that the Emperor could not do) should once again be refuted.<sup>2</sup>

hiscæ regibus, nimirum Romano et Franco, dictum est, idem in inferioribus observatum fuisse, qui historicos legent, deprehendet, ut merito censeam Divina lege eum justum principem esse, qui ex populi consensu regnet, quod et Aristot. tradit, qui vero invitus dominetur, eum tyrannum esse, utiamsi Caesar sit, a Septemviris electus, vel quaqua alia ratione civili jure potentiam suam tueatur. Unde cum magna regna non ex subditorum consensu, sed per violentiam primo constituta sunt, merito Augustinus libro de Civitate Dei IIII magna latrocinia esse dicit "

<sup>1</sup> Id id, vol. II col. 1162, 'Comm on Digest,' L 16, 111 "Hallucinantibus theologis, adulantibus jurisconsultis,

persuadentibusque omnia principi licere, summamque et liberam esse potestatem. Quod certe in Italia verum non est . . . ut ridiculum sit affirmare pontificibus, ducibus, et quos Germanica voce marchiones vocant, absolutam in subditis potestatem competere, quæ nec ipsi Imperatori in Italos competit "

<sup>2</sup> Id, 'De Formula Romani Imperii' (ed Basle 1554) p 43. "Et hæc a nobis diffusius dicta sunt, tum ut inde admonerentur principes, sive ipsi ad summum imperii gradum pervenerint, sive ab imperatoribus, reges, duces, comites appellati sint. non tantum illis in populos licere quantum adulatores eorum auribus melle diluto veneno infundunt, tum etiam ut Martini, qui Bonomæ jus civile pro-

Alciatus did not, we think, doubt that the prince had the legislative power, which he had received from the people, but in one passage he indicates that he was of opinion that the prince should not make laws without the advice of the "Periti," the men of experience. It appears very possible that this is a reminiscence of the provisions of 'Code,' i. 14, 8, though he is not here commenting on that passage.<sup>1</sup> He is also clear that the prince is bound by his contracts, that he has no power to revoke or annul them. We have already observed the importance of this conception in the Civilians of the fourteenth and fifteenth centuries; indeed, he refers directly to some of them, and he also refers to the important parallel principle of the Feudal Law, that the lord could not deprive the vassal of his fief without just cause.<sup>2</sup>

He also discusses the question whether the prince can insert, in his briefs, clauses which derogate from the law; he says in one place that no one can do this except the prince, and such persons as have received authority from him.<sup>3</sup> That is, he would seem to maintain the dispensing power of the prince. It should, however, be observed that in another place Alciatus allows this only under important reservations. The prince, he says, has power to remit all punishments for offences against himself, but he cannot deal in this way with "our" rights any more than the people did who gave him this authority;

fitabatur, nihil non Imperatori concedentis, sententiam confutaretur"

For the story about Martin, cf Savigny, 'Geschichte des Römischen Rechts,' vol. iv. p. 180.

<sup>1</sup> Id, Opera, vol iii col 26, 'Comm. on Cod,' 1, 2, 5 "Rationabilis Consilio. Non enim debent principes ex se ipsis, leges promulgare, sed adhibito peritorum consilio"

<sup>2</sup> Id id, vol iv, col 816, 'Tractatus de Praesumptionibus,' 'Regula Tertia Praescriptionum' "Et probatur ista opinio, quae videtur communi . . . ubi non presumitur causa in principe volente rescindere proprium contractum imo istud non potest etiam de plenitudine potestatis, secundum

Paulus de Castro in L. Digna Vox C De Legibus (Cod. i. xiv 4) Et Baldus in Cap I Ad haec de pace jur firm. Et Lud. Rom . . . Queritur primo, dicens, quod princeps non potest revocare contractum a se factum . . . Item est in feudo"

<sup>3</sup> Id id, vol i col 1108, 'Comm on Dig,' xxx 1 55. "Adnotavit in primis Doct non posse testatorem adversus leges quicquam inducere Et ideo nec ipsum, nec quemquam alium, excepto principe, posse clausula derogatoria legum uti. Principibus quidem id permittitur, qui legibus soluti sunt, alius vero minime, nisi quatenus ex principis indulgentia hoc consequantur"

there is, therefore, in 'jure nostro' no mention of "plenitudo potestatis," or of "non obstante" clauses. Much less can marquises, dukes, or counts take away another man's rights.<sup>1</sup> Alciatus seems clearly to interpret the doctrine that the prince is "legibus solutus" as meaning little more than that he can remit penalties that he has himself imposed, and not as meaning that he can suspend any law at his pleasure.

The conception of political authority which we find in Alciatus is obviously very important, even if it stood alone, but its importance is greatly increased when we bring it into comparison with that of some other important Civilians of the sixteenth century.

How far it may be thought that some of the conceptions of other important French Civilians of the sixteenth century are due to the influence of Alciatus, and his teaching at Bourges, we cannot positively say, but it is certainly remarkable that several of them set out conceptions which are more nearly akin to his than to those of the Italian Civilians of the fifteenth century with which we have dealt in the second part of this volume.

François Connon, who died in 1551, is said to have studied law at Bourges under Alciatus,<sup>2</sup> and his Commentaries on the Roman Law contain some very important observations on the nature of law and its relation to the king. The primitive world, he says in one place, was ruled by kings who were chosen for their capacity and virtue, and they ruled without any fixed system of law. When, however, they began to abuse their power, and men saw how dangerous it was to entrust the wellbeing of all to the goodwill of one, they either thrust

<sup>1</sup> Id id, vol iii col. 113, 'Comm. on Cod,' ii, 2, 2 "Dubium tamen non est, quinsupremi principes, si volunt, has poenas, libera, quam sibi vendicant, potestate remittere possunt De jure autem nostro non possunt, cum enim omne jus et imperium ex translatione populi habeant, non aliter eo debent uti, quam ipsi qui transtulerunt uterentur qua propter in jure nostro,

nullus est mentio plenitudinis potestatis, item clausulae non obstante, &c, ut Baldus ait Sed quid in Marchionibus, Ducibus, Comitibusque ab his constituti? Et multo minus posse, dicendum est, nec in ejus dignitatis concessionem id actum videri potest, ut jus alterius auferant"

<sup>2</sup> Cf. 'Biographie Universelle.'

out the kings and made laws, or retained the kings and imposed upon them the restraints of law.<sup>1</sup> He goes on to cite a judgment which he attributes to Aristotle, that to obey the Law is to obey God and the Law, while to obey a man is to obey a wild beast, for the greed and anger which turns the magistrate from virtue is like that of a wild beast.<sup>2</sup>

These are general conceptions, and when he turns to the actual conditions of his time, his statements are different but significant. In discussing the source of Law he first mentions with approval the saying of Demosthenes that law is the agreement of the whole "Civitas" and the similar doctrine of Papinian ('Digest,' i. 3, 1), but he admits that in France it is the authority of the king which binds men by laws. Even here, however, Connon maintains that it was from the consent of the people that this authority was drawn, and thus no law is made without the will of the people, either by their own decree, or by that of the person to whom they have given authority to make it.<sup>3</sup>

<sup>1</sup> F. Connanus, 'Libri Commentariorum Juris Civilis,' vol. i. Bk. i. 7 (p. 25): "Hoc est quod dicitur, priscis illis seculis omnia fuisse gubernata manu regia. . . . Erat enim regibus sola naturae ratio et juris et injuriae regula. . . . Itaque non quilibet creabatur rex, sed inter ipsos esset ad res gerendas maxime idoneus, qui virtute, consilio, prudentia, ac animi magnitudine et robore maxime praestaret. . . . Qui non amore aut odio, non cupiditate aut iracundia duceretur ad judicandum, sed quod jus, quod equitas et veritas postularet, id omnibus in rebus constitueret, id sequeretur et tueretur."

Postquam vero coepissent illi, quibus ad hunc modum fuerat data rerum omnium potestas, contra rationis praesumptionem, multa pro animi libidine facere, et periculosum videretur, unius arbitrio fortunam et vitam omnium committi, quidam, electis regibus, leges posuerunt, alii, retentis regibus,

tamquam frenos legum iniecerunt, ut eos nimia potentia ferocientes duritia juris cohiberent."

<sup>2</sup> Id. id. id., "Bene Aristoteles: Qui legem praeesse vult, is videtur Deum et leges imperare: qui autem vult hominem, adiungit et beluam: nam beluae similis est cupiditas et iracundia, quae magistratus et optimum quemque a virtute detorquent."

<sup>3</sup> Id. id., i. 8 (p. 28). "Quod vero lex dicitur esse conventum quoddam totius civitatis, bene a Demosthene dicitur quod Atheniensibus lex nulla nisi de ipsorum consensu imponi potuerit. Bene et Papinianus, 'lex est commune preceptum. . . . communis reipublicae sponsio' (Dig. i. 3, 1) Nam et Romanis legis sciendae potestas fuit penes populum"

Nos qui regibus paremus, non communis sponsio, sed principis auctoritas alligat legibus nisi jam tum ab initio regni constituti, consensus etiam ea de re noster putatur accessisse,

Connon is, however, clear that the legislative authority of the prince (at least, of the Roman Emperor) was unfettered by the necessity of taking counsel; he cites the opinion of Papinian that the Law is "consultum virorum prudentum," but adds that this does not imply that the prince must consult the jurists; it is customary to do so, and it is right and honourable, as the Code says "Humanum est," &c. ('Code,' i. 14, 8), but as Bartolus says, this is a counsel of "Humanitas," not a legal necessity. Connon holds clearly and emphatically that the legislative power of the prince was as complete as that of the whole Roman people.<sup>1</sup>

On the other hand, he contemptuously repudiates the notion that law is superior to custom; their authority is equal, and the later prevails over the earlier<sup>2</sup>; and he is equally dogmatic in repudiating the doctrine that the prince is "legibus solutus." The prince is, indeed, over the people, but he is still one of the people, and he wishes that all princes should remember the "Digna Vox" ('Code,' i. 121, 4), and should suffer their authority to be controlled by the law and by equity.<sup>3</sup> A little later he lays down dogmatically the principle that an unjust law is not a law at all, and should be corrected or annulled; and that, if a king by hereditary right becomes a tyrant and violates the divine and human laws, he should be deposed. The law and the king are sacred, and not to be violated, but evil law is to be abrogated and the tyrant to be expelled. Until this has been done, they must be obeyed;

cum et illi regnandi potestas data est, et nobis imposita necessitas parendi

Sic fit ut nulla lex non de populi voluntate constituatur, et sit tanquam pactum quoddam consentientium inter se civium, ut dicebat Lycophron sophistes, quod eam aut sciunt ipsi, aut is cui eius sciendae ferendaeque dederunt potestatem. Ergo vel utilitas ipsa iusti prope mater et equi, ut scribit Horatius, vel conventio ipsa nostra, nos obligat legibus, ut omnes parere debeamus."

<sup>1</sup> Id. id., 8 (p. 29).

<sup>2</sup> Id. id., 10 (p. 42).

<sup>3</sup> Id. id., 8 (p. 28): "Quod si ita est, ne princeps quidem ipse legibus solutus est, quoniam ita praestitit populo, ut unus tamen sit de populo, 'Digna vox est majestate Regnantis. . . . et re vera majus imperii est submittere legibus principatum. Et oraculo praesentis edicti quod nobis licere non patimur, alius indicamus.' Quod utinam sibi editum puterint omnes principes omnium qui unius imperio subsunt populorum. et potentiam suam jure, lege, equitate praeponderari sinant."

but when it is done, men are free from them.<sup>1</sup> We cannot say that these conceptions of Canon are derived from those of Alciatus, but there are obviously important parallels between them.

François Duaren was also a pupil of Alciatus and a contemporary of Canon, dying in 1559, and in his Commentaries on the 'Digest' we find some important observations on the sources of law and the authority of the prince.

There is no doubt, he says in one place, that the prince can make law, but he raises the question how far the people also have the right to do this, and he contends that they clearly possessed this right in the time of Julianus, that is, in the second century; he also cites Dion and Suetonius as showing that Augustus and Caligula were in the habit of submitting legislative proposals to the people, and in a later passage he suggests that it is at least possible that the people shared their power of legislation with the prince, and did not renounce it entirely, and he cites the words of Julianus as illustrating this.<sup>2</sup>

<sup>1</sup> Id. id., 8 (p. 30): "Haec igitur disputationis nostrae summa sit, injustam legem, legem non esse, et vel tollendam esse, errore cognito, vel certe corrigendam; dum id fiat parendum ei esse.

Ut si qui justa hereditate rex est, tyrannicos mores induat, divina atque humana jura pervertat, suorum non salutem petat, sed sanguinem, efficiendus regno est: dum id fiat, rex est: nec attendendus a quoquam est, nisi communi suorum decreto deliberatum sit et constitutum. Sanctum est, enim nomen legis, sanctum et regis: neutrum quod fieri potest violandum: sed illa abroganda, si mala est; hic, si tyrannus, expellendus est. Tum utrique impune non pareas, utroque solutus. Ante vero si obedientiam abjeceris, manus quodammodo videris afferre patriae."

Cf. 'Sachsenspiegel,' iii., 54, 4

(cf. vol. iii. p. 61, note 2). Vacarius, cf. this volume, p. 23, note 4.

<sup>2</sup> F. Duarenus, 'Comment, in Digest.' i. 3, cap. 3: "Principem nulla dubitatio est legem condere posse, cum potestas populi in eum translata sit. . . . Sed de populo quaeri potest an legis constituendae potestatem habeat. Et Julianus satis aperte ostendit in l. De quibus, hic (Dig. i. 3, 32) tempore suo populum legem condere potuisse. Ac scribit Dion, Augustum leges ad populum ferre solitum, postquam urbis imperium ei delatum est. Sed et Suetonius, de Caligula loquens: 'tentavit, inquit, et comitiorum more revocato, suffragia populo reddere.'"

Id. id., i. 4, cap. i.: "Nam jus quod princeps constituit, vim legis habet, etsi non intervenerit populi consensus, sed sola principis voluntas. . . . Quamvis autem juris consti-

His treatment of custom seems to us to be related. He first asks whether custom can override the law when made by the prince, for "the event shows that the law did not correspond with the customs of the people"; and he cites as from Gratian the words of St Augustine that laws are confirmed when they are approved by the custom of those who are concerned. He also repudiates the interpretation of the famous rescript of Constantine as meaning that custom could not override law; Constantine only meant that custom had in itself no greater authority than law.<sup>1</sup>

Duaren accepts the principle that the prince is "legibus solutus," though he adds that he does voluntarily submit to the law, and he cites "Digna Vox" ('Code,' i. xiv. 4), but he very emphatically contradicts the conception that the rescripts of the prince are to be always obeyed. They have no authority against the law or the public interest, they cannot deprive a man of his legal rights, they cannot annul a judicial decision ("res judicata") when there is no legal right of appeal.<sup>2</sup>

tuendi potestas fuerit principi concessa a populo: tamen credibile est populum eam potestatem magis cum principe quodammodo communicasse, quam a se omnino abdicasse, quod et Julianus ostendit, paulo ante disputans de consuetudine. D. I. De quibus, supra prox. Tit. (Dig. i. 3, 32)."

<sup>1</sup> Id. id., i. 3, cap. 12, 4: "Postquam vero desiit populus leges condere, queritur, an possit consuetudo jus a principe constitutum tollere. Et existimo, si princeps ab initio non coegerit inobedientes ad parendum legi, sed dissimulaverit longo tempore, adeo ut consuetudo inoleverit paulatim legi contraria, ea consuetudine legem abrogari. Eventus enim docet eam legem moribus populi non convenientem, atque ideo contemnendam esse. Can. erit autem 4 Dist. (Gratian Decret. D. 4). Inde illud Augustini celebratum est, 'leges firmantur, cum moribus utentium approbantur. . . .'

Verum obicitur nobis rescriptum Constantini l. 2. Quae sit longa consuetudo (Cod. viii. 52, 2). . . . Ex quo consequi videtur legem consuetudine abrogari non posse.

Sed alius mihi videtur eorum verborum sensus quam vulgo erodatur. Non enim his verbis significat Constantinus, si consuetudo legi omnino contraria sit, non posse legem ea abrogari, sed consuetudinem majoris auctoritatis non esse quam legem, imitatur enim legem, et vim legis habet."

<sup>2</sup> Id. id., i. 3, cap. 5: "Excipitur Princeps, qui legibus solutus est lege, et senatus consultis. . . . Sed is se sponte sua legibus se subicit, et secundum leges profitetur se velle vivere l. Digna Vox (C. i. 14, 4)."

Id. id., i. 4, cap. 4: "Rescriptum parendum esse sine recusatione. . . . Quae res multas cautiones habet, ut saepe accidit ut rescripto parendum

This means, as we understand it, that while the prince stands personally in some way outside of the law, he cannot interfere with the due process of law, or, by his brief, deprive a man of his legal rights. We are again reminded of Alciatus.

We turn to another French Civilian of a little later date, Nicolas Vigelius, whose work on the 'Digest' was first published in 1568.

His discussion of the sources of law does not seem to us to be much more than a collection of some of the passages in the 'Digest' and 'Code' which refer to it,<sup>1</sup> except when he deals with the relation of custom to law. This he discusses in some detail, and he states his own conclusions dogmatically. He first refers to it in dealing with what he terms "Exceptiones adversus leges." The seventeenth "exceptio" is "nisi lex alia lege vel consuetudine sit mutata," and he cites some words of that passage of Julianus, to which we have so often referred, in which he says that laws are abrogated not only by the will of the legislator, but also by the tacit consent of all, "per desuetudinem."<sup>2</sup>

Vigelius returns to the subject a little later, and at some length. Custom, he says, has the force of law, and he confirms this by citing various passages from the 'Digest' and the 'Code.' He cites as an "exceptio" that important rescript of Constantine which seems to imply that custom had no force against law ('Code,' viii. 52, 2) and some words of Ulpian (Digest, i. 32, 3); but he concludes dogmatically that if the

non sit, idque varus ex causis, propter quas hodie in iudicis rescripta impugnari solent. Primum, quod rescriptum juri contrarium sit, aut contra utilitatem publicam, l. nec damnosa l. rescripta C. De Precibus imper offer l ult (Cod. i. 19, 3, and 7) C si contra jus vel utilitatem publicam (Cod. i. 22, 6) Quo in genere poni debet rescriptum, quo jus alienum tollitur . . . unde intelligitur rescripta impetrari solum posse a principe de us quae nemini damnum inferunt. . . .

Quaeritur de eo, qui adversus sententiam rescriptum impetravit. Et certum est, si res iudicata sit, ut nullus supersit locum appellationi aut supplicationi, rescripta ejus retractandae causa impetrata, nullius esse momenti. . . . Praeterea adversum rescriptum obicitur quod per mendacium et obreptionem impetratum sit "

<sup>1</sup> Vigelius, 'Digestorum Juris Civilis Libri Quinquaginta,' i., 1, 4, 1. 3, 1: 1. 4, 1, 1. 4, 3

<sup>2</sup> Id. id., i. 7, 17.

custom were subsequent to the written law, it prevails against it. (We cite the last words of the passage.)<sup>1</sup>

When he turns to the relations of the prince to the law, while he cannot directly repudiate the doctrine "Princeps legibus solutus," he argues that to act upon this is contrary to the "Digna Vox," and that in several cases the Emperor had said they would not act upon it, but that while they were "legibus soluti" they lived according to the laws; and he quotes some lines of Claudian.<sup>2</sup> Vigelius clearly does not like the principle that the prince is "legibus solutus." When we come to the authority of the prince's briefs, he states dogmatically the limits which are set upon it by the law. In spite of the reverence which is due to the briefs of the prince, no such brief is to be accepted in a Court of Law which is contrary to the general law or the public service, unless it is such that it inflicts no injury upon anyone.<sup>3</sup>

<sup>1</sup> Id. id., i. 8 (col. 28). "Ergo si scripta lex extet contra consuetudinem, consuetudo legi scriptae cedit. Hujus exceptionis replicatio haec est. nisi lex scripta consuetudinem praecessent, tunc enim consuetudo postea insecuta praecedentem legem tollit, eaque potior habetur."

<sup>2</sup> Id. id., i. 7, 18. "Exceptio, nisi imperator vel Augusta leges non observaverit. Haec exceptio approbatur l. Princeps, 31 ff. De Legibus (Dig. i. 3, 31), his verbis princeps legibus solutus est . . .

Plane non omne quod licet honestum est. Itaque quamvis principi liceat praeter leges vivere, decet tamen eum vivere secundum leges. Quod approbatur l. Digna Vox (Cod. i. xiv. 4) . . . Concordat l. ex imperfecto 23 ff. De Legibus . . . 'Ex imperfecto testamento legata vel fideicommissa imperatorem vindicare inverecondum est' Decet enim tantae majestatis, eas servare leges, quibus ipse solutus esse videtur. Concordat item l. ex imperfecto 3 C. de testamentis, his verbis (Cod. vi. 23, 3). Ex testamento

nec imperatorem hereditatem vindicare, saepe constitutum est. Licet enim lex imperii solemnitatibus juris imperatorem solverit, nihil tam proprium imperii est, quam legibus vivere. Concordat denique Instit. quibus modis testamenta infir. fin. ubi, Imp. Severus et Antoninus (Inst. i. xvii. 8). 'Licet (inquunt) legibus soluti simus, attamen legibus vivimus,' Huc pertinet versus apud Claudianum poetam 'In commune jubes si quid, censeve tenendum, Primus jussa subi tunc observator aequi, Fit populus, nec ferre vetat, cum viderit ipsum, Auctorem parere sibi.'

<sup>3</sup> Id. id., i. 10 (col. 35): "Primo: Rescriptum principis regulariter utile est, et servandum. . . . Concordat l. sacrilegi ix. Cod. De Diversis rescriptis, his verbis (Cod. i. xxiii. 5). 'Sacrilegi instar est, super quibus cunque administrationibus vel dignitatibus promulgandis obviare beneficis' . . . Hujus regulae exceptiones sequuntur . . . (col. 40), xii exceptio Nisi rescriptum contra jus sit, vel utilitatem publicam. Haec exceptio approbatur

A little later still, we come to another important French Civilian who lectured at Bourges from 1551 to 1572, H. Doneau, whose work, 'Commentariorum de Jure Civili,' was first published in 1589-90.<sup>1</sup>

Doneau is, in the first place, clear that law is established by the Roman people, for the prince only holds the legislative power because the people have conferred it upon him, and it is immaterial whether the people makes laws itself, or whether it does this by those to whom it gives the power to do so.<sup>2</sup>

In another place Doneau seems to speak as though the consent of the citizens were still required to make law, and he cites the important passages which speak of the "communis resipublicae sponsio" as a necessary element in legislation; this is the more significant as he adds that the obligation of law is greater when it represents a man's own consent, than when it is imposed upon him by the will and authority of another.<sup>3</sup>

l. ult C Si contra jus, et his verbis (Cod. i xxii 6), Omnes cujusque majoris vel minoris administrationis nostrae universae reipublicae iudices monemus, ut nullum rescriptum, nullam pragmaticam sanctionem, nullam sacram adnotationem, quae generali juri vel utilitati publicae adversa esse videatur, in disceptationem cujuslibet litigii patiantur proferri sed generales sacras constitutiones, modis omnibus non dubitant observandas . . . Concordat l nec 3 C. De precibus Imp. offerendis hisce verbis 'Nec damnosa fisco, nec juri contraria postulari oportet' (Cod i xix. 3). Propositae exceptionis replicatio haec est 'Nisi rescriptum contra jus nemini obsit, et prosit petenti': quae replicatio approbatur l Rescripta, 7 C De Precibus Imp off his verbis (Cod i xix 7) 'Rescripta contra jus elicta ab omnibus iudicibus praecipimus refutari nisi forte aliquid est quod non laedat alium et prosit petenti, vel crimen supplicantibus indulgeat.'

<sup>1</sup> We wish to express our great

obligations to the excellent work of M. Eysell, 'Doneau, sa vie et ses ouvrages,' both for his detailed study of Doneau and for his valuable account of the other Civilians with whom we have been dealing

<sup>2</sup> H Doneau, 'Opera Omnia,' vol 1, ed Rom 1828, i 8, 6 'Commentariorum de Jure Civili' "Lex totius populi Romani constitutio est . . . Penes hunc summa juris constituendi potestas fuit Nam, ne princeps quidem, postea hac potestate praeditus esset, nisi populus potestatem suam in illum contulisset . . . i 8, 14 Jam ante dixi, nihil interesse, utrum quis quid constituat, aut decernat ipse, an vero ii, quibus ipse constituendi aut decernendi potestatem dedit"

<sup>3</sup> Id id id, i 16, 6. "Accedit ad haec consensus civium in jura et leges, ex quo lex, 'Communis reipublicae sponsio,' dicitur in l i, l ii Dig De legibus (Dig i 3 1, 2) Sponsio communis, quia in eam se omnes cives obligant communi consensu tamquam sponsione . . . unde eam servare

It seems reasonable to relate this to Doneau's treatment of custom in relation to law. He interprets the rescript of Constantine ('Cod.,' viii. 52, 2) as referring not to a particular custom, but to custom in general, that is, as meaning that custom, as such, is not superior to law as such; and that if a particular custom and a particular law are in conflict, the later in time is superior.<sup>1</sup>

When Doneau turns to the relation of the prince to the existing law, he asserts dogmatically that all men are under the law, even the prince. It is true that the prince is "legibus et solemnitatibus juris solutus" by the "Lex Regia" of the Roman people, but he is bound "communi principum lege et sua," for the prince wills to live according to the law.<sup>2</sup>

He returns to the question in his Commentary on the 'Code,' and contemptuously brushes aside the contention of those who favoured the prince, that it was derogatory to his dignity that he should not be able to do whatever he pleased, and he points out that the Empire rests upon good laws, which are established not only by the words of the prince but by his example.<sup>3</sup>

debet tanto diligentius quanto major est obligatio ea, quam sibi quisque sponsione sua imposuit, quam quae aliena voluntate et imperio injicitur"

<sup>1</sup> Id id id, i 10, 6 "In his enim verbis, 'Consuetudo non vincit rationem aut legem,' neque 'consuetudinis' verbo nominatur species aliqua consuetudinis, ut apparet, sed genus ipsum consuetudinis . . . Itaque totum hoc edictum est de consuetudine et lege in suo genere, non in specie hujus, aut illius vel consuetudinis vel legis . . . Caeterum, si species inter se conferantur, consuetudinis seu leges abrogantes, et leges abrogatae, negare non potest, quin lex abrogans vincit priorem quae abrogatur"

<sup>2</sup> Id id, i 17, 1. "Sed an omnes juri parere debent? Omnes, quando quidem commune preceptum est, quod omnibus ponitur. . . Etiamne princeps? Et tenentur etiam principes

legibus. Dicitur quidem princeps solutus legibus, l princeps d de legibus (Dig i 3, 31) quia legibus et solemnitatibus juris solutus est a populo Romano lege regia, quae de ejus imperio lata est (Dig i 4, 1, Cod vi. 23, 3) At tenentur legibus communi principum lege et sua, declarant enim hi se velle legibus vivere, statuentes, nihil magis convenire imperio l 3 C. De Testamento ult (Cod vi 23, 3), Inst quibus modis test infirm (Instit. ii 17, 8) Extatque hujus sententiae confirmatio cum insigni commendatione conjuncta in l digna, C De Legibus 'Digna Vox' (Cod i 14, 4) . . . Quod si quidquid principi placuit lex est (Dig i 4, 1), etiam haec voluntas lex erit Et quoniam principes in se hoc volunt. etiam ipsi in sese erunt lex"

<sup>3</sup> Id, Opera, vol ix., 'Comm on Code,' vi 23, 3 (col 15). 'Sed pro principe hoc dicitur principem solu-

The general principle that the prince is under the law is so firmly asserted by Doneau, that it is not surprising that he should lay it down dogmatically that Imperial Rescripts in particular cases, which are contrary to law and the public interest, are to be ignored by the judges. He admits, indeed, that if they do not injure others, and in some other cases, they may be received, but with these exceptions they are to be treated as null and void; it is significant, he adds, that even if they contain a "non obstante" clause, they have no force.<sup>1</sup>

It would seem clear, as we said before, that, whether we attribute this to the influence of Alciatus or not, these important Civilians of the sixteenth century represent very different conceptions from those of most Italian Civilians of the fifteenth century.

We can now turn to Cujas, the greatest French Civilian of the sixteenth century; it is true that his work belongs to

tum esse legibus . . . Respondent boni principes, hoc jus sibi placere, ne quid ex imperfecto testamento capiant, non quod pro sua potestate capere non possint, si ea uti velint, sed quia soluti legibus, nihilominus legibus vivere volunt, et submittere legibus principatum (Inst. ii. 17, 8, Cod. vi. 23, 3).

Dixerit aliquis, quod de assentatoribus principum nimis quam saepe audire solet, principem facere infra dignitatem et magistratus imperium, si non faciat quae libet, cum hoc ejus imperio tributum sit, ut sit solutus legibus caeterorum. Hic egregie responderunt boni principes, quod in hoc rescripto legimus, tantum abesse ut, dum principes se subjiciunt legibus, aliquid imminuant de majestate imperii et sua, ut nihil sit tam proprium imperii quam legibus vivere. Et recte, nam proprium imperii est rempublicam et imperium ornare moribus, bonorum morum pars magna est obtemperare bonis legibus. Proprium

imperii est, eas res constituere maxime, quibus imperium consistit. stat autem omne imperium bonis legibus, hae stabiluntur a principe, non verbis et ejus jussu, sed maxime exemplo."

<sup>1</sup> Id., Opera, vol. 1. 'Comm. De jure Civili,' i. 9, 12. "Si concessum quid sit contra jus vel utilitatem publicam. Quod totum genus districte vetatur rescriptis a iudicibus admitti." (Herefersto Code i. 19, 3, 7, and Code i. 22, 6.) Such Rescripts may, however, be admitted if they do not injure a third party, or if they merely remit a punishment, and in some other cases when they merely provide for some delay. "Quod si nihil horum erit non dubitabimus, quin rescriptum contra jus impetratum non debeat a iudicibus admitti. Quid tamen, si princeps nominatum addiderit in rescripto, velle se servari quod rescribit, non obstante lege contraria, et eam legem nominatum appellet? Ne sic quidem rescriptum admittendum."

the later years of the century, but it appears to us that it is closely related in character to that of the Civilians with whom we have been dealing. Cujas' observations on politics are scattered over his various legal works, but when they are put together they seem to represent something like a systematic theory of the nature of the State and its authorities.

In commenting on the famous passage of Gaius, "omnes populi" ('Digest,' i. 1, 9), he sets out a far-reaching and significant judgment on the relation of the organised State to human life. There may be, he seems to mean, men who are not ruled by laws and customs, but these do not constitute a "Populus," for where there is no law there is no "Populus," and therefore no Commonwealth; and he cites Aristotle as saying that where there is Law, there is a Commonwealth. So far his words are reminiscent of Cicero as well as of Aristotle, and, indeed, they are also closely parallel to Bracton, and they represent the same profound and penetrating judgment, that without rational order the life of the community is impossible.<sup>1</sup> Cujas does not, however, merely say that there can be no Commonwealth without Laws, but he also holds emphatically that while there may be races of men who live, like the beasts, without them, yet there is in all men a right Reason which makes them capable, like us, of the greatest things; for this Reason can be brought out like fire from ashes or from flint; and, though they may be "wild and outlaws," they are not, like the beasts, incapable of being ruled by custom and law. The natural Reason, which is the Law of Nature, may be asleep or buried in them, but the light of Reason may be easily stirred up.<sup>2</sup>

<sup>1</sup> Cf. vol. i. p. 4 and vol. iii. p. 67 f.

<sup>2</sup> Cujas, 'Opera Omnia,' vol. ii. 'Comm. on Digest,' ad. L. ix (z.e., Dig. i. 1, 9) (col. 136): "At autem. 'Omnes populi qui legibus et moribus reguntur' Ergo quidem sunt qui nec legibus nec moribus reguntur et quidam sunt non populi. Nam ubi lex non est, nec pro lege mos, ibi nec populus est. Et si populus non est, nec Respublica.

Nam Respublica est res populi. Et recte Arist. 4 Politic 'ubi lex est' inquit, 'ibi est Respublica' Et ubi Respublica, ibi leges vel mores, qui sunt pro legibus. Sunt qui, bestiarum more, vitam ducunt, et in agris agentes passim, et ratione recta nihil administrantes. Sunt plerique gentes hujusmodi sed tamen inest eorum animus vis et materia, non minus quam in

These are very interesting words, closely parallel to a famous passage in Cicero's 'De Legibus' <sup>1</sup>; but it is important especially as illustrating Cujas' judgment that the foundation of the Commonwealth is the Law, and the foundation of Law is Reason.

In another passage Cujas discusses the meaning of "Jus," and says that if we are to consider this properly we must begin with the Jus Gentium, which he identifies with that Natural Law which Reason teaches men, and which is present in all men.<sup>2</sup>

He then discusses a phrase of Modestinus ('Digest,' i. 3, 40). "Jus," he says, "is made by consent or necessity, or established by custom," and Cujas explains what he understands this to mean. "Jus," which is made by consent, is Lex, for it is established by the command of the "Populus" or the "Plebs." "Lex," that is, law in this sense, is binding upon us because we have consented to it, or because it has been established by that State in which we were born and brought up. Again, Cujas puts it in another way. What is "Lex" ? he asks. It is an agreement of the Commonwealth or the common consent of all those who dwell together, or as Demosthenes and Aristotle say, the common agreement of the city.<sup>3</sup>

nostris, ad maximas res gerendas, et recta ratio quae facile elici potest, aut reddi melior, praecipiendo, ut ex cinere ignis, ignis ex silice non difficile elici potest, quod insit ei haec natura. Nam quod sint quidam feri, et immanes et exleges, non ideo etiam ut bruta non possunt non moribus et legibus regi. Consopita est in quibusdam et quasi conspulta ratio illa naturalis, quod est gentium omne jus, et quamvis eo non regantur, est tamen insitum in eis, quantumvis feris, ejus rationis lumen quod facile excitari potest."

<sup>1</sup> Cf. Cicero, 'De Legibus,' i. 1-12 and vol. i. (p. 8).

<sup>2</sup> Id. id., 'Comm. on Digest,' ad L. vii. (Dig. i. 1, 7) (col. 129): "Qui voluit definire jus civile universum, non praetermisit jus gentium, ut

Aristoteles qui jus civile divisit summatim, in jus naturale, quod est jus gentium, et legitimum: non praetermisit consuetudinem, non equitatem, ut Cicero in Topicis. Nam jus gentium est ratio, qua imbuti sunt omnes homines, quae jubet faciendae, prohibetque contraria, quam nemo ignorat, vel si quis eius ignorantiam obtendat, non excusatur."

<sup>3</sup> Id. id., 'Comm. on Digest,' ad L. vii. (Dig. i. 1, 7) (col. 130). He cites Modestinus (Dig. i. 3, 40): "Ergo omne jus aut consensus fecit, aut necessitas constituit, aut firmavit consuetudo. . . . Nam jus quod consensus fecit, lex est, quae populi aut plebis jussu sancita est, nam lex nulla alia ex causa nos tenet, quam quod nos ei consenserimus, aut quod

Jus, which is made by necessity, is in the first place a "senatus consultum," and Cujas cites Pomponius, 'Digest,' i. 2, 2. When it became difficult for the whole people to be gathered together on account of their number, it was necessity which compelled men to give the care of the Commonwealth to the Optimates. In the second place, it was necessity which created the form of "Jus" which is made by the prince; it was because the Senate was not equal to the charge of ruling the Provinces that the prince was created.<sup>1</sup>

Jus, which is established by long custom, also rests upon consent, but it is a tacit and unwritten form of consent. Cujas adds that Jus, which is established by necessity, has indeed some form of consent, but it is a forced, not a free consent, such as that which makes law (lex) or custom. The foundation of the Senatus consultum is necessity, that of law and custom is will.<sup>2</sup>

eam civitatem (civitas) constituit, in qua nos nati et educati sumus l. de quibus, de legibus (Dig. i. 3, 32). Quid lex? Communis reipublicae sponsio l. 1; de legibus (Dig. i. 3, 1), et communis consensus omnium simul habitantium, consponsio populi, Demosthenes Lib. ii. *συνθήκη κοινή τῆς πόλεως*. Et Arist. *δηολόγημα τῆς πόλεως*, in addit. ad Alex."

<sup>1</sup> Id. id. id. (col. 130): "Jus autem, quod necessitas fecit, est senatus consultum, l. 2 § deinde, de Orig. Jur. (Dig. i. 2, 2, 9). Cum difficile posset populus in unum convenire, aucto numero civium, necessitatem ipsam curam reipublicae ad optimates, politiores viros, ad senatum deduxisse, inde nata senatus consulta. . . . Nam jus quod princeps facit, necessitas fecit. Nam non ob aliam rem creamus principem, quem ut decreta faciat et jura det, ut est aperte scriptum in l. 2 § novissime, de Orig. Juris (Dig. i. 2, 2, 11), dum ait, 'Sicut ad pauciores (id est, ad senatum) vias juris constituendi transisse videbatur, ipsis rebus dictantibus' (id est ipsa rerum necessitate), ita per

partes evenisse (id est paulatim, non ut quidam per partes, id est per suffragia. Alii per partes, id est per factiones). Et rectissime dicitur ab Accursio *rem* a populo venisse ad senatum, et a senatu ad populum (principem) per partes, per vices, paulatim pedetetimque. Quid vero, inquit, per partes venit? ut, inquit, necesse esset reipublicae per unum consuli. Nam senatus non potuit sufficere omnibus provinciis regendis, ob id constitutus princeps, qui rerum omnium esset dominus, quique potestate caeteros omnes praepolleret."

<sup>2</sup> Id. id. id. (col. 130): "Verum notandum hoc jus, quod firmavit consuetudo longa, etiam esse consensum, sed tacitum et illiteratum. Legem facit consensus expressus et literatus, suffragium, conventio, jussum, decretum populi aut plebis. Quinimo et jus quod necessitas constituit, in se consensum habet, sed coactum, non liberum, qualis est is qui legem aut consuetudinem facit. Senatus consulti principium est necessitas, legis et consuetudinis voluntas."

We turn to his more developed theory of the nature of law as custom. In another work Cujas discusses this question with immediate reference to the famous passage in 'Code,' viii. 52, 2; he maintains that a custom which reason and public utility approve, and which has been confirmed by long unwritten consent, and by a judgment in the Courts, abrogates any law which has ceased to serve its purpose and is of little use to the Commonwealth. For no law is binding upon men unless it has been received by custom; or, as he puts it in another place, the force and power of approved custom is such that written laws do not bind men unless they have been accepted by the judgment of the people, that is, unless they have been approved by custom.<sup>1</sup>

This is a very explicit statement of the importance and authority of custom as representing the reception of a law by the people. Cujas puts this principle, however, in still more general terms, in another work, when commenting on the famous definition by Papinian of Lex, in 'Digest,' i. 3, 1. We are bound, he says, by the Laws, for no other reason than that they have been received by the judgment of the people, and approved by custom, and he cites Aristotle as saying that the whole authority, which law has to compel men to obedience, comes from custom; and he cites a writer named Demetrius as saying that law is simply custom which has been written down, and that custom is unwritten law.<sup>2</sup>

<sup>1</sup> Id. id., vol. iii., 'Paratitla in Libros ix. Codicis,' Code viii 52 (col. 211) "Ea (Consuetudo) tamen quam ratio suavit, ut ait l. 1, ratio quaedam major, et publica utilitas, et longum tempus tacito et illiterato omnium consensu, et rerum iudicatarum firmavit auctoritas, sane abrogat legem, cujus ratio vel cessavit, vel minore est, vel minus confert Reipublicae, quia et deficere videtur lex tanquam oblitterata supra quam usus invaluit, et deficiente lege consuetudo sola dominatur, et legis vim obtinet. . . . Sed et nulla lex, aliter nos tenet quem si et consuetudine recepta sit."

Id. id. id., 'Comm on Code,' viii.

52 (col 1196): "Hic igitur quaerimus, de vi longae et probatae consuetudinis, cujus una vis seu virtus haec est, quod leges ipsae, quae ex scripto constant, nulla alia ex causa nos tenent, quam quod iudicio populi receptae sint, id est quod etiam consuetudine sint adprobatae"

<sup>2</sup> Id. id., vol. iv., 'In Lib. I. Defini. Papin. Ad l. 1 ff De legibus' (Dig. i. 3, 1) (col 1273) "Lex enim est commune praeceptum, communis sponsio omnium, et recte l de quibus (Dig i. 3, 32), leges nulla alia ex causa nos tenere, quam quod populi iudicio receptae et usu probatae sunt, id est, communi sponsione populi, et idem

So far, then, Cujas conceives of law as representing the custom and consent of the community, but he also formally and explicitly accepts the principle that the people had transferred their legislative authority to the prince. In one work he puts this quite dogmatically and simply, that while the public and general ancient laws were made by the people, or the Plebs, they do not now make such laws, for they have transferred their authority to the prince.<sup>1</sup> In another work he gives a summary of the various forms of Jus, which once belonged to the people, but had been transferred to the prince.<sup>2</sup> It should, however, be noticed that in his Commentary on the 'Digest,' Cujas' language about the nature of the authority of the prince does not seem quite the same. In commenting on the account given by Pomponius of the origin of the Imperial power, he describes how, by a slow process, Rome passed from the authority of a king to that of the people, from that of the people to that of the Senate, and from that of the Senate to that of one man, not a king, but a prince who should be first in the Commonwealth and the Senate, but should not take to himself all the right (jus) of the people or Senate, but rather should share it.<sup>3</sup>

We turn to Cujas' conception of the relation of the prince

ipse Arist. ii. Polit., *ὁ νόμος οὐδεμίαν βίαν ἔχει πρὸς τὸ πείθεσθαι παρὰ τὸ ἔθος*, id est lex nullam vim habet, qua compellat homines ut sibi pareant, nisi eam quam assumit ex more recepto, ex consuetudine, quae non conflatur, nisi diurno tempore, atque adeo recte Demetrius legem nihil aliud esse quam consuetudinem scriptam, consuetudinem esse legem, non scriptam."

Cf. Cujas, Opera, vol iii., 'De Feudis,' Lib. ii 1 (col. 1827)

<sup>1</sup> Id. id., vol iii., 'Paratitla in Libros ix. Codicis,' Code. i 14 (col 20) "Ac primum quidem in hoc titulo agitur de legibus publicis et generalibus, quae antiqua sunt iussa populi vel plebis quales nullae feruntur hodie, populi potestate translata in principem."

<sup>2</sup> Id. id., vol iii., 'Comm on Code,'

vi 50 (col. 818) "Jus omne, quod populi fuit, translatum est in principem Populi fuit leges ferre et perferre . . . hodie est principis. . . . Populus creavit magistratum, hodie princeps. . . . Populus indixit bella . . . hodie princeps solus . . . Populus a magistratibus appellabatur, hodie princeps. . . . Bona vacantia populo deferebantur, hodie principi"

<sup>3</sup> Id. id., vol. ii., 'Comm on Digest,' ad L 2 (Dig. i. 2, 2) (col 148): "Per partes . . . Et lento progressu a vi et potestate regis ad populum, a populo ad senatum, a senatu ad unum, non regem, sed principem quasi in republica et senatu primum, qui nec populi sibi, nec senatus jus omne vindicaret, sed cum eo partiretur."

to the law, when made, that is, to his discussion of the meaning of "legibus solutus." In treating the passage of Ulpian (Digest, i. 3, 31), which says, "Princeps legibus solutus est," he says that these words had been understood by the Greeks as referring to "penal" laws, for the prince has no judges; by the Latins as referring to all laws; but the truth is that they only apply to "Leges Caducariae," not to others; even if the prince has not sworn to observe the laws, much more, if he has. The people was bound by the laws which it had made, and therefore, also, the prince upon whom it had conferred its authority. The proper meaning of the phrase is that the prince has the power of making and unmaking laws, but he must only use this power for a just cause and for the good of the Commonwealth; he has also some power of rectifying things done without law.<sup>1</sup> In another work, commenting on 'Code,' vi. 23, 3, he sets out the same judgment in much the same terms, and with special reference to his own time.<sup>2</sup>

<sup>1</sup> Id id, vol iv, 'Observationes,' Lib xv. 30 (col 1755). "Ad l princeps De Legibus (Dig i. 3, 31) De legibus poenaris Graeci ita interpretantur . . . quia scilicet iudices non habet. Latini, de quibuscumque legibus, cum sit, inscriptione legis, ea sententia tantum accipienda de legibus caducariis, Julia, et Papia, quae satis etiam per se odiosae erant. Sed et plerisque alius principes soluti non erant, licet imperii initio non jurassent in leges, et multominus si jurassent. Quinimo, ut populus ipse suis legibus tenebatur, ita princeps . . . Caducarius legibus soluti erant, ex S C quodam eorum, quae facta esse Jus tinianus refert, et alius quibusdam veluti solemnibus manumissionum. Quod igitur d l Princeps, et Dio 53, dicens hoc se ex Latino sermone transferre λευεται των νόμων, non de omnibus legibus accipiendum est. Et quod Dio Chrysostom, principem esse των νόμων επανω . . . et idem Justinianus in Nov 105 (Nov 195, 2, 3)

eo tantum pertinet, ut intelligatur penes principem esse omnem potestatem ferendarum vel abrogandarum, aut derogandarum legum, ut Augustinus ait in Epistola quadam, 'Imperatorem non esse subjectum legibus qui habet in potestate alias leges ferre, non temere quidem, sed ex justa causa et re publica atque adeo confirmanda etiam quae non jure facta sunt.' Ut principem legibus adoptionem non jure factam confirmare . . . et matrimonium statumque liberorum non jure quaesitorum, et hoc quidem solum est principem supra leges esse. Non placet quod de Achille Horatius, 'Jura negat sibi data, nihil non arrogat armis' "

<sup>2</sup> Id id, Opera, vol iii, 'Comm on Cod,' vi 23, 3 (col 687) "Principem non vindicare hereditatem. Imperatorem, non item, quia defuncto extraneus est. Et addit rationem, quia lex imperii solemnitate juris imperatorem solverit, nihil tamen est tam proprium Imperatori quam legibus

It is quite clear that Cujas refuses to admit that the Roman Emperor was above the law; he recognises, indeed, his legislative power, but maintains very confidently that he was

vivere. Et legem imperii vocat eam quae primum Augusto detulit imperium, ut refert Dionysius Lib 52 Quod Augustum privilegium dicitur, leg un. ult. de Caduc. toll. (Cod vi. 51 § 14, a). Quodque Dionysius scribit se transferre ex Latino sermone λιοτων των νόμων id est solvuntur legibus. Et inde D Chrisos in Oratione quadam tradit principem esse, των νόμων επανω. Et similiter Justin, in Nov. 15, leges tibi princepe, et esse ei submissas, atque subjectas, quod scil. in potestate sit solius principis, ex usu reipublicae leges ferre, vel abrogare, vel derogare, et eas ipsum quandoque sequi non posse. Quapropter aliquando major videtur potestas esse principis, quam populi fuerit. Populus enim suis legibus tenebatur, princeps suis legibus non tenetur . . . Ea est lex imperii, quae Augustum solvit legibus, maxime si non juraverit in leges initio imperii. Non solebant enim jurare in leges, cum Plinius scribit in Panegyrico, 'jurare magistratus quidem in leges, sed enim jurisjurandi verba ignota esse principibus' Nisi cum magistratus cogunt jurare in leges.

Hodie quia princeps statim initio imperii jurat in leges, tantum abest, ut legibus soluti sint, quin quam maxime legibus obstringantur ex suo jurejurando. Et ut soluti sunt principes legibus, tamen ut inquit l. 3 (Cod vi, 23, 3), nihil est tam proprium principatus quam secundum leges vitam degere . . . Et eleganter Imppp Severus et Anton. in § ult. Inst quibus modis testamenta infirmantur (Inst ii 17, 8), licet, inquit, soluti simus legibus, tamen legibus vivimus. Et elegantius, l 4. De Legibus (Cod i. 14, 4), preclarum esse et dignum vocis principis, profi-

tentis se legibus alligatum esse, et de auctoritate legum pendere auctoritatem principis, et revera majus esse imperio legibus submittere imperium . . . (Col 688), Contra tamen invenio in quibusdam legibus omnino, ita esse solutos principes, ut nec secundum leges vivant. Invenio solum esse principem legibus caducariis, Julia nempe et Papia, l quod princ. de leg 2 (Dig i., 4, 1) Si tibi relictum sit legatum et hominem exemeris i. mortuus fueris, antequam dies legati cederet, caducum fit legatum. Sed si legatum relictum sit principi, et is obierit, quod omnes obire oportet, antequam dies legati cederet, legatum non fit caducum, sed cedit heredi principis. Et hoc est quod ait l princeps de legibus, 'Princeps legibus solutus est' (Dig. i. 3, 31) Nam diligenter attende ad inscriptionem legis quae est Ulpiani ex quatuordecim ad legem Juliam et Papiam, quae sunt leges caducariae. Princeps ergo est legibus solutus, i. l. Julia et Papia, non omnibus legibus . . . Nec vivere dicam unquam generaliter esse verum quod ait l. princeps (Dig i 3, 31) cum id tantum sit accipiendum, specialiter de lege Julia et Papia, non de legibus omnibus, et tamen maxime id affirmabo cum erit princeps, qui juravit in legem, et quod contra legimus in plerisque auctoritatibus 'Principem esse supra legem,' hoc eo pertinet ut intelligatur principem habere potestatem ferendi et abrogandi leges, non temere quidem sed ex justa causa et e republica.

Ac consequenter posse principem confirmare quae non jure facta sunt, ut legimus adoptionem non jure factam a principe confirmari . . . et matrimonium injustum, statumque liberorum in jure quaesitorum, a

normally bound to obey the law so long as it was law; and it must be observed that Cujas says in the passage last quoted that the princes of the modern world were bound by the oath, which they took on their accession, to obey the laws; that is, it is clear that besides what he conceived to be the rational and critical interpretation of the jurisprudence of the ancient world, he had no doubt about the constitutional principle of his own time. It may also be observed that Cujas very emphatically asserts that it is a mere error to maintain that the prince has "property," in the strict sense of the word, in that which belongs to the private individual; he has rights over it "imperio," but not "dominio."<sup>1</sup>

We think that it is plain that in France from Alciatus to Cujas, a number of the most important Civilians of the sixteenth century maintained a conception of Law and its relation to the prince very different from that of the Italian Civilians of the fifteenth century, and even from that of the Civilians of the fourteenth century.

We must also observe that one of the most important Civilians of the century in Germany, Zasius, a native of Zurich, but for many years Professor of Roman Law in the University of Freiburg in the Breisgau, during the first part of the sixteenth century, represented in some important points the same principles as Alciatus and the French Civilians with whom we have just been concerned.<sup>2</sup>

principio confirmari. . . . Legimus eos poenae veniam facere et abolere crimen indulgentia et benignitate sua. Eos ex causa etiam veniam legibus facere. Et hoc solum est, quod dicitur princeps esse supra leges non placet, quod de Achille ait Horatius, 'Jura negat sibi data, nihil non arrogat armis' "

<sup>1</sup> Id. id., vol. v., 'Observationes,' xv. 30 (Col 1755) "Verum ne abutimur etiam illa sententia 'omnes esse principes,' ex l. 3 C De quadr praesc (Code vii 37, 3) cujus mens haec est, ut omnia tam fiscalia quam patrimonalia, de quibus in ea lege agitur, principis

esse intelligamur. At et juris civilis Seneca hanc vocem esse ait 'omnia regis esse, etiam quae sibi quisque privatus habet et possidet,' quam tamen ita excipit rectissime, 'ut omnia rex imperio possideat, singuli domino' "

Nec enim quae tua sunt, principis sunt, aut certe tua sunt, aut certe tua non sunt, quoniam dominium in soli dum duorum esse non potest et communia quoque esse inter se et principem dixerit nemo, et fiscalia quoque ipsa proprie principis non sunt "

<sup>2</sup> For an account of his life and work of the excellent work of Stinzing,

We find some important judgments in his Commentaries on the 'Digest,' and we have, in one of his "Consilia," a detailed discussion of the question whether the Emperor could interfere with a judgment of the Reichs Kammer-Gericht by an Imperial writ or brief.

Zasius uses the strongest terms to describe the "Potestas immensa" of the Emperor; he is a living law, and what he decrees as law, or decides in judgment, is held to be law. He is "legibus solutus," and can make law "solus"; whether Zasius meant by this that he can issue laws by his own authority, or that he is the only person who can make law, is not clear.<sup>1</sup>

We must not, however, be misled by these high-sounding phrases. Zasius goes on at once to say that the Roman prince, if he has made any contracts or agreements even with private persons, is bound by them; for, though God has placed the laws under the control of the prince, he has not done this with contracts; they belong to the "Jus Gentium" and are founded on natural reason. This, he maintains, is the common doctrine of the "Juris Periti," such as Cynus and Baldus, and he relates it to the tradition of feudal tenures.<sup>2</sup> Zasius returns to this question of contractual obligations in his treatise, 'In usu feudorum.'<sup>3</sup>

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<sup>1</sup> Zasius, 'Opera Omnia,' Frankfurt, 1590, vol. i., 'Comm on Digest,' i. 2, 2 (p. 124) "(Ratum esset) Ex quo colligitur, principis Romani potestatem esse immensam, est enim lex animata in terris . . . Et quidquid statuerit, aut sententiam dando decreverit, ceteris paribus pro lege servatur . . . ipse enim sicut est legibus solutus ita solus legem condere potest "

<sup>2</sup> Id id id id . "Contractus tamen si quos princeps Romanus etiam privatis personis perfecit, eum obligant ut fidem conventionis servare cogatur. Licet enim Deus principi

subjecerit leges, non tamen subjecit contractuum vincula, quae juris gentium sunt, naturalique ratione consistunt, et praecipue in principe bonam fidem requirunt. Quae est communis jurisperitorum doctrina, Bald Cynus. Doctor . . . Unde nimis improvide, ne quid durius dicam, nuper quidem ex doctor aulicis contrarium responderat. Nec porro tutum mihi videtur quod Jacobus de Sancto Georgio in practica feudorum, in princip asservit, principem Romanum auferre vasallo feudum posse. Cum enim vum contractus feuda habeant, stare contractus principis tenebitur "

<sup>3</sup> Id id, vol. iv., 'In usu feudorum,' pars. vii 56 (p. 87).

He also maintains that the prince's actions must be conformed to reason and equity, and he cites not only the well-known stories about Trajan and Agesilaus, but also the rescript of the Emperor Anastasius, which instructs the administrators of the Empire that they were not to pay any heed to rescripts or pragmatic sanctions which were contrary to the general law or to public utility.<sup>1</sup>

Zasius considers this question further in a passage in which he discusses what is meant by the phrase "legibus solutus." Does this, he asks, mean that the prince can act contrary to the law and annul the Civil Law? The Canonists, he says, maintain that this was true of the Pope; it would thus be true also of the Emperor; but this assertion, he says, never pleased him, for various reasons, and especially because laws (*jura*) are given by God through the mouth of the prince. He considers that some laws may be suspended in particular cases, and that this is done by a "non obstante" clause. But again, he says, if the prince should annul a man's legal rights without due cause, his action is null and void, even though he does it in the form of a law or decree. This is the law of Germany, and he says that he had heard a judgment given against the prince in the prince's "consistory."<sup>2</sup>

<sup>1</sup> Id. id., vol. i., 'Comm. on Digest,' i. 2, 2 (p. 124): "Et in universum, princeps nihil admittet quod rationi obviet et equitati, ut est elegantissimus text. in Leg. Digna Vox. (Cod. i. 14, 4). Licet enim absoluta potestas legibus non ligetur, ut supra diximus, ea tamen potestate abuti non debet: quanto enim est sua potestas immensior, tanto magis aequitatem exigit et justitiam, quam in primis colere et colendam praescribere debet. . . . Insignis extat D. Trajani sententia . . . denique optime Rex Agesilaus . . . quod et imperator Anastasius salubriter sancivit in l. fin. C. si quid contra jus (Cod. i. 22, 6); quem textum utinam doctores pro suo quisque, vel commodo vel ingenio, non ita distorquerent." (The text of Code i. 22, 6, reads:

"Omnis cujuscunque majoris vel minoris administrationis universae nostrae reipublicae iudices monemus, ut nullum rescriptum, nullam pragmaticam sanctionem, nullam sacram adnotationem quae generali juri vel utilitati publicae adversa esse videatur, in disceptationem cujuslibet litigii patiantur proferri, sed generales sacras constitutiones modis omnibus non dubitent observandas.")

<sup>2</sup> Id. id., Opera, vol. i., 'Comm. on Digest,' i. 3, 31 (p. 167): "Sed quia in L. nostra principem ab omnibus absolvisse legibus, et lege positiva, quaero an per hoc princeps possit facere contra legem: an possit tollere jus civile: Certe Canonistae hoc tenent de Papa, quod possit tollere jus positivum . . . et sic etiam hoc

This reference to a definite case in the Courts is of great interest, and it seems probable that this is the case which, as we have said, is dealt with at length in one of Zasius' "Consilia," which has happily been preserved. The plaintiff had, many years before, brought a case against the defendant in the Reichs Kammer-Gericht, and the Court had ordered the defendant to pay a certain sum of money to the plaintiff. The defendant had then taken the matter to the Emperor Maximilian, who issued a mandate, "de plenitudine potestatis et ex certa scientia," annulling the judgment. After further negotiations, a compromise had been arrived at, by which the plaintiff was to receive 1000 florins, but this was never paid. On the death of Maximilian, the plaintiff applied for the execution of the original judgment.<sup>1</sup>

Zasius begins by laying down two general principles, the first that the Emperor could not override the judgment of the Court, and the second, that the Emperor was bound by his contract.

He recognises that there had been much discussion about the effect of the use of such phrases as "ex plenitudine potestatis" and "ex certa scientia," when employed by the Emperor in his briefs or writs, but he is himself quite clear that the prince could not annul "Res Judicata" by the use of such phrases. He had always held, and still maintained, whatever other doctors might say, that the prince could not, by his "plenitudo potestatis" or his "certa scientia," or in any other way, annul the lawful right (*ius*) which a man might demand, except for some great public cause. The authority of the prince is of the largest kind,

imperatori esset permissum. Sed mihi nunquam placuit ista assertio, per multas rationes quas jam obmitto, et maxime, quia jura sunt divinitus per ora principum promulgata, ut dicunt patres in decretis. Bene credo quia aliqua jura ex causis possint in particulari tolli, vel contra eas indulgeri, quod quotidie fit per clausulam non obstante. . . . Quapropter si princeps noceret tollendo mea jura,

hoc non valeret, causa non apparente, etiamsi hoc per modum legis, decreti, aut statuti faceret, contra doctrinam Baldi in l. 2 C. eod.: et ita servat nostra Germania integritatem legis: et vidi ita judicari in Consistorio Principis contra Principem, securi quo pacto adulentur vel Itali vel alii principibus."

<sup>1</sup> Id. id., vol. vi. "Consilia" Liber ii. 10 (p. 127).

for the protection of his subjects, but an authority to injure them, belongs not to a prince, but to a tyrant. He dismisses rather contemptuously the contention that it must always be presumed that the prince had some just reason for his action, and contends that the use of such phrases as "plenitudo potestatis," &c., had become so much a matter of convention that no great force could be attributed to them. He concludes, therefore, that the prince could not take away a man's lawful rights by the use of such phrases.<sup>1</sup>

<sup>1</sup> Id id, n 10 l "Praemitto pro indubitato, quod sententia diffinitiva, a domino iudice Camerae lata, vim habet rei iudicatae . . . quod igitur per sententiam diffinitivam procerum, Imperii Caesaris nomine decisum est, refricari alio processu non debet. . . .

4. Secundo praemitto, principem Romanum suo contractu ligari, sicuti privatam aliquem Deus enim qui leges mere positivas principi subiecit, eundem subjecti contractibus. . . .

6 Et quod princeps Romanus contractu eatenus obligatur, ut nec plenitudo potestatis, nec ulla urgens clausula eum eximat, tenet Philippus Decius . . . Idem Decius . . . qui dicit Principem licet lege positiva non obligetur, tamen dictamine rationis subici. . . .

His sic praemissis, aliqua ex actis mihi presentatis dubia colligere volui, quae videbantur magis necessaria ut dividerentur. Primo an princeps de plenitudine potestatis, et ex certa scientia, per sua mandata, rem iudicatam a domino auctore obtentam cassare et annullare potuerit. . . .

Breviter igitur agentes, duximus mandata huiusmodi titulo Caesaris emissa, quamvis ex plenitudine potestatis et ex certa scientia exierint, rem iudicatam predictam cassari non potuisse, nec esse cassatam, quod multipliciter probari potest.

7. Et primo quicquid dicant doctores in hoc punto, ego semper tenui et teneo quod princeps, nec ex pleni-

tudine potestatis, nec ex certa scientia, sed nec ullo alio modo, jus alteri quaesitum tollere, vel infirmare possit, nisi hoc ingens publicae utilitatis causa urgeret . . .

10 Promde eiusdem leges a doctoribus male in argumentum trahuntur, quasi principis Romani absoluta potestas ad iura privatorum violanda se extendat. Scio bene principis potestatem ad tutelam subditorum, ad iustitiam asserendam esse amplissimam caeterum ut injuria subjectis fiat, illic principis potestatem non agnosco, sed tyrannam . . .

11 Nec obstat quod ex doctoribus aliqui putant, causam justam in principe semper praesumi . . . Si in Caesaris mandatis absurda, non verisimilia, item impertinentia et quae prima fronte iniqua apparent, continentur, et princeps in mandatis et clausulis huiusmodi emittendi esset facilis, jam justa causa presumi nec deberet nec posset . . .

13 Accedat quod cum huiusmodi clausulae plenitudine potestatis et certae scientiae, hoc tempore velut ex styli consuetudine, in omnibus prope imperialibus literis, ut divus N. alio quodam loco fatetur, inseri et saepe numero impertinenter asseribi consueverint, non est tanta in eis vis ponenda . . .

15 Et ut finiam, si a iustitia justus dicitur, et principem Romanum iustum esse necesse est, consequitur ut in eo iustitiam residere dice-

This is important, but it is not all that Zasius has to say; so far he has argued on general grounds that the Emperor could not override the judgment of a Court of Law, or violate the clear rights of any subject, by invoking some supposed absolute authority. He goes on to contend that in this particular case the Emperor Maximilian was bound by a Constitution of his own. He describes the Diet held at Worms in 1495, and says that Maximilian promulgated a Constitution that he would not obstruct the proceedings or judgments of the Reichs Kammer-Gericht, nor evoke its cases to himself, nor annul, nor suspend its decisions, and that he had confirmed this Constitution on several later occasions. This Constitution had received the force of a contract by the Emperor's oath to observe it, and the Emperor is bound by his contract.<sup>1</sup>

He sums up, therefore, that the authority of the Roman prince does not extend to injustice; although he is free from merely positive law, he is subject to reason and the Divine Law, the right (jus) claimed by another which belonged to the Jus "Naturale" or "Gentium" could not be taken away by any words of the Emperor, such as "de plenitudine potestatis" or "ex certa scientia," except for some obvious public cause; the use of such phrases in the Imperial writs

mus . . . At cum iustitia unicuique tribut quod suum est, quomodo princeps alteri quod suum est auferet? Quomodo injuriae ab eo nascentur a quo iura processerunt?

16 Recte ergo concludo quod per clausulas supra dictas quantumcunque sinum effundant, alteri quod suum est, sine ratione, immo contra rationem, pro solo voluntatis et potentiae libito, auferri non possit."

<sup>1</sup> Id id id. "26. Tertia ratio sumitur a contractu seu constitutione Divi Caesaris N. Nam in facto mihi refertur, quod Caesarea majestas ante complures annos cum principibus, proceribus, legationibus et statibus sacrosancti imperii Romani dum conventus imperii Wormaciae haberentur, constitutionem et ordinationem fecerit, quod sua majestas statum et procur

sum iudicii Camerae imperii, in ejus processibus et sententiis non impedire, nec ad se advocare, irritare, suspendere, aut ulla via, sive appellationis, supplicationis aut restitutionis, ad sese trahere, aut rescindere velit, &c. Quam constitutionem seu ordinationem, dicitur Divus Caesar verbo majestatis seu dignitatis suae promississe vero existente quod eandem ordinationem Caesar in aliis sequentibus imperii consensibus saepe renovaverit, sicuti et novissime de anno, &c., 10, in civitate Augusta factitatum esse fertur, prout ex actis apparet. Cum igitur divus Caesar se dictam ordinationem servare promiserit, non est dubium quin in vim contractus transierit. Sed supra in secundo evidentiali evicimus, Caesarem suo contractu obligari et subici."

has therefore little significance. The Emperor, therefore, cannot annul the "res iudicata" in the case under discussion, and more especially because he was bound by his own contract made with the Empire. He concludes, therefore, that the Court should order the judgment given before in favour of the plaintiff to be carried out.<sup>1</sup>

We shall have occasion in later chapters to deal with some other important jurists of the sixteenth century, specially with Bodin, Peter Gregory of Toulouse, Barclay, and Althusius, but primarily as political writers, not jurists, it seems to us better to treat them from that point of view.

In this chapter we have endeavoured to put together some observations on the political theory of some important Civilians of the sixteenth century, mainly in France, and we think that we have done enough to make it clear that they represent a position different in some respects from that of the Civilians of the fourteenth and fifteenth centuries, and analogous rather to that of some of the most important Civilians of the thirteenth century, like Azo and Hugolinus.

<sup>1</sup> Id. id. id., 67: "Epilogando igitur, et velut sub summario recolligendo quod supra diffuse scripsimus: cum Principis Romani potestas ad iniustitiam extendi nec debeat nec possit, scilicet quod princeps etsi sit lege mere positiva solutus, rationi tamen et juri divino subjectus sit: nec alterius jus quaesitum, quod de jure naturali vel gentium prodidit, auferri per principem possit, ne de plenitudine quidem potestatis, vel certa scientia, nisi fortassis ex causa publicae utilitatis princeps moveretur, et de ea manifeste appareret: et constat quod dictae clausulae, plenitudinis et scientiae, passim sine delectu in principalibus litteris inculcari consuetae, non ita

multum operentur, id quod Divus N. ultro per litteras suas confossus est: et maxime predictae clausulae nullam prorsus habeant efficaciam si constet principi esse obreptum; hisque consequens sit quod Divus Caesar supra dictis mandatis ab eo obreptitiae extortis, rem iudicatam domini actoris tollere et cassare nec potuerit nec voluerit, attento praecipue contractu et ordinatione sua cum imperio facta. . . . Concludimus, partes domini iudicis et dominorum assessorum esse, ut sententiam et rem iudicatam praedictam, juxta petita domini actoris, esse exequendam pronunciant, et exequantur."

## PART IV.

### THE POLITICAL THEORY OF THE LATER SIXTEENTH CENTURY.

#### CHAPTER I.

##### THE SOURCE AND AUTHORITY OF LAW.

WE have so far been dealing with the history of political theory and ideas in the first part of the sixteenth century, for it appears to us that it is wise to distinguish in our treatment between the earlier and the later part of the century. How far indeed there are any important differences between the general character of the earlier and later conceptions we shall have to consider, but it is obvious that in the second half of the century there was a great deal more political writing. The fact is obvious, and some of the causes are obvious and apparent, for the last fifty years of the century were full of the clamour and noise of civil war and revolutionary movements. We may say at once that it seems clear to ourselves at least that these movements had no relation at all to what is called the "Renaissance," whatever that word may mean, and that the great revival of religion, the Reformation, or what is called the counter-reformation, was only, and only in part, the occasion and not the cause of these movements.

As von Ranke long ago pointed out, the great international conflicts of the sixteenth century were not caused by the religious movements, but only sometimes crossed and some-

times deflected by them; and the same thing is true of the political principles and theories. It is at first sight a curious thing to find a Scottish Protestant like George Buchanan expressing almost the same judgments in political theory as the Spanish Jesuit Mariana; but the fact is that the difference of religious belief, as such, had little or no relation to political conceptions.

All this, however, we shall have to consider; the fact is that, whatever the reason may have been, there was a great outburst of energetic political theory in the second part of the sixteenth century, and our business is to examine this, and to consider what were the relations of this to the traditional conceptions of the Middle Ages.

We thought it well to begin the preceding part of this volume by drawing attention to a work which seems to us to be in many ways very representative of the normal attitude of men in the sixteenth century to political authority—that is, de Seyssel's 'La Grant Monarchie de France,' a work written apparently with no specially controversial intention, and we pointed out that, to him, the Government of France was a monarchy indeed, but limited by the various laws and organisations of the country.

In 1583 there was published in England (but it had been written apparently in 1562) the work entitled 'De Republica Anglorum,' by Sir Thomas Smith, a man of large and varied experience of public office, an Ambassador, a Privy Councillor, and a Secretary of State.<sup>1</sup> This work also appears to have been written without any special controversial intention, and we think that a consideration of the main principles set out in this work may serve to indicate some of the normal conceptions of Englishmen about politics, and especially their conception of the place and authority of law.

After describing the six forms of good and bad governments in the terms of the Aristotelian tradition,<sup>2</sup> he goes on to deal in more detail with the contrast between the king and the

<sup>1</sup> Cf. J. W. Allen, 'Political Thought in the Sixteenth Century,' p. 263.

<sup>2</sup> T. Smith, 'De Republica Anglorum,' i. 3.

tyrant. The king he describes as one who by inheritance or by election has received the Crown with the consent of the people, and who governs it by its laws, to the benefit both of the country and of himself. The tyrant, on the other hand, is one who rules without the consent of the people, who makes and unmakes laws at his pleasure, without the advice of the citizens, and who puts the advantage of himself and his kindred before the common good.<sup>1</sup>

He goes on to say that this "tyrannical power" was given, as it was said, to the Roman emperor by a decree of the people, and some say that the same power belonged to the King of France and some of the Italian princes, that they possessed the power of making and unmaking laws, and of imposing taxes without the consent of the people; he adds that it was said that it was Louis XI. who first changed the administration of the French kingdom into this absolute and tyrannical power. There are, he says, some who maintain that this was not a form of tyranny but the proper form of monarchy. Smith, however, regards such an unlimited authority as one which might be valuable in time of war, but is in time of peace dangerous to the people.<sup>2</sup>

<sup>1</sup> Id. id., i. 7: "When one person beareth the rule, they define that to be the estate of a king, who by succession or election, commeth with the good will of the people to the government, and doth administer the common wealth by the lawes of the same and by equitie, and doth seeke the profit of the people as much as his owne.

A tyrant they name him, who by force commeth to the Monarchy against the will of the people, breaketh lawes already made at his pleasure, maketh other without the advise and consent of the people, and regardeth not the wealth of his communes but the advancement of him selfe, his faction, and kindred."

<sup>2</sup> Id. id., i. 7: "The Emperors claime this tyranicall power by pretence of that Rogation or plebiscitum, which Caius Caesar or Octavius ob-

tained, by which all the people of Rome did conferre their power and authority unto Caesar wholly . . . Some men doe judge the same of the Kinges of Fraunce, and certaine Princes of Italie and other places, because they make and abrogate lawes and edicts, lay on tributes and impositions of their own will, or by the private counsell and advise of their friends and favourites only, without the consent of the people.

The people I call that which the word 'populus' doth signifie, the whole bodie and the three estates of the commonwealth; and they blame Lewes the XI. for hindering the administration royall of Fraunce, from the lawfull and regulate reign to the absolute and tyranicall power and government. . . .

I. 8: Others do call that kinde of

This is a very emphatic and important statement, that in normal political society, and in its normal circumstances, it is the Law and not the prince which is supreme. This is the conception of Bracton and of Fortescue, and, as in Fortescue, the statement receives a greater emphasis by the reference to France, while Smith, like Fortescue, thinks of the French conditions as being recent developments.

It is interesting to compare the conceptions of Sir Thomas Smith with those expressed in the contemporary work of Francis Victoria, who was a Dominican and Professor at Salamanca. Victoria has a high conception of the nature and place of the king and his legislative authority, but he also sets out in very dogmatic terms his judgment that the king is bound by the Law. Some, he says, contend that the king is above the whole commonwealth, and that no one can be bound except by a superior; but it is clear that the king is bound. The laws of the king have the same authority as those which are made by the whole commonwealth, but laws made by the whole commonwealth are binding upon all men. It is open to the king to make laws or not, but it is not open to him to be bound or not. As in contracts, a man may or may not enter into a contract, but when it is made it binds him.<sup>1</sup>

administration which the Greekes do call *παμβασιλείαν*, not tyranny, but the absolute power of a king, which they would pretend that everie king hath, if he would use the same; the other they call *βασιλεία νομική*, or the royal power regulate by lawes. Of this I will not dispute at this time. But, as such absolute administration in time of warre, when all is in armes, and when lawes hold their peace because they cannot be heard, is most necessarie: so in time of peace, the same is very dangerous, as well to him that doth use it, and much more to the people upon whom it is used: whereof the cause is the frailtie of man's nature, which (as Plato saith) cannot abide or beare long that abso-

lute and uncontroled authoritie, without swelling into too much pride and insolence."

<sup>1</sup> Franciscus Victoria, 'Relectiones De Potestate Civili,' xxi.: "Queritur tamen, an leges civiles obligant legislatorem, et maxime reges. Videtur enim aliquibus quod non, cum sint supra totam rempublicam, et nullus possit obligari nisi a superiore: sed certius et probabilius est quod obligentur.

Quod probatur primo: quia huiusmodi legislator facit injuriam reipublicae, et reliquis civibus, si, cum ipse sit pars reipublicae, non habeat partem oneris, juxta personam tamen suam et qualitatem, et dignitatem. Sed ista obligatio est indirecta, et ideo

The principles of government which are set out by Sir Thomas Smith may be conveniently compared with those which had been laid down a few years earlier, that is, in 1556, by Bishop Ponet in his work entitled 'A Short Treatise of Politike Power.' Ponet certainly shows no signs of the influence of that theory of the Divine Right of Kings with which we have dealt in a previous chapter, but sets out with singular clearness the same constitutional traditions as Sir Thomas Smith. Like him, he repeats the Aristotelian description of the three good governments—the Monarchy, Aristocracy, and Democracy; but adds, "And where all together, that is, a king, the nobilitie, and the Commons, a mixte state, which men by long continuance have judged to be the best of all; . . . but yet every kynde of these states tended to one ende, that is, to the maintenance of justice, to the wealth and benefit of the hole multitude, and not of the superiour and governours alone" (Ponet, 'Short Treatise,' Part I. p. 7). Ponet, however, also deals with the subject of the relation of political authority to God, and in Part II. he asks the question whether kings, princes, and other governors have an absolute power and authority over their subjects. "Forasmuch as those that be the rulers in the world, and wolde be taken for Goddes (that is, the ministers and images of God here in earthe . . .) clayme and exercise an absolute power . . . or prerogative to doo what they lust, and none may gaynesaye them; to dispense with the laws as pleaseth them, and freely and without correction or offence doe contrary to the lawe of nature and other Goddes lawes, and the positive lawes and customes of their countreyes, or breake them: and use their subjectes as men doe their beastes, and as lords doe their villanes and bondemen, getting their goods from them by hooke and by aliter probatur. Nam eandem vim populari regimine plebiscita obligant ipsum populum: ergo similiter leges regiae obligant ipsum regem: et licet sit voluntarium regi condere legem, tamen non est in voluntate sua non obligari, aut obligari. Sicut in pactis. Libere enim quisque paciscitur, pactis tamen tenetur."

crooke, with 'sic volo sic jubeo,' and spending it to the destruction of their subjectes; the miserie of this tyme requirith to examyne whether they doe it rightfully or wrongfully" (Id. id., Part II. p. 17).

He answers the question first by pointing out that political authority was ordained by God Himself, to the end that justice should be maintained by men. "Before, ye have heard how for a long tyme, that is until after the general flood, there was no civile or politike power, and how it was first ordayned by God Himself, and for what purpose He ordayned it: that is (to comprehende all briefly) to mayntene justice: for every one, doing his deutie to God, and one to another, is but justice" (Id. id., Part. II. p. 18).

It is, however, his constitutional principles which are most fully and emphatically developed. He asks the question again, whether kings and princes have an absolute authority over their subjects, and answers confidently: "Ye have heard also, how States, Bodies politike, and Commonwealths, have authority to make lawes for the maintenance of the Policie, so that they be not contrary to Goddes lawe, and the lawes of Nature, which if ye note well the question before propounded, whether kings and princes have an absolute power, shall appear not doubtful, or if any wolde affirm it, that he shall not be able to maintain it" (Id. id., Part II. p. 18).

And this leads him to make the same distinction, with which we are familiar in Fortescue, between those States which are governed by laws made by the prince, and those in which the community has retained the legislative power in its own hands. There are two kinds of princes, "the one, who alone maye make positive laws, because the whole State and body of the country have geven and resigned to them their authoritie so to do. Which nevertheless is rather to be compted a Tiranne than a king. . . . And thother be suche unto whom the people have not geven such an authority, but keep it themselves; as we have before sayed concerning the mixte State" (Id. id., Part. II. p. 21).

Ponet recognised that the Roman Empire had the first character, but this Empire had long ceased to exist, and he

exclaims impatiently, "I beseech thee, what certayntie should there be in anything, when all should depend on one's will and affection?" (Id. id., Part II. p. 24).

He had already pointed out that it was just in order to prevent the oppression of the members by the head, that the various constitutional forms had been created in various states: Ephors in Sparta, the Tribunes in Rome, the Council or Diet in Germany; "in Fraunce and England, Parliamentes, wherein there mette and assembled of all sortes of people, and nothing could be done without the knowledge and consent of all" (Id. id., Part I. p. 10).

In a later section of the treatise Ponet considers the question whether it is lawful to depose a wicked ruler and to kill a tyrant, and his answer is very explicit. He cites the deposition of Chilperic by the Pope, the depositions of Edward II. and Richard II. in England, and the recent deposition of the King of Denmark, and he urges that "the reasones, argumentes and lawe that serve for the deposing and displacing of an evil governour, will doe as mucche for the prooffe that it is lawful to kill a tiranne" (Id. id., Part VI.).

With special reference to England, he says that it pertained to the authority of the High Constable, "not only to summone the king personally before the Parliament or other Courtes of Judgment (to answer and receive according to justice), but also on just occasion to commit him unto warde" (Id. id., Part VI.); and in more general terms, "Kings, princes and governours have their authoritie of the people, as all lawes, usages and policies declare and testifie . . . and, is any man so unreasonable to denie that the hole maie do as much as they have permitted one member to doo? or those that have appointed an office upon trust, have not authoritie upon juste occasion (as the abuse of it) to take awaie that they gave?" (Id. id., Part VI.).

The only limitation he makes is that no private person may kill the tyrant except by public authority, except in the case that the public authority is utterly negligent; but the prince, committing crimes against any of his people, such as

murder, theft, rape, &c., should be punished like any other criminal (Id. id. id.).

The theories of Ponet are, especially in this last part of his treatise, developed in terms far removed from Sir Thomas Smith's restrained and judicious manner, but the substance of his constitutional position is the same, and serves to indicate the importance in England of the political tradition of Bracton, Fortescue, and St Germans; and even some of Ponet's most drastic contentions were, after all, founded upon political traditions which were not unimportant.

So far we have been dealing with writings which are not related to the great political controversies of the latter part of the century. We must now turn to the literature which belongs to these. We turn to that great Humanist, George Buchanan, who vindicated the deposition of Mary, Queen of Scots. In his treatise, 'De Jure Regni apud Scotos,' published in 1578, he deals first with the origin and nature of Law, for, as he evidently thought, until this had been made clear it was not possible to discuss properly the place and authority of the ruler.

The treatise is in the form of a dialogue between Buchanan and a person he calls Maetellanus (presumably Maitland). God, he says, is the author of human society, and He implanted in man the Law of Nature, of which the sum is that man should love God and his neighbour as himself; it is this Divine Law which is the source of human society. This society must have an authority to maintain peace and harmony, and this authority is that of the king. If the qualities required for a king were fully and properly developed in one man, we should recognise him as king by Nature, not by election, and give him an unrestrained power; even if these qualities are not perfect, we shall still call the ruler king, but we should give him as companion and restraint the Law. "Metellanus" asks whether, then, Buchanan does not think that the prince should have a complete authority, and Buchanan answers that he should by no means have this, for he is not only a king but a man, and liable to err through ignorance

or sin, and therefore the wisest men have thought that the law should be added, to enlighten his ignorance, and to bring him back into the right way if he errs.<sup>1</sup>

Buchanan expresses this again in more general terms, and says that kings were created to maintain "aequitas," and if they had done this they would have retained an authority free and "legibus solutus"; but, as is natural in human things, the authority which was intended for the public good changed into a "proud lordship." Laws therefore were made by the people, and the kings were compelled to obey the law which the people had created. They had found, by much experience, that it was better to entrust their liberty to the law than to the king.<sup>2</sup>

The king is subject to the law, and Buchanan then discusses the question, who is the legislator? The people, he says, who have conferred authority upon the prince should have the power to impose a limit upon this authority. He explains that he did not mean that this power should be given to the whole mass of the people, but that, as "our"

<sup>1</sup> George Buchanan, 'De Jure Regni apud Scotos.'

(p. 8): "B. Haec igitur (prudencia), si summa et perfecta in quopiam esset, tum natura, non suffragiis regem esse diceremus; liberamque rerum omnium potestatem ei traderemus: sin talem non reperiamus, qui proxime ad illam excellentem naturae praestantiam accesserit, similitudinem quandam in eo veri regis amplexi, etiam regem appellabimus. . . . Et quoniam adversus animi affectiones, quae possunt et plerumque solent avertere a vero, ne satis firmus sit, timemus, legem ei, velut collegam, aut potius moderatricem libidinum, adjiciemus.

M. Non censet igitur rerum omnium arbitrium penes regem esse debere?

B. Minime. Nam eum, non solum regem, sed etiam hominem esse memini, multa per ignorantiam errantem, multa sponte peccantem, multa prope invitum; quippe animal ad omnem favoris

et odii auram facile mutabile. . . . Quamobrem legem ei adjungendam censuerunt homines prudentissimi, quae vel ignorantiam ostendat, vel aberrantem in viam reducat. Ex his opinor, intelligis, *ὡς ἐν τῷ πρῶτῳ*, quodnam ego veri regis officium esse reor."

<sup>2</sup> Id. id. (p. 8): "Illud igitur, quod initio diximus, tenere semper oportet, reges primum tuendae aequitati fuisse constitutos. Id illi si tenere potuissent, imperium, quale acceperant, tenere perpetuo potuissent, hoc est liberum et legibus solutum. Sed (ut humana sunt omnia) statu rerum in pejus prolabente, quod publicae utilitatis causa fuerat constitutum imperium, in superbam dominationem vertit. . . . Leges igitur, hac de causa, inventae sunt a populis, regesque coacti, non sua in judiciis licentia, sed, quod populus in se dedisset, jure uti. Multis enim edocti erant experimentis, melius libertatem legibus quam regibus credi."

custom is, men chosen from all the "orders" should enter into counsel with the king, and only after this *προβούλευμα* should the final judgment be given by the people.<sup>1</sup> Maitland objected that the people were rash and inconstant, and says that these advisers will be no better. Buchanan replies that he thinks differently. For the many not only know more, and are wiser than any one of them, but they are wiser and know more than any single person, even if he excel every one of them in prudence and intelligence; the multitude judges all questions better than any one man.<sup>2</sup>

Buchanan also maintains that the interpretation of the Law must not be left to the judgment of the king.<sup>3</sup>

We shall return to Buchanan later when we deal with the whole question of the position of the king, but in the meanwhile it is clear where he stands with regard to the source and the authority of the Law. He is, under his own terms, setting out the normal mediæval conceptions.

We must turn to the treatment of law in the great and complex mass of the political tracts of the period of the civil wars in France. The immediate occasion of these civil wars was, no doubt, the question of religion; but it is also evident that the religious conflict was the occasion rather than the cause of the development of a very emphatic constitutionalism.

<sup>1</sup> Id. id. (p. 13): "M. Quando igitur regem solvere legibus non licet, quis tandem est legislator, quem ei tanquam pedagogum dabimus? . . . B. Neminem ergo ei dominum impono, sed populo, qui ei imperium in se dedit, licere volo, ut ejus imperii modum ei prescribat: eoque jure, quod populus in se dederit, ut rex utatur, postulo. Neque has leges per vim, ut tu interpretaris imponi volo, sed communicato cum rege consilio, communiter statuendum arbitror, quod ad omnium salutem communiter faciat. . . . Ego nunquam existimavi universi populi judicio, eam rem permitti deberi; sed ut, prope ad consuetudinem nostram, ex omnibus ordinibus selecti ad

regem in concilium coirent. Deinde, ubi apud eos, *προβούλευμα* factum esset, id ad populi judicium deferetur."

<sup>2</sup> Id. id. (p. 13): "B. At ego longe aliud ac tu opinaris exspecto. . . . Primum, non omnino verum est, quod tu putas, nihil ad rem facere multitudinis advocacionem, quorum e numero nemo fortassis erit excellenti sapientia præditus. Non enim solum plus vident et sapiunt multi, quam unus quilibet eorum seorsum, sed etiam quam unus, qui quemvis eorum ingenio et prudentia præcedat. Nam multitudo fere melius quam singuli de rebus omnibus judicat."

<sup>3</sup> Id. id., p. 121.

It was between the years 1573 and 1579 that there appeared several tracts or pamphlets, the 'Remonstrance aux Seigneurs Gentilshommes et autres,' the 'Droit des Magistrats,' the 'Franco Gallia,' the 'Archon et Politie' (or 'la Politique'), and the 'Vindiciae contra tyrannos,' and others which are related to each other in subject-matter and in principles. The general principle, which they seek to assert, is well expressed in the 'Remonstrance.' This work is addressed, primarily, to the nobles and gentlemen of the Reformed Religion in France, but also to all those Frenchmen who sought the preservation of the kingdom, and it begins with the declaration that the name of Frenchman (Frances) was a proper description of men who desired to maintain an honourable liberty under the authority of their kings.<sup>1</sup>

It goes on a little later to denounce the flatterers and parasites who tell the king that if he were under the rule and order of the Law he would be nothing but a 'valet' of the people, and to lament the fact that the Courts of Parlement, which were formerly over the kings and resisted their absolute power, were now basely servile to the commands of those from whom they expected rewards.<sup>2</sup> The statement that the king was under and not over the Law, and that the Parliament was the organ of the supremacy of the Law, may seem somewhat extreme, but it should be remembered that it is practically what had been said in the early years of the sixteenth century by de Seyssel in the 'La Grant Monarchie de France.'<sup>3</sup>

The same principle is restated in the 'Droit des Magistrats.' It is the part of a detestable flatterer, and not of

<sup>1</sup> "Remonstrance aux Seigneurs, gentils hommes, et autres, faisans profession de la Religion reformee en France, et tous autres bons Français desirant la conservation de ce royaume." (In 'Mémoires de l'estat de France,' Ed. 1576, vol. iii. p. 64.)

<sup>2</sup> Id. id. (p. 73): "Voyons nostre roi, environné de tels flatteaus et parasites, qui pour lui gratifier, osent dire, que de reduire les Roys à la reigle

et ordre prescrit par les loix c'est autant que les faire valets du peuple. . . .

(p. 74): Les cours de parlement qui anciennement estoient pardessus les Rois, et s'opposoient avec grande integrité à leur puissances absolues, aujourd'hui se laschent servilement aux commandemens de tous ceux dont ils esperent prouffit."

<sup>3</sup> Cf. pp. 219-225.

a loyal subject, to tell the prince that sovereigns are not bound by the Laws. On the contrary, they are bound to govern by them, for they have sworn to maintain and to protect them.<sup>1</sup> In a later passage of the same work we find a good illustration of the circumstances under which the Huguenots thus appealed to the supremacy of the Law. The author admits that subjects have not the right to force their lord to change the order of the State in matters of religion, but must submit to persecution, if the laws command it, for their religion. It is, however, wholly different if by public edicts, lawfully issued and confirmed by public authority, they have been permitted to exercise their religion. In that case the prince is bound to obey them, or by the same authority to revoke them. Otherwise he is exercising a manifest tyranny, and it is lawful, under proper conditions, to resist.<sup>2</sup>

The same conceptions are restated and further developed in the treatise called 'La Politique, Dialogue de l'autorité des Princes, et de la liberté des peuples,' generally cited as 'Archon et Politie.' Tyranny, Politie says, in an hereditary kingdom, is when a legitimate prince is not content with what he has

<sup>1</sup> "Du Droit des Magistrats" (in 'Mémoires de l'estat de France,' Ed. 1576), vol. ii. p. 750: "Car, pour certain, c'est une parole tres fausse, et non poinet d'un loyal sujet à son Prince, mais d'un détestable flatteur, de dire que les souverains ne sont astraits à nulles loix. Car, au contraire, il n'y en a pas une, par laquelle il ne doyve et soit tenu de regler son gouvernement, puis qu'il a juré d'estre le mainteneur et protecteur de toutes."

<sup>2</sup> Id. id. (p. 788): "En tel cas, doncques, assavoir, si on veut forcer les consciences d'idolatrer, que ferons les sujets? Certainement, de vouloir contraindre leurs seigneur à changer l'estat public il n'y auroit ordre: et pourtant il faut que tous endurent patiemment la persecution, ce neant-

moins servans à Dieu, ou bien qu'ils se retirent d'ailleurs.

Mais, les Edits, estans legitiment dressez et emologuez par autorité publique, par lesquels sera permis d'exercer la vraye Religion: je dis que le prince est d'autant plus tenu de les observer, que nuls autre, que l'estat de la Religion est de plus grande consequence que nul autre: ou bien par mesme ordre, et telle connaissance de cause qu'il appartient, les rovoquer. Sinon, je dis, qu'il use de manifeste tyrannie, à laquelle il est permis de s'opposer, avec les distinctions ci-dessus mentionnees; voire par raison d'autant meilleure, que nos ames et nos consciences nous doyvent estre plus cheres que tous les biens de ce monde."

lawfully acquired, but violates the ancient laws and customs of his country.<sup>1</sup>

Archon protests that this is to put the king under the law, but there is a sentence in the Pandects which says that he is not under the law, though "par honnesteté" he should carry it out. For it is he who makes the law, and he does not submit to it except so far as he pleases, otherwise his power is not sovereign but bridled and restrained.<sup>2</sup>

To this contention Politie replies by considering the real source of laws. He cites the definitions of law by Papinian, Demosthenes, and Chrysippus ('Dig.,' i. 3. 1, and 2), and the opinion of Cicero that the deliberation and consent of the commonwealth are implied in the laws, and that the prince must therefore be subject to them.<sup>3</sup>

When Archon contends that the Civil Law is composed of the ordinances of princes, and that in all its parts it is subject to their power, Politie replies that in general terms the Law includes all ordinances which are just; these have been formed by the people in their customs. If they are not suitable, the prince can adjust them to the needs of particular times and persons, but must not usurp the power to do this without the consent of those who are most concerned.<sup>4</sup> Archon objects that this is very far indeed from the opinion of many kings, who consider that their subjects, their lives, and property are completely under their power. Politie agrees that they are under their jurisdiction, but only by process of

<sup>1</sup> "Archon et Politie," in ('Mémoires de l'estat de France,' Ed. 1576), vol. iii. p. 102: "Politie. Mais celle (tyrannie) qui survient en un royaume qui est tenu pour hereditaire, est, quand un prince, legitiment pourvenu, ne se contente pas de ce qu'il trouve de droit equitable luy estre acquis, ains pour dominer plus seigneurialement viole les anciennes loix et coutumes de ses pays."

<sup>2</sup> Id. id. (p. 110): "Archon. Tout ceuy tend à mettre le Roi sous la loi, touteffois il y a un axiome aux Pandectes, qui dit qu'il n'est sous la

loi, combien que par honnesteté, il s'y doit ranger. Par ainsi, puis que c'est lui qui la donne, il ne s'y submet pas s'il ne luy plait; ou autrement on ne doit pas nommer sa puissance, souveraine, mais bridee et restraite."

<sup>3</sup> Id. (p. 110): "Politie. Ciceron . . . dit que l'entretènement et conseil de la république estans situez dans les loix, faut necessairement que le prince y soit sujet: d'autant que son autorite soit de là, et se maintient par la conservation de justice qui est descrite en icelle."

<sup>4</sup> Id. (p. 117).

law,<sup>1</sup> and he adds a reminiscence of the Feudal Law, that the Lord owes the same faith and love to his vassal as the vassal to him, and loses his lordship for the same causes and crimes as the vassal loses his fief.<sup>2</sup>

In another place the author of this treatise, like the author of the 'Droit des Magistrats,' appeals to the supremacy of the Law as justifying the resistance of the Huguenots to persecution, when the exercise of their religion had been granted them by formal laws and edicts; and he extends this principle to the general legal rights of the people, for, as he says, there are few kingdoms or principalities where the chief rulers are not restrained by many laws to which they have sworn, when they were accepted, and which they have promised to the sovereign power to obey—that is, to the estates which are formed by the whole body of the people.<sup>3</sup> (We shall have much more to say later of the conception of the sovereign power which is represented in these words.)

The best known of these Huguenot works is the 'Vindiciae Contra Tyrannos,' published in 1579. There has been much discussion of its authorship, but we are not here concerned with this but with the judgment of the author on the origin of law and its relation to the prince. His judgment is very clearly expressed. Men would have been satisfied to have received law from one good and just man, but the judgment

<sup>1</sup> Id. (p. 120): "Archon. Quoy, les roys n'ont-ils pas puissance sur la mort et sur la vie de leurs sujets ?

"Politie. Oui bien, mais avec connoissance de cause et informations valables, et non autrement "

<sup>2</sup> Id. id.

<sup>3</sup> Id. (p. 128). "Politie. Et si par loix et edicts solennels, le peuple a obtenu de ses princes l'exercice de la vraye Religion, et puis apres par mauvais conseil, le prince se veut desdire et oster tyranniquement ce qu'il avoit sanctement accordé, les sujets ont double raison de ne luy obeyr en cest endroit, et de conserver leur vraye liberte, par les moyeus légitimes sus declarez, dont nous parlerons encore

apres.

Cela se doit estendre aussi aux autres droits du peuple, lesquels ne peuvent estre abolis sans manifeste confusion et aneantissement des Estats, et à plus forte raison quand les loix reiglent des longtemps la grandeur des princes et magistrats souverains. comme il se trouvera bien peu de royaumes et principautez, dont les principaux gouverneurs ne soyent lez et retenus en limites par beaucoup de loix, queux mesmes jurent à leur reception, et promettent à la souveraineté (c'est à dire aux Estats composez du corps de tout le peuple) de garder inviolablement."

of kings was too uncertain and variable. Laws were therefore made by the wise men and the magistrates. The principal function of the king is to keep and maintain the law. It is better to obey the law than the king; the law is the soul of the king, while the king is the instrument of the law. The law represents the combined reason and wisdom of the many, for the many see and understand more than the one. It has thus come about that while in the earliest times kings reigned absolutely and their will was law, this now only continues among barbarians, while the more polite and civilised people are bound by laws. We do not accept the saying of Caracalla that the emperor makes laws but does not receive them; rather in all well-ordered kingdoms the king receives the law from the people, and does not obtain the kingdom until he has promised to give every man his right (jus) according to the laws of the country. He can only amend or add to the laws when this has been approved by the people, or the chief men of the people, formally or informally, called together.<sup>1</sup>

<sup>1</sup> 'Vindiciae Contra Tyrannos' (Ed. Edinburgh, 1579), Q. III. (p. 114): "Certe cum populus jus aequabile quereret, id si ab uno justo et bono viro consequeretur, eo contentus erat. At qua vix id fieri poterat, et raro contingebat; saepe vero, dum arbitria Regum, legum instar essent, eveniebat, ut alia alius loquerentur. Leges tum quae cum omnibus una eademque voce loquuntur, a prudentioribus et ceteris magistratibus proxime inventae fuerunt. Regibus vero id praecipua munus commendatur, ut legum custodes, muniti et conservatores essent. Interdum etiam, quia lex in omnem eventum prospicere non poterat, quaedam ex eadem aequitate naturali supplerent. . . . (p. 115) Quis vero ambigat, quin legi, quam regi parere, id est homini, utilis et honestius sit? Lex est boni regis anima per hanc movetur, sentit, vivit. Rex legis organum est, et quasi corpus, per quod illa suas vires

exerit, sua munera obit, sua sensa eloquitur. Anima vero, quam corpori parere justius est.

Lex est multorum prudentum in unum collecta ratio et sapientia. Plures autem oculatiores et perspicaciores sunt quam unus. . . . (p. 117) Inde vero pactum est, inquit idem, ut quum primis temporibus reges absolute imperarent, quorum arbitrium lex erat, paulo post inter politicores et civiliores passim legitimi fierent, id est, legibus servandis custodiendisque obligarentur, absoluta vero illa potestas, penes barbarorum reges tantum maneret. . . . (p. 119) Non denique quod ipse Caracalla, Imperatores leges dare, non accipere. Quin potius in omnibus regnis bene constitutis, regem a populo leges, quas tuncatut quasque intueatur, accipere. . . . (p. 121) Neque enim Imperator, Rex Franciae, Reges Hispaniae, Angliae, Poloniae, Hungariae et omnes legitimi principes . . . prius in

The author of the 'Vindiciae' adds some important observations on the actual or traditional practice of some of the more important countries of Western Europe. In the empire the emperor "rogat in concilio," and, if they approve, the princes, barons, and representatives of the cities sign the decree, and only then is the law valid; the emperor swears to observe the laws which have been thus made, and not to make other laws except with the common consent. In France, where the authority of the king is commonly thought to be higher than elsewhere, laws were formerly made in the Assembly of the three Orders, and all commands of the king were void, unless the Senate (*i.e.*, the Parlement) ratified them. In England, Spain, and Hungary the custom is the same as it always was. He concludes that if it is true that the laws are greater than the king, if kings must obey the law as the slave does his master, who would not prefer to obey the law rather than the king? Who would obey the king if he violated the law, or would refuse to defend the law which had been violated? <sup>1</sup>

These writers are agreed in maintaining that the king was under the law and not over it, for his authority was derived from the law, and the law proceeds ultimately from

principatum recipiuntur, quam . . . se secundum leges patrias jus cuique suum reddituros promiserint. . . . (p. 122) In summa, principes legitimi, leges a populo accipiunt, diadema vero honoris, sceptrum potestatis, insigne, ut et acceptas tueatur et ex earum praecipua tutela gloriam sibi quaerant. . . . Si quid abrogandum, surrogandum, derogandum, putabit, populum, populivae optimates, aut ordinarios, aut extra ordine convocatos, admonebit legemque rogabit. At sane non prius jubebit, quam ab isdem rite expensa comprobataque fuerit."

<sup>1</sup> Id (p. 123). "Imperator rogat primum in Comitibus. Si probatur, Principes, Barones, civitatum legati subsignent ac demum lex rata esse solet. Jurat vero se leges (p. 124) latas serva-

turum, et novas non nisi de communi consensu, ulla laturum. . . In Francia, ubi tamen amplissima vulgo censetur regum auctoritas, ferebantur olim leges in trium ordinum conventu, regiove consilio ambulatorio. Ex quo vero Parlamentum statarum est, frustra sunt omnia regum edicta, nisi senatus illa comprobet, cum tamen senatus seu Parlamentum adest, si lex dosit, legis vim passim obtineant. Et in Anglico, Hispanico, Hungarico, et caeteris idem juris est, ut et in antiquis quoque fuit. . . . Quod si vero, ut ostendimus, leges regibus potiores sunt, si reges legibus, ut servi dominis, parere tenentur, quis non legi, quam regi parere malit? quis regi legem violanti obsequatur. Quis violatae auxilium ferre recuset?"

the community. They admit that, in the earliest stages of human life, men may have submitted to the authority of rulers, uncontrolled by law; but they found long ago that it was impossible to submit to the arbitrary and capricious rule of one man, and this only now survives among barbarous and uncivilised people; and, as we have just seen, the author of the 'Vindiciae' asserts this principle of the supremacy of the Law of the community as representing the normal conception of the greater European countries.

It may be suggested that these writers were Protestants, though, as we have observed, there is nothing in these contentions which represents an appeal to distinctively Protestant opinions. We turn, therefore, to a group of writers who belonged to the Order of the Jesuits.

We begin with Molina, an important Spanish Jesuit, whose work, 'De Justitia et Jure,' was published in 1592. He maintains that the light of nature teaches that it is in the power of the commonwealth to entrust authority over itself to one or more persons, as it judges best. This authority is greater or less according to its judgment, and if the ruler endeavours to exercise more authority than is given to him, he acts tyrannically.<sup>1</sup>

Having thus set out clearly the source and limits of the authority of the ruler, Molina approaches the subject with which we are here immediately concerned—that is, the conditions of the legislative authority.

One of the functions of the king is to make laws, but the question must be considered whether the people gave him the power to make laws only with their approval, or without

<sup>1</sup> Molina, 'De Justitia et Jure,' vol. 1, Tract. II., Disp. 23: "Lumen ipsum naturae docet, in republicae arbitrio esse positum, committere alicui, vel aliquibus, regimen et potestatem supra se ipsum, prout voluerit, expedireque judicaverit. . . . (3) Cum autem potestas a republica in rectores derivetur, pro ipsius republicae arbi-

tratu, poterit sane in unaquaque republicae specie, derivari amplior, et minus ampla, neque est maior in republicae rectoribus quam a republica fuerit illis concessa. Quin potius, si rectores eam extendant, maioremque sibi usurpant, in tyrannidem per in justitiam, quam ea in parte committunt, degenerant."

it; and Molina thinks that if it is the custom that laws have no force unless they are approved by the people, it must be assumed that the commonwealth only granted to the king the legislative power, subject to this condition; for it is more probable that the king increased his power, the subjects not venturing to resist, than that they had diminished the power which they had given him. If, as Castro suggested, the custom was that the commonwealth should obey all the laws of the prince which were not actually unjust, it would have to be concluded that it had granted all its authority to the king, but it could scarcely be believed that any commonwealth had done this.<sup>1</sup> Molina's principle seems to be clear, that it is almost incredible that the commonwealth should have completely surrendered all that authority, which originally belonged to it, to the ruler.

It must not indeed be supposed that Molina was an enemy of monarchy; indeed, he clearly holds that it is the best form of government, for it tends more to internal peace than any other form,<sup>2</sup> and he maintains that the authority of the monarch is greater, not merely than that of individuals in the commonwealth, but than that of the whole commonwealth—that is, within the limits of the authority which has been granted to him.<sup>3</sup> But again, it must be observed that this authority is limited, and if the king attempts to take more

<sup>1</sup> Id. id. id., Tract II., Disp. 23, 6: "Cum potestate regia ad rempublicam moderandam coniuncta est potestas ferendi leges, quibus gubernetur. . . . Si namque usus habeat, ut tales leges vim non habeant, nisi a populo approbentur, censendum est rempublicam non maiorem potestatem regibus concessisse, quam condendi eas leges dependentes ab approbatione populi. Verisimile esto, si populi ad id adverterunt, non maiorem potestatem regibus concessisse; imo esto non adverterent, haec videtur fuisse reipublicae intentio, sibi regem constituentis, quando aliud non expressit, semperque est potius presumendum regem per potentiam

amplasse suam potestatem, subditis non audentibus resistere, quam subditos restrinxisse illi potestatem semel concessam. Quare fas erit reipublicae non acceptare leges, quae ipsam notabiliter gravent, quando ad commune bonum necessariae omnino non sunt. Quod si princeps ad id eam cogit, iniustitiam committet. Si vero, inquit Castro, usus receptus habeat, ut legibus principum non iniquis omnino pareatur, censendum est, rempublicam omnem omnino suam potestatem regi concessisse, quod vix de aliqua credi potest."

<sup>2</sup> Id. id. id., Tract II., Disp. 23, 14.

<sup>3</sup> Id. id. id., Tract II., Disp. 23, 8.

than had been granted to him, the commonwealth is entitled to resist him as a tyrant.<sup>1</sup>

Molina very emphatically maintains that the royal power, or any other supreme civil power which the commonwealth may create, is derived immediately from the commonwealth, and only "mediately" from God. For it is by the natural light and the authority which God has granted to the commonwealth that it should choose that form of civil power which it thinks most expedient.<sup>2</sup> He adds that there always remain two powers: one in the king, the other in the commonwealth. The latter is indeed restrained in action, so long as the former continues, but restrained only as far as the commonwealth has granted power to the king. If this power is abolished, the commonwealth resumes its whole power; and even while it continues, the commonwealth can resist the king if he behaves unjustly or exceeds the power granted to him.<sup>3</sup>

It is clear that Molina does not acknowledge any absolute "Divine Right," or indeed any form of absolutism. His language is grave and measured, but his conclusions are

<sup>1</sup> Id. id. id., Tract II., Disp. 23, 10: "Si tamen rex potestatem sibi non concessam, vellet assumere, posset quidem respublica ei tanquam tyranno ea in parte, resistere, perinde ac cuius alteri extraneo, qui reipublicae injuriam vellet inferre. Ratio vera est, quia neque rex ea in parte est reipublicae superior, neque respublica est illo inferior: sed manet, ut se habeat, antequam illi unam concederet potestatem."

<sup>2</sup> Id. id. id., Tract II., Disp. 26, 6: "Nihilominus negandum non est manere duas potestates, unam in Rege, alteram vero quasi habitalem in republica, impeditam ab actu, interim dum illa alia potestas perdurat, et tantum praecise impeditam, quantum respublica independenter in posterum a se Regi illi eam concessit."

<sup>3</sup> Id. id. id., Tract II., Disp. 23, 4: "Dicendum est tamen cum Durando. . . . Tum regiam tum quamvis aliam supremam civilem potestatem, quam pro arbitrato respublica sibi elegerit, esse immediate a republica, et mediate a Deo, per lumen naturale et potestatem quam reipublicae concessit, ut sibi deligoret civilem potestatem prout vellet, expedireque judicaret. Quare descendit a jure naturali, est tamen simpliciter de jure humano reipublicae,

clear. He does not indeed refer directly to the constitutional traditions of Spain, as we shall presently see, that Mariana does, but it is at least probable that he has them in mind. He believes in monarchy, but a monarchy of limited powers—limited by the conditions imposed by the commonwealth; and that these limitations can be enforced by the action of the commonwealth. The terms in which he states his arguments and conclusions are, no doubt, much more restrained than those of George Buchanan, or of the French Huguenot pamphlets, but the principles are the same. The community is the immediate source of all political and legislative authority, and the king has only a limited authority which is determined by the conditions under which the community has granted it.

From Molina we turn to Suarez, one of the most famous Jesuit writers of that time. The most important of his works for our purpose, 'De Legibus ac De Legislatore,' was indeed only published in 1613, but it appears to us that it may reasonably be put alongside the work of Molina.

The authority to make law, he says, from its very nature, resides not in one man but in the community, for all men are by nature born free, and no man therefore has by nature jurisdiction or lordship over other men, and he repudiates the conception that political authority was bestowed immediately by God.<sup>1</sup> He is careful indeed to point out that it is not any chance body of men without order or definite purpose which has this authority, but a community united by the common consent and special intention to form a political and mystical body and to pursue one political end.<sup>2</sup>

<sup>1</sup> Suarez, 'De Legibus ac De Legislatore,' iii. 2, 3: "Dicendum ergo est, hanc potestatem (condendi legis), ex sola rei natura in nullo singulari homine existere, sed in hominum collectione" (he cites St Thomas Aquinas, i. 2. 90, 3, and i. 2. 97, 3) . . . "Ratio prioris partis evidens est, quae in principio est tacta, quia ex natura rei omnes homines nascuntur liberi, et ideo nullus habet jurisdictionem politicam in alium, sicut nec dominium. . . . Potestas ergo domin-

andi seu regendi politice homines, nulli homini in particulari data est immediate a Deo . . . (4). Hinc facile concluditur altera pars assertionis, nimirum, potestatem hanc ex solius juris natura esse in hominum communitate."

<sup>2</sup> Id. id., iii. 2, 4: "Alio ergo modo consideranda est hominum multitudo, quatenus speciali voluntate seu communi consensu in unum corpus politicum congregantur uno societatis vinculo, et ut mutuo se juvent in ordine

This community has the power to transfer its jurisdiction to one person, but the nature and form of the authority thus created is created by human will. Suarez seems to prefer monarchy, but he seems to think that this may often be combined with other forms of political authority; and he adds a little later that while a monarchy may be strictly hereditary, it also has first been derived from the community, and is subject to those conditions under which it was first created.<sup>1</sup>

He had already said that political authority was not given by God to any one man directly; he corrects this by saying that God had only done this in rare cases, but that generally when the Scriptures say that God gave the kingdom to some definite person, this only meant that the Divine Providence had so ordered or permitted, and this did not exclude human action.<sup>2</sup>

ad unum finem politicum, quomodo efficiunt unum corpus mysticum, quod moraliter dici potest per se unum; illudque consequentes indigent uno capite."

<sup>1</sup> Id. id., iii. 3, 8: "Communitas autem humana potest suum jurisdictionem transferre in unam personam, vel aliam communitatem . . ."

iii. 4, 1: "Ex dictis in superiore capite possumus aliqua inferre. . . . Primum est, quod licet haec potestas absoluta sit de jure naturae, determinatio ejus ad certum modum potestatis et regiminis est ex arbitrio humano. Declaratur; nam triplex est politica gubernatio simplex, Monarchia . . . Aristocratia . . . Democratia. Ex quibus confici possunt varii modi gubernationis mixte, seu composite ex illis simplicibus per participationem vel omnium, vel duorum ex illis. . . ."

iii. 4, 3: "Qua propter necesse est ut primus (Rex) habuerit potestatem supremam immediate a republica; successores autem illius ab illa . b ant mediate et radicaliter. Et quia res transit ad successorem cum suo onere, conditiones illae cum quibus

primus rex a republica regnum accepit, ad successores transeunt, ita ut cum eisdem oneribus regnum habeant."

<sup>2</sup> Id. id., iii. 4, 2: "Ratio ex dictis est, quia haec potestas ex natura rei est immediate in communitate; ergo ut iste incipiat esse in aliqua persona, tanquam in supremo principe, necesse est, ut ex consensu communitatis illi tribuatur. Deinde explicatur a sufficiente partium enumeratione: nam haec potestas potest intelligi data regibus immediate ab ipso Deo, sed hoc, licet aliquando sit factum ut in Saul, et Davide, tamen illud fuit extraordinarium, et supernaturalis quoad modum; iuxta communem autem, et ordinariam providentiam non ita fit, quia homines iuxta naturae ordinem non revelationibus, sed naturali ratione reguntur in his quae civilia sunt. . . ."

Neque obstat quod scriptura interdum dicit, Deum dare regna. . . . In his enim solum significatur, haec omnia non fieri sine speciali providentia Dei, vel ordinantis vel permittentis. . . . Hoc tamen non excludit quin per homines fiant."

The first important aspect of Suarez' political theory is then clear. The community is the ultimate source of all political authority, and therefore of Law, and the conception that the authority of the prince was directly derived from God, while it may have been true in some exceptional cases, was not normally true; normally his authority was derived from the community, and was subject to such conditions as the community may have imposed.

We turn to another question when we consider the principles of Suarez with regard to the legislative power of the prince when he has been created by the community. It is, however, not at all easy to arrive at a quite clear conception of his position, and we give our opinion subject to correction. In one place he says that the power of making laws belongs to all supreme kings, but this is subject to the conditions under which the power was given him by the community. We must therefore ask whether the consent of the people is required when the king makes law. Suarez seems to us to answer that in principle, and normally this power belongs to the king alone, but custom may require the consent of the people.<sup>1</sup>

In another place he says that in some countries the absolute power of making laws, as it was said, was not given to the king, but that he could only do this with the consent of the kingdom, expressed in public assemblies, and this was said to be the case in Aragon. But in other countries the power of the prince was not thus limited; and this was the case "in perfecta monarchia," for in this the people transferred

<sup>1</sup> Id. id., iii. 9, 2: "Primo ergo constat ex dictis, hanc potestatem (condendi leges) esse in omnibus regibus supremis. . . ."

4. Atque hinc sequitur secundo, etiam in principe supremo esse hanc potestatem eo modo et sub ea conditione, sub qua data est, et translata per communitatem. Ratio est clara ex superioribus dictis, quia hæc est veluti conventio quaedam inter communitatem et principem, et ideo

potestas recepta non excedit modum donationis vel conventionis. . . . Et juxta hoc etiam definiendum est, an requiritur consensus populi ad ferendas hujusmodi leges, quando scilicet, populus per reges gubernatur. Nam per se loquendo, et jure communi, potestas legislativa proprie est in solo supremo principe. . . . Juxta consuetudinem autem, requiri potest consensus populi, saltem quoad acceptionem, de quo infra videbimus."

its power absolutely. Suarez seems to mean that this was the ordinary character of monarchical authority.<sup>1</sup>

Finally, we must ask what Suarez held about the relation of the prince to the law when made, but again it is difficult to feel confident that we understand his meaning. He is aware that some think that the prince or legislator, whether Ecclesiastical or Civil, is bound to obey his own laws; and he seems to mean that it is the will of God that the legislator should be bound by his own laws, but he refuses to accept the interpretation of the phrase that the prince is "legibus solutus" as applying only to some "leges caducarii" (as Cujas maintained<sup>2</sup>), and explains it as meaning that the prince is exempt from the "vis legum coactiva."<sup>3</sup>

It must, however, be observed that just as St Thomas must be understood as meaning that while there was no ordinary process of law against the king, the community has the right and power to restrain him or, if need be, to depose him if he becomes a tyrant, so Suarez had said in an earlier passage of this treatise that the king cannot be de-

<sup>1</sup> Id. id., iii. 19, 6: "In primo notanter dixi, 'in supremo legislatore,' quia inferior magistratus potest habere facultatem limitatam, sub tali vel tali limitatione. Imo in aliquibus provinciis, licet per reges gubernentur, dicitur non esse translata in regem absoluta potestas ferendi leges, sed solum consensu regni in comitiis ejus, ut dicitur esse in regno Aragoniae. . . . Nam ibi supremus legislator non est solus rex, sed rex cum regno."

Ubi autem tale pactum non intercessit inter regem et populum, nec de illo potest usu aut scripta lege constare, non est data principi potestas cum illa limitatione, sed absolute constituitur caput reipublicae. Et ita servatur in perfecta monarchia, in quo suprema potestas est in imperatore vel rege, vel quocunque alio, qui in temporalibus non habet superiorem: nam in illum transtulit populus suam potestatem absolute et simpliciter, ut ex ordinario modo regimen constat, nec aliud veri-

similiter affirmari potest, nisi ubi ex consuetudine constiterit."

<sup>2</sup> Cf. pp. 315-318.

<sup>3</sup> Id. id., iii. 35, 4: "Nihilominus communis et constans sententia est, teneri principem, seu legislatorem, tam civilem quam ecclesiasticum, ad servandas suas leges, quando materia communis et ejusdem rationis est in ipso et in aliis. . . ."

11. Deus autem non solum ut auctor gratiae, sed etiam ut auctor naturae vult, legislatorem humanum non habere potestatem ad ferendas leges, nisi cum universali obligatione illarum, qua totam rempublicam ut constantem ex corpore et capite comprehendat. . . ."

27. He repudiates the conception that the phrase 'legibus solutus' only applied to 'leges caducarii.' . . ."

28. "Vera ergo est communis interpretatio, quae leges has intellegit de exceptione principis a vi legum coactiva."

prived of his power unless he becomes a tyrant, but that, if this happened, the kingdom could justly make war upon him.<sup>1</sup>

Suarez clearly agrees with Molina in repudiating the theory of the "Divine Right" and recognising that the community is the immediate source of all political and legislative authority, and has the power to determine the form of this, according to its own judgment. But he is not so clear about the question whether the community normally retains a share in legislation. As we understand him, he inclines to the view that normally this belongs to the prince.

We turn to a more determined constitutional thinker in Mariana, also a member of the Society of Jesuits, whose work, 'De Rege,' was brought out in 1598. He conceived of men as having originally been without any fixed order or society, but as having been driven into society by their own weakness, by their deplorable confusions, and by the crimes of men against each other.<sup>2</sup>

The first government of the community was that of a king, appointed for his good qualities, and at first there were no laws.<sup>3</sup> These were finally made because men doubted the justice and impartiality of the prince, while the law always speaks with the same voice. Mariana adds an important description of law: it is reason drawn from the mind of God, and free from all changeableness, which enjoins things honourable and useful, and forbids what is contrary to these.<sup>4</sup>

It must not be thought that Mariana was an enemy of monarchy; on the contrary, he carefully discusses the advantages and disadvantages of monarchy, and concludes that it is the best form of government, provided that it is of a constitutional kind.<sup>5</sup> We shall deal with the meaning of this in

<sup>1</sup> Id. id., iii. 4, 6: "Et eadem ratione non potest rex illa potestate privari, quia verum illius dominium acquisivit, nisi fortasse in tyrannidem declinet, ob quam possit regnum justum bellum contra illum agere."

<sup>2</sup> Mariana, 'De Rege,' i. 1.

<sup>3</sup> Id. id., i. 2 (p. 18).

<sup>4</sup> Id. id., i. 2 (p. 18): "Scribendi leges duplex causa extitit. Principis

aequitate in suspicionem vocata, quod unus vir non praestabat ut pari studio omnes complecteretur, ira odioque vacaret: leges sunt promulgatae, quae cum omnibus semper atque una voce loquerentur. Est enim lex ratio omni perturbatione vacua, a mente divina hausta, honesta et salutaria prescribens, prohibensque contraria."

<sup>5</sup> Id. id., i. 2 (pp. 19-27).

a later chapter. In the meanwhile we are concerned with the relation of the king to the Law, and on this point Mariana says very emphatically that when the monarchy is controlled by Law, nothing can be better; when it is free from that control, nothing can be worse.<sup>1</sup>

The authority of the king is derived from the people; it is they who determine the laws of succession, and they have given him an authority restrained by the laws.<sup>2</sup> And, in another place, Mariana says the prince must show an example of obedience to the laws: no one may disobey them, least of all the king. He may indeed, if circumstances require it, propose new laws, may interpret and mitigate old ones, and may provide for cases not determined by the law. To overturn laws at his pleasure, to show no reverence for the customs and ordinances of the country, is the peculiar vice of the tyrant; legitimate princes may not behave as though they had obtained an authority free from the laws.<sup>3</sup> The prince should remember that most laws have not been made by the prince, but by the will of the whole commonwealth, whose authority in commanding and forbidding

<sup>1</sup> Id. id. id. (p. 23): "Ad haec, constricto legibus principatu nihil est melius; soluto, nulla postis gravior; et est argumentum oppressae per tyrannidem reipublicae, cum contemptis legibus ad rectoris nutum vertitur."

<sup>2</sup> Id. id., i. 3 (p. 36): "Praesertim cum leges successionis mutare non ejus (regis) sed reipublicae est, quae imperium dedit iis legibus constrictum."

Id. id., i. 4 (p. 38): Leges, quibus constricta est successio, mutare nemini licet, sine populi voluntate, a quo pendent jura regnandi.

Id. id., i. 5 (p. 44): Rex quam a subditis accepit potestatem, singulari modestia exercit. . . . Sic fit, ut subditis non tanquam servis dominetur, quod faciunt tyranni sed tanquam liberis praesit: et qui a populo potestatem accepit."

<sup>3</sup> Id. id., i. 9 (p. 79): "Postremo sit principi persuasum, leges sacro-

sanctas, quibus publica salus stat, tum demum fore stabiles si suo ipse eas exemplo sanciat. Ita ergo vitam instituat, ut neque quemquam alium plus legibus valere patiat, eum enim fas jusque legibus contineatur in omni vitae parte, qui leges violat, ab aequitate discedat, et a probitate, necesse est; quod nulli conceditur. Regi multo minus. . . . Licet quidem quibusdam rebus exigentibus, novas leges rogare, interpretari veteres atque emolire, supplere si quis eventus lege comprehensus non est. Pro suo tamen arbitratu leges invertere, ad suam libidinem et commodum referre quae agit omnia, nulla moris patrii institutorumve reverentia, proprium tyrannorum esse vitium credit: neque in legitimos principes cadere ita se gerere, ut legibus solutam potestatem obtinere et exercere videantur."

is greater than that of the prince, and as the prince must obey the laws, he may not change these without the consent and decision of the whole body ("universitas").<sup>1</sup>

In another chapter, which deals more generally with the relation of the authority of the king to that of the commonwealth, he not only contends that the authority of the king is limited by the laws, but refers to the constitution of Aragon as providing a special officer, the "justitia," who had been created for the purpose of restraining the king by the authority of the law, and even as sanctioning the principle that the chief men could meet together without the knowledge of the king for the purpose of maintaining the laws and defending their liberty.<sup>2</sup>

We turn to a greater, more massive, more restrained political thinker in Richard Hooker. It may indeed be doubted whether any political thinker of the sixteenth century is equal to him in breadth and justice of thought. It is true that his work was concerned primarily with law as related to the Church and Church order, but, like Gratian and Aquinas, he recognised that it was impossible to form an adequate conception of Church law without taking into account the principles of law in general. It is true also, as we shall point out in later chapters, that he said much which is of great import-

<sup>1</sup> Id. id., i. 9 (p. 81): "Praesertim, quum plures leges non a principe latae sint, sed universae reipublicae voluntate constitutae: cujus major auctoritas jubendi vetandique est majus imperium quam principis; si vora sunt, quae superiore disputatione posuimus. Atque iis legibus non modo obedire princeps debet, sed neque eas mutare licebit, nisi *universitatis consensu* certaque sententia."

<sup>2</sup> Id. id., i. 8 (p. 69): "Me tamen auctore, quando regia potestas, si legitima est, a civibus ortum habet, iis concedentibus primi reges in quaque republica in rerum fastigio collocati sunt; eam legibus et sanctionibus circumscribent ne sese nimio efferat, luxuriet in

subditorum perniciem, degeneretque in tyrannidem. . . . Idem recentiori memoria in Hispania Aragonii praesiterunt, studio tuendae libertatis acres et incitati, neque ignari a parvis initiis multum imminui jura libertatis. Medium itaque magistratum crearunt, tribunitiae potestatis ad instar (vulgo hoc tempore Aragoniae Justitia dicitur) qui legibus, auctoritate et populi studiis armatus regiam potestatem certis hactenus finibus inclusam tenuit; ac proceribus praesertim orat datum, ut fraudi non esset, si quando inter se consilio communicato per causam tuendarum legum, defendendae libertatis, inscio rege, conventus haberent."

ance with regard to the political order in general, but his conception of this is dominated by his conception of law.

Hooker was a great and independent thinker, but his independence consisted not in ignoring the past and the great political writers of the past, but in gathering together and putting into clear and intelligibly ordered form the principles and implications of the past, not as one who was bound and restricted by its authority, but as one who thought out again for himself the great principles and traditions of mediæval society. For it is indeed perhaps the most interesting aspect of his work that he repeated, restated, and enlarged the normal conceptions of the political civilisation of mediæval Europe and handed them down to the modern world.

It is, we think, clear that it is from St Thomas Aquinas that, directly or indirectly, Hooker took the analysis of the general nature of law, and he therefore accepted the division of law in the most general sense into the Eternal Law of God, the Natural Law, the Divine Law, and Human Law.

His definition of the Eternal Law is: "This law therefore we may name Eternal, being that order which God, before all ages, has set down with Himself to do all things by."<sup>1</sup> This law is not a mere command of God's will, but the expression of His wisdom. "They err therefore who think of the will of God to do this or that, there is no reason besides His will . . . That law Eternal which God Himself hath made to Himself . . . that law in the admirable frame whereof shineth with most perfect beauty, the countenance of that wisdom which hath testified concerning herself. 'The Lord possessed me in the beginning of His way, even before His works of old I was set up.'"<sup>2</sup>

This is clearly in substance the same judgment as that of St Thomas Aquinas: "Et secundum hoc, lex eterna nihil aliud est, quam ratio divinae sapientiae, secundum quod est directiva omnium actuum, et motionum."<sup>3</sup>

<sup>1</sup> R. Hooker, 'Of the Laws of Ecclesiastical Polity,' i. 2, 6. <sup>3</sup> St Thomas Aquinas, *Summa Theologica*, i. 2, 93, 1.

<sup>2</sup> Id. id., i. 2, 5.

When Hooker turns to the Natural Law he follows the same tradition by saying that while all things were governed by the Eternal Law, the relation to this of the rational creature differed from that of the unrational.<sup>1</sup> By the law of nature, therefore, Hooker means the law which man's reason recognises as binding upon him; and it might properly be called the law of reason.<sup>2</sup> This is practically the same as Aquinas' "*lex naturalis nihil aliud est quam participatio legis aeternae in rationali creatura.*"<sup>3</sup>

We go on to the question of human law. This brings us to the conception of the nature and purpose of the Commonwealth or State. Hooker's conception of the origin of political society is expressed in a well-known passage: "The laws which have been hitherto mentioned (*i.e.*, the Natural Laws) do bind men absolutely even as they are men, although they have never any settled fellowship, nor any solemn agreement among themselves what to do or not to do. But, forasmuch as we are not by ourselves supplied with competent store of things needful for such a life as our nature doth desire, a life fit for the dignity of man, therefore, to supply the defects and imperfections which are in us, living single and solely by ourselves, we are naturally inclined to seek communion and fellowship with others. This was the cause of men's uniting themselves in politic societies, which societies could not be without government, nor government without a distinct kind of law from that which hath been already declared.

Two foundations there are which bear up public societies: the one, a mutual inclination, whereby all men desire sociable life and fellowship; the other, an order expressly or secretly agreed upon, touching the manner of this union in living together. The latter is that which we call the law of a common weal, the very soul of a politic body, the parts whereof are by law animated, held together, and set on work in such actions as the common good requireth.

Laws politic, ordained for external order and regiment amongst men, are never framed as they should be, unless

<sup>1</sup> Hooker, *id.*, i. 3, 1.

<sup>3</sup> Aquinas, '*Sum. Theol.*,' i. 2, 91, 2.

<sup>2</sup> *Id. id.*, i. 8, 4, 8 and 9.

presuming the will of man to be inwardly obstinate, rebellious, and averse from all obedience unto the sacred laws of his nature; in a word, unless presuming man to be, in regard of his depraved mind, little better than a wild beast, they do accordingly provide, notwithstanding, so to form his outward actions, that they be no hinderance unto the common good for which societies are instituted: unless they do this, they are not perfect."<sup>1</sup>

If we add to this passage another which follows a little later, we have a fairly complete view of Hooker's conception of the origin and purpose of political society. "We all make complaint of the iniquity of our times; not unjustly, for the days are evil. But compare them with those times when there were no civil societies, with those times when there was as yet no manner of public regiment established, with those times wherein there were not above eight persons righteous living upon the face of the earth; and we have surely good cause to think that God hath blessed us exceedingly and hath made us behold most happy days."<sup>2</sup>

Hooker's statement has a little of Cicero's conception of the naturally sociable disposition of men, something also of Aristotle, that the State is necessary for the good life, but also very clearly it represents the Stoic and Patristic tradition of the coercive State as the necessary remedy for the Fall; and it is interesting to observe that Hooker thinks of the period between the Fall and the Flood as illustrating the lamentable disorder which followed from the absence of this.

The character of human nature in Hooker's view requires government and law. How then were these created? He sets aside very emphatically the notion which was later developed in a somewhat absurd work of Sir Robert Filmer, that political authority was related to that of the father of a family. "To fathers within their private families nature has given a supreme power. . . . Howbeit over a whole grand multitude having no such dependence upon any one . . . impossible it is that any should have complete lawful power, but by consent of men, or immediate appointment of God;

<sup>1</sup> *Id. id.*, i. 10, 1.

<sup>2</sup> *Id. id.*, i. 10, 3.

because, not having the natural superiority of fathers, this power must needs be either usurped and thus unlawful; or if lawful, then either granted or consented unto by those over whom they exercise the same, or else given extraordinarily from God, unto whom all the world is subject."<sup>1</sup> And, equally emphatically, Hooker derives all political authority from an agreement among men to set up some "government public," to which they granted authority to rule and govern.

"To take away all such mutual grievances, injuries, and wrongs, there was no way but only by growing unto composition and agreement amongst themselves, by ordaining some kind of government public, and by yielding themselves subject thereunto; that, unto whom they granted authority to govern, by them the peace, tranquillity, and happy estate of the rest might be procured. . . . Without which consent there were no reason that one man should take upon him to be lord or judge over another; because, although there be, according to the opinion of some very great and judicious men, a kind of natural right in the noble, wise, and virtuous, to govern those which are of servile disposition; nevertheless, for manifestation of this, their right, and men's more peaceable contentment on both sides, the assent of those who are governed seemeth necessary."<sup>1</sup>

Hooker here represents the normal conception of the Middle Ages, which had been only reinforced by the revived study of the Roman Law, that all political authority is in some sense derived from the community. He seems here also to suggest that behind this grant of authority by the community there lies some agreement or "contract" between men to form a political community, the conception with which we are familiar in Hobbes and Locke.

Hooker thinks that at first the government was left in the hands of one man, but men soon began to feel the inconvenience of this. "They saw that to live by one man's will becomes the cause of all men's misery. This constrained them to come unto laws, wherein all men might see their duties

<sup>1</sup> *Id. id.*, i. 10, 4.

beforehand, and know the penalties of transgressing them."<sup>1</sup> We have already seen this opinion as expressed by Buchanan and Mariana.<sup>2</sup>

This leads Hooker to consider more fully the nature of law and its coercive authority, for "laws do not only teach what is good, but they enjoin it; they have in them a certain constraining force."<sup>3</sup> He makes a distinction, a very important distinction, between those whose function it is to "devise" laws and those who give them coercive authority. It is the wise men by whom laws should be "devised." Men of ordinary capacities are not competent to do this, but it is not the wisdom of these "devisors" which gives these laws coercive authority. This can only be given by the whole community, for, "by the natural law, to which God has made all men subject, the power to make laws belongs to the whole community, and therefore it is mere tyranny for any prince to take this upon himself, unless he has received this authority from the community, or immediately and personally from God Himself." "Laws they are not, therefore, which public approbation hath not made so."<sup>4</sup>

He is indeed careful to add that the community may give its consent, not directly but by representation, "as in Parliaments, Councils, and the like Assemblies, although we be not personally ourselves present, notwithstanding our assent is by reason of other agents there in our behalf"; and he extends this even to the position of an absolute king, on the assumption that he had received his authority from the community; and this authority continues so long as it is not revoked by the same authority as that which gave it. "Laws, therefore, human, of what kind soever, are available by consent."<sup>5</sup>

Hooker's words do not suggest a direct reference to any one political writer, but it seems to us reasonable to say that his very careful but dogmatic judgment is founded, first, upon the doctrine of the Roman Law that the legislative

<sup>1</sup> *Id. id.*, i. 10, 5.

<sup>2</sup> Cf. pp. 332, 348.

<sup>3</sup> *Id. id.*, i. 10, 7.

<sup>4</sup> *Id. id.*, i. 10, 7 and 8.

<sup>5</sup> *Id. id.*, i. 10, 8.

power is derived from the "populus" (*i.e.*, the community); while his conception of the place of the wise men in "devising" Law may be related to the terms of the famous definition of Papinian.<sup>1</sup> In the second place, it is probably related to the saying of St Thomas Aquinas that the power of making laws belongs either to the whole multitude or to him who "gerit vicem" and has the care of the whole multitude.<sup>2</sup>

Hooker's statement is drastic and far-reaching; if his principle that it is the community, and only the community, which can give the Law its coercive power, is derived from the Roman Law, he is explicitly and dogmatically generalising this principle as applying naturally to all political societies, as in the famous phrase we have just quoted: "Laws they are not, which public approbation hath not made so."

In a later Book of the 'Ecclesiastical Polity' he again deals with this subject, and in one place he cites the well-known words of Bracton: "Attribuat lex legi, quod lex attribuat ei, potestatem et dominium," and "Rex non debet esse sub homine, sed sub Deo et lege."<sup>3</sup> Hooker admits, indeed, that there are different kinds of kingdoms, some by conquest, some by "agreement and composition"; and in this last case the authority depends upon the nature of the agreement; but he concludes: "Happier that people where Law is their king in the greatest things, than that whose king is himself the Law," and "Most divinely therefore Archytas maketh unto public felicity these four steps . . . ὁ μὲν βασιλεὺς νόμιμος, ὁ δὲ ἄρχων ἀκόλουθος, ὁ δὲ ἀρχόμενος ἐλεύθερος, ἂ δ' ὅλα κοινωνία εὐδαίμων."<sup>4</sup>

These are Hooker's general principles, but it is important to observe that he applies them specially to England. In a passage which follows immediately upon that just cited, he says: "In which respect, I cannot choose but commend highly their wisdom, by whom the foundations of this commonwealth have been laid; wherein, though no manner person

<sup>1</sup> 'Digest,' i. iii. 1: "Lex est commune preceptum, virorum prudentum consultum, delictorum quae sponte vel ignorantia contrahuntur coercitio, communis reipublicae spon-

sio."  
<sup>2</sup> St Thomas Aquinas, 'Summa Theologica,' i. 2. 90, 3.

<sup>3</sup> Hooker, viii. 2, 3.

<sup>4</sup> Id. id., viii. 2, 12.

or cause be un-subject to the king's power, yet so is the power of the king over all and in all, limited, that unto all its proceedings the Law itself is a rule. The axioms of our royal government are these: 'Lex facit regem,' the king's grant of any favour made contrary to the law is void; 'Rex nihil potest, nisi quod jure potest.' Our kings, therefore, when they take possession of the room they are called unto, have it painted out before their eyes, even by the very solemnities and rites of their inauguration, to what affairs by the said law their supreme authority and power reacheth."<sup>1</sup>

And again, in a passage which is primarily related to Church Law in England, but has a general application: "The Parliament of England, together with the Convocation annexed thereunto, is that whereupon the very essence of all government within this kingdom doth depend; it is even the body of the whole realm, it consisteth of the king and of all that within the land are subject to him, for they are all there present, either in person, or by such as they voluntarily have derived their power unto. . . . Touching the supremacy of power, which our Kings have in the case of making laws, it resteth principally in the strength of a negative voice; which, not to give them, were to deny them that without which they were but Kings by mere title, and not in exercise of dominion. . . . Which laws, being made amongst us, are not by any of us so taken or interpreted, as if they did receive their force from the power which the Prince doth communicate unto the Parliament, or to any other Court under him, but from power which the whole body of the Realm, being naturally possessed with, hath by free and deliberate assent derived unto him that ruleth over them, so far forth as hath been declared."<sup>2</sup>

Finally, we must consider the treatment of the source and authority of Law as it is presented by that most important jurist of Lower Germany, Johannes Althusius, whose work, first published in 1603, was for a long time almost forgotten, but was recovered by Professor von Gierke, and which again

<sup>1</sup> Id. id., viii. 2, 13.

<sup>2</sup> Id. id., viii. 6, 11.

serves to bring out very clearly the fact that the conception of an ordered or constitutional liberty was not asserted merely by controversial writers like George Buchanan or Mariana, or the pamphleteers of the Huguenot Party and the Catholic League in France, but by a writer learned, judicious, and measured in his thought and in his language, who also, like Hooker, sets out, not only philosophical principles, but also what he conceived to be the actual constitutional system of a great country. For, as Hooker finds an embodiment of the principles of a free and ordered society in the English constitution, Althusius finds the same in the Government of the German Empire and of the States and cities which formed it.<sup>1</sup>

In order to understand Althusius' conception of Law, we must observe his conception of the nature and origin of political society. He accepts the Aristotelian principle that a solitary man is not capable of a self-sufficing life, but also traces the origin of political society to an express or tacit contract between those who are to live together. He accepts the Ciceronian definition of the people as being a society of men living under a common system of law, and working for the common good. The object of the government of society is the common good, and its final end is a life in which men quietly and rightly serve God.<sup>2</sup>

Althusius accepts the Aristotelian conception of the necessity of society, but he also clearly asserts that the formation of political society rested upon the contract or agreement between those who formed it. The statement of this conception is interesting and important in relation to the political

<sup>1</sup> Our citations from Althusius are taken from the text of the edition of his work published in 1614, and recently republished by Professor C. I. Friedrich of Harvard University, and we desire to express our obligations to him for having made this edition easily accessible to students. We follow his numeration of paragraphs in each book. The scope of our work does not allow us to deal with the

political theory of Althusius as completely as we should desire, but that is the less necessary because Professor von Gierke has handled the subject in a masterly and comprehensive fashion in his work, 'Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien.'

<sup>2</sup> Althusius, 'Politica methodico digesta,' i. 3, 4, 7, 19, 30.

theory of the seventeenth and eighteenth centuries, but it belongs rather to those times than to the history of mediæval political theory, and we refer our readers to the discussion of this subject by von Gierke in his 'Althusius,' especially Part II., Chap. ii., 2.

We turn to what is here properly our subject when we consider Althusius' conception of law and its place in the State. The administration and government of the commonwealth, he says, is nothing else than the execution of the Law, and he illustrates this principle by citing Aristotle as saying that there is no commonwealth where the Laws are not supreme; and again, the supremacy of the Law is the supremacy of God, while that of a man is the supremacy of a beast. Cicero calls the magistrate the servant and interpreter of the law; we are all servants of the law that we may be free; Plato says that the Law is queen, and should control not only the other citizens but kings themselves.<sup>1</sup> In another place Althusius says that the magistrates are bound by the civil laws of the kingdom and of the "Majestas." The magistrate may be called a living law for he does nothing except by the Law's commands.<sup>2</sup>

It is important to observe that from these principles Althusius draws the conclusion that it was right to say that the magistrate is not "legibus generalibus solutus"; he is not free from either the natural law or the civil laws. Althusius was, of course, aware that many thought differently, but he is only willing to concede that the prince was in such

<sup>1</sup> Id. id., xxi. 16: "Sic itaque administratio et gubernatio reipublicae, nihil aliud est quam legis executio. . . ."

17. Aristotle Lib. Pol. iv. 4: Respublica nulla est ubi leges non tenent imperium! Cicero Pro Cluentio. Legum ministri magistratus, legum interpretes, iudices, legum donique ideo omnes servi sumus ut liberi esse possimus. . . . Arist. Lib. iii. Polit. dicit, eum qui legem praeesse jubet, deum praeesse jubet, qui hominem, bestiam. . . . Plato: Epist. vii. "Lex regina esse

debet, ac dominari, non aliis tantum civibus sed ipsis etiam regibus."

<sup>2</sup> Id. id., xxiv. 48: "In administratione hac sua, magistratus obligatus est legibus Decalogi . . . atque civilibus regni et Majestatis legibus . . . ad quas tanquam ad cynosuram, normam et regulam, omnia negotia administrationis suae referre debet. . . . Unde magistratus lex viva, exsecutor, custos et minister legis dicitur; qui nihil nisi lege jubente velit, faciat, vel omitat, ut recte dicit Vasquez, c. 14 d. Lib. 1."

a sense exempt from the penal laws, that he was not to be punished unless he violated the fundamental laws, and his own agreement with the people; and Althusius refers to Cujas as holding this opinion.<sup>1</sup> The prince cannot do anything against the law of the commonwealth, for the law is of the nature of a contract by which the prince is bound, and the authority which the people have conferred upon the prince is by its own nature limited to that which is for the good of the citizens.<sup>2</sup> We shall return to the subject of the contract between the prince and people in the next chapter; in the meanwhile it is worth while to observe that Althusius conceives of the Law as having this character. We have seen this conception in writers of the fourteenth and fifteenth centuries.<sup>3</sup> Althusius admits, indeed, that the prince is "legibus solutus," but only in the sense that the Law may in some cases give him the right of "dispensation."<sup>4</sup>

In order, however, to appreciate fully Althusius' principle of the supremacy of law over the prince, we must consider his conception of the "Majestas" or sovereign power in the commonwealth. It is probable that he takes this term from Bodin,<sup>5</sup> and he agrees with him in interpreting it as meaning that authority which recognises no other as equal or superior to itself.<sup>6</sup> So far he does not differ from Bodin, but, having

<sup>1</sup> Id. id., xxiv. 49: "Qua de causa recte dicitur, magistratum non esse legibus generalibus solutum . . . non tantum naturalibus sed etiam civilibus. . . Dissentiunt plurime, per l. 31. De Legibus ('Dig.' i. 3, 31) quæ tamen non obstat, si eam intelligis de legibus poenariis, quibus magistratus est solutus, non respectu obligationis, sed executionis. Nam si deliquerit (at non contra leges fundamentales et conventionem propriam cum populo initam), non punitur. Cujas. Lib. 36, Obs. c. 35."

<sup>2</sup> Id. id., xxiv. 50 (The prince cannot do anything against the law of the State): "Tum quia lex est contractus, l. 1, ibi. communis reipublice sponsio, de legibus (i.e., 'Dig.'

i. 3, 1) . . . ex quo contractu princeps obligatur. . . Ergo concessio imperii a populo principi facta etiam verbis generalissimis, ex materia, subjecta, limitata, et restricta est ad meram utilitatem civium."

<sup>3</sup> Cf. Part I. c. 2; Part II. c. 2.

<sup>4</sup> Id. id., xxiv. 50: "Princeps etiam solutus est legibus in casibus, in quibus jus ipsi dispensationem concedit."

<sup>5</sup> For the discussion of Bodin's position, cf. Chap. III.

<sup>6</sup> Id. id., ix. 15: "Ideo potestas imperandi universalis dicitur, quæ aliam superiorem vel parem aut sociam non agnoscit. Atque hoc supremum jurisdictionis universalis jus, est forma et substantialis essentia

said this, he begins to develop a sharply marked contradiction of Bodin's theory. No single persons, he says, can receive this complete authority ("plenitudo potestatis"); they must recognise that it lies in the consent and agreement of the associated body.<sup>1</sup>

We must turn to a long passage in which Althusius draws out his own conception in opposition to that of Bodin. Bodin, he says, contradicted the principle that the supreme power belonged to the whole community. He begins by pointing out that even Bodin admits that the supreme power is subject to the Natural and Divine law; and he urges that a really absolute power would be a mere tyranny. He refuses dogmatically to attribute the supreme power to the king or the "optimates," and maintains that it can belong only to the whole body of the "universal" association—that is, to the commonwealth or kingdom, for it is from this body that, after God, all legitimate authority comes. The king, princes, or "optimates" recognise that the commonwealth by which they are set up or removed is superior to them, and that they are bound by a contract to obey it. The king, therefore, has no supreme and perpetual power which is free from the law, and does not hold the "Jura Majestatis," but only, and that by the grant of the society, the administration of these. The monarch therefore must render an account of his administration and may be deposed.<sup>2</sup>

Majestatis, seu majoris illius status quem diximus, quo sublato, vel adempto Majestas illa concidit."

<sup>1</sup> Id. id., ix. 19: "Administratores potestatis hujus plures esse possunt, ita ut singuli, impositæ solitudinis, non in plenitudinem potestatis adsumantur. . . Et singuli hi non habent penes se supremam potestatem, sed omnes simul unam agnoscent in consociatorum corporum consensu et concordia."

<sup>2</sup> Id. id., ix. 20: "Huic sententiæ nostræ, qua regno seu universali consociatione summa potestas tribuitur, contradicit Bodinus Lib. 1, c. 5, 'De Repub.' Ibi enim ille jus Majestatis,

quod regni jus appellavimus, dicit esse summam et perpetuam potestatem, nec lege, neque tempore definitam, quam majestatis affectionem late explicat Bonnet. Lib. 1, 'De Majestate Politica.' Ego in eo, quo Bodinus hæc sensu accipit, nullum horum requisitum genuinum in jure hoc Majestatis agnosco. Non enim est summa potestas, non perpetua, neque lege soluta.

21. Summa non est, quia legem divinam naturalemque agnoscat omnis humana potestas, arg. Rom. c. 13. Minister Dei est tibi in bonum. Si minister Dei est, ergo contra Domini sui mandantis præscripta nihil facere

We have dealt with this aspect of political theory in the sixteenth century at some length, for, as it seems to us, the conception of the nature and authority of law was still, as in the Middle Ages, the most important element of political

potest. . . Absoluta vero summa, et legibus omnibus soluta potestas tyrannis dicitur. . . Remota, aut (Augustinus) justitia, quid sunt regna nisi magna latrocinia. In quo quidem, nec Bodinus a nobis dissentit. . . Quaestio igitur nobis est, de civili lege et jure, an huic etiam imperium et fasces subijciat, qui summam dicitur habere potestatem. Negat Bodinus, et plurimi alii cum eodem. Erit igitur ex horum sententia summa potestas quae civili lege non est definita; quod ego non dixerim. Nam lege civili potestatem solvere, est etiam aliquatenus naturalis et divinae legis vinculis eandem exuere. Nulla enim est, nec esse potest, lex civilis quae non aliquid naturalis et divinae aequitatis immutabile habeat admixtum. . . Quod si igitur lex civilis generalis a principe lata est aequa et justa, quis eundem ab obligatione istius legis solvere potest? . . . Quatenus vero lex illa civilis in quibusdam discedit a naturali aequitate. . . fatebor, eum qui summam habet potestatem, nec superiorem nisi Deum et naturalem equitatem et justitiam agnoscit, illa lege non teneri. . .

22. Atque in hoc sensu accepta lege, soluta summa potestate, concedo in sententiam Bodini. . . Cujacii. . . et aliorum jurisconsultorum. Sed hanc summam potentiam nequaquam possum tribuere regi aut optimatibus, quam sententiam tamen Bodinus acerrime propugnare conatur, sed jure, illa tantum corpori universalis consociationis nimirum reipublicae vel regno, tanquam propria est adscribenda. Ab hoc corpore, post Deum, profuit omnis potestas legitima, in hos, quos reges, optimatesve vocamus, l. 1. De Const. Prin. ('Dig.,' i. 4, 1). . .

Corpus igitur hoc consociatum, rex, princeps, optimatesve superius agnoscunt, a quo iidem constituntur, remouentur, deficiuntur, et exauctorantur, sicuti latius probaverim in dictis locis.

Quis vero summam dicit potestatem, quae superiorem agnoscit aliam? Quod et Bodinus probat. Quis lege solvet eum, in quam ipsemet consentit, et ad cujus obedientiam se per modum contractus obligavit. . .

23. Quantacunque enim est potestas, quae alii conceditur, semper tamen minus est ejus potestate, qui eandem concessit, et in ea praeeminentia et superioritas concedentis reservata intelligitur. . . Unde efficitur, regem summam, perpetuam, legeque solutam potestatem non habere, et per consequens nec illius jura Majestatis esse propria, quamvis eorundem administrationem et exercitium ex corporis consociati concessione habeat. . .

24. Quod si igitur etiam secundum Bodinum duplex est Majestas, regni et regis, quaero, utra ex hisce, sit altera major et superior? Negari non potest, illam majorem esse, quae alteram constituit, quaeque immortalis est in subjecto suo, populo scilicet, et alteram minorem, quae in unius persona consistit et cum eadem moritur. . . Unde fit, ut etiam summus monarcha rationem reddere teneatur administrationis suae. . . atque etiam exauctorari possit. . . Sed infert Bodinus: Inanis est potentia regis. . . si comitiorum ac populi jussis tenetur. . . Atque hoc modo incipiet esse aristocratia vel democratia, quae ante erat monarchia. Negamus hoc, et Bodini opiniones allatas in c. 39, ubi de monarchae potestate dicitur, refutamus.'

theory, and it will, we hope, be clear that the mediæval principle of the supremacy of law was still asserted and understood.

We shall in a later chapter inquire how far there had also developed in the sixteenth century a conception that the king was absolute and above law.

## CHAPTER II.

## THE PRINCE UNDER THE LAW.

WE have, in the last chapter, considered some aspects of the conceptions of the source and authority of law, that is, of those who were clear that the law was greater than the ruler. We shall, in a later chapter, discuss the position of those who took the opposite view. But, before we do this, we must deal with the conception of the source and nature of the authority of the prince.

We think it will be found to make for greater clearness if we treat this subject under the following heads: (1) The Source of the Authority of the Ruler; (2) The Conception of a Sovereign Power behind the Ruler; (3) The Relation of the Ruler to the Courts of Law; (4) The Theory of the Contract between the Ruler and the People; (5) The Right to resist, and even to depose the Ruler; (6) The Magistrates or Ephors.

(1) The Source of the Authority of the Ruler.—There is no need to discuss this at any great length, for while there were a few, with whom we shall deal in a later chapter, who trace the authority of the king to the direct appointment of God, these were quite exceptional. The great mass of opinion was clear, that is, that while God was the ultimate source of all authority, the immediate source was the Community itself, and it should be remembered that this judgment was confirmed by the whole tradition of the Roman Law and by the mediæval and contemporary Civilians.

This was the current opinion, apart entirely from the political controversies of the time. We may begin by observing

again the words of the Spanish Dominican, Soto, the Confessor of Charles V. and Professor at Salamanca. The public civil authority is the ordinance of God, the commonwealth creates the prince, but it was God who taught men to do this.<sup>1</sup> We find the same principle stated by his Dominican contemporary and colleague in Salamanca, Franciscus Victoria, in the terms of a careful distinction between "Potestas" and "Autoritas." The Royal "Potestas" is not derived from the commonwealth, but from God Himself, for though he is established by the commonwealth, for the commonwealth creates the king, it transfers not "Potestas" but its own "Autoritas" to him.<sup>2</sup>

The same judgment is expressed by such a careful and experienced politician as Sir Thomas Smith. In a passage already cited, he contrasts the king and the tyrant, not only with reference to their relation to the law, but also to the source of his authority. The king is one who has attained the royal power by hereditary succession or by election, with the consent of the people, while the tyrant is one who has obtained power by force, and without the consent of the people.<sup>3</sup>

We have cited these opinions, not as being in themselves very important, but merely as illustrations of what we think was the normal opinion, apart from the controversies of the later part of the century. When we pass to those who wrote under these later conditions, we naturally find all this much more sharply asserted. George Buchanan, for instance, in his work, 'De Jure Regni apud Scotos,' which is in the form

<sup>1</sup> Soto, 'De Justitia et Jure,' iv. 4, 1 (p. 309): "Ecce quemadmodum publica civilis potestas ordinatio Dei est; non quod respublica non creaverit principes, sed quod id fecerit divinitus erudita."

<sup>2</sup> Franciscus Victoria, 'Relationes de Potestate Civili,' viii.: "Videtur ergo quod regia potestas sit non a republica, sed ab ipso Deo, ut Catholici doctores sentiunt. Quamvis enim a republica constituatur (creat namque

respublica regem), non potestatem, sed propriam auctoritatem in regem transfert."

<sup>3</sup> T. Smith, 'De Republica Anglorum,' I. 7: "Rerum summam ad unum aliquem delatam potestatem, regiam esse perhibent, qui vel natalium splendore, vel suffragiorum prerogativa, per consentientem populi voluntatem, eam adeptus. . . Tyrannum appellant, qui per vim absque consensu populi nectus principatum."

of a dialogue between himself and "Metellanus" (Maitland), in asserting the subordination of the King of Scotland to the laws, maintains that though the kings of Scotland received the throne by hereditary succession, they were created by the laws and the will of the people just as much as those kings who were elected.<sup>1</sup>

The Huguenot writers of the period between 1573 and 1580 set out this conception in different ways. Hotman does this, with reference primarily to history, in his work 'Franco Gallia,' originally published in Latin in 1573.<sup>2</sup> We are not here concerned with the historical value of his contentions about the nature of the Merovingian and Carolingian monarchies, but only with the conclusions which he drew from his study of history. He contended that the supreme authority in the time of these monarchies belonged to the general assembly of the whole people, which he relates to the States General of later times,<sup>3</sup> and that it was this assembly which elected and deposed kings.<sup>4</sup> He gives a number of examples of the authority of the States General, including a statement that it was the States General which decided between the claims to the French crown of Edward III. and Philip of Valois.<sup>5</sup> In one place he says roundly that the "Concile des États" (the States General) had the power to elect and to depose kings, and to entrust the administration of the kingdom during a minority to such a person as it thought best.<sup>6</sup>

The treatise entitled 'La Politique, Dialogue d'Archon et de Politie,' published in 1576,<sup>7</sup> has a very high conception of monarchy, and speaks of the Prince as the Image and Vicar of God; but if he has this character, he must also represent the goodness and justice of God.<sup>8</sup> Hereditary succession or

<sup>1</sup> George Buchanan, 'De Jure Regni' (p. 26): "B. Equibus omnibus facile intelligi potest, qualem a majoribus acceperunt potestatem: non aliam videlicet, quam qui suffragiis electi in leges jurant. . . Illud autem, opinor, vides qui nascuntur nobis reges, eos et legibus et populi suffragio creari, non minus quam quos ab initio diximus

electos."

<sup>2</sup> Cf. Allen, *op. cit.* (p. 309).

<sup>3</sup> Hotman, 'Franco Gallia,' x. (page 647).

<sup>4</sup> *Id. id.*, xi. (p. 661).

<sup>5</sup> *Id. id.*, xvii. (p. 701).

<sup>6</sup> *Id. id.*, xx. (p. 712).

<sup>7</sup> Cf. Allen, *op. cit.* (p. 314).

<sup>8</sup> 'La Politique,' &c. (p. 90).

election are both tolerable: the best is to combine the two, but even in the case of those who hold by hereditary succession the peoples who have the right to place magistrates over themselves have also the right to depose them.<sup>1</sup> The best known of these works, the 'Vindiciae Contra Tyrannos,' published in 1577, also speaks of kings as the Vicars of God,<sup>2</sup> and says that it is God Who has "instituted" kings, but it is the people who constitute them, who bestow kingdoms and approve their election. Kings must remember that they reign "a Deo sed per populum et propter populum." Therefore if in some countries kingship has become hereditary, it is still the custom that the children do not succeed their fathers till they have been constituted anew by the people, and are only held to be kings when they have received the investiture of sceptre and crown from those who represent the "Majestas" of the people.<sup>3</sup>

George Buchanan and the Huguenot writers express this judgment in strong and unqualified terms, but we find the same opinions expressed in as thorough-going a fashion by some of the Roman Catholic writers of the last years of the sixteenth century. Among the most important tracts written in defence of the deposition of Henry III. of France is that of Boucher, 'De justa Abdicatione Henrici Tertii,' published

<sup>1</sup> *Id.* (p. 96): "Politie. Il me semble que et l'un et l'autre ne sont si louables que ceux qui sont par election et succession tout ensemble. . . Politie. J'avoue bien que par coutume la chose est tellement reeue qu'elle (hereditary succession) est réputé pour droit, mais puis que les peuples ont le droit de mettre les magistrats sur eux . . . il faut conclure qu'ils les peuvent demettre, et par là sont electeurs de leurs princes."

<sup>2</sup> 'Vindiciae Contra Tyrannos.' Qu. I. (p. 9).

<sup>3</sup> *Id.*, Q. III. (p. 76): "Ostendimus antea Deum Reges instituere, regna regibus dare, reges eligere. Dicimus jam, populum reges constituere, regna tradere, electionem suo suffragio

comprobare. . . ." (P. 79): Quo semper recordantes reges se a Deo quidem, sed per populum et propter populum regnare. . . ." (P. 82): Etsi vero, ex quo virtutem patrum imitati filii, nepotesve, regna sibi quasi haereditaria fecisse videntur, in quibusdam regionibus electionis libera facultas desisse quodammodo videatur; mansit tamen perpetuo in omnibus regni bene constitutis ea consuetudo, ut de mortuis non prius succederent liberi, quam a populo quasi de novo constituerentur, nec tanquam suis haeredes patribus agnoscerentur, sed tum demum reges censorentur, cum ab iis qui populi majestatem representant, regni investituram, quasi per sceptrum et diadema acceperissent."

in 1589. Boucher was a theologian of some eminence, and his work is largely concerned with the question of the power of the Pope to depose kings. We are not, however, here concerned with this question, but with his conception of the relation of the authority of the king to that of the community. With regard to this, he expressed himself as clearly and dogmatically as the Huguenot writers.

It is the people or commonwealth which establishes the king, but while it bestows this authority upon him, the final authority and "Majestas" remains with the people. It resided with them before there were any kings, and even kings must render their account for any offence against it.<sup>1</sup> This "Majestas" is embodied in the Estates.<sup>2</sup>

It is the people, then, from whom the king derives his authority, and not from God only, and he repudiates the interpretation of St Paul's words in Romans xiii. 1 as implying the latter. We recognise, he says, that kings, like all good things, come from God, but in accordance with the *Jus Gentium*, it is through the people.<sup>3</sup>

It would be difficult to find a more explicit repudiation of what we call the "Divine Right," and a more thorough-going affirmation of the principle that the royal authority

<sup>1</sup> J. Boucher, 'De Justa Henrici Tertii Abdicatione,' l. 9: "Jus autem illud cum in duobus positum sit, ut et a populo seu republica constituuntur reges, et regibus constitutis, sic penes eos summam potestatem esse constet, ut summa in eos tamen populi seu reipublicae jus ac majestas remaneat, huiusque adeo laesae vel imminutae, ei res ita ferat, rex teneri possit."

Id., III. 7: "Majestas reipublicae ac populi quae sit, dictum antea est. Quae ut prima per se ac regibus antiquior est, ita authenticum quid penes se, vel teste scriptura habet, quod deponere, quodque abiicere a se nec possit nec debeat. Cujusque legibus omnes omnis generis homines ac reges ipsi teneantur. Quippe, cum penes eos non aliunde majestas sit, quam quia publica ab iis potestas referatur.

Quae Caesar ab iis semel, ut sceptro reos amoneat, lege Julia constat, quae poenam majestatis, non dignitatis tantum, sed et animae amissionem esse jubet."

<sup>2</sup> Id. id., III. 8: "Porro majestatem illam cum penes ordines seu comitia esse constet, id quoque sequitur, qui ordines laeserit, publicae majestatis supra omnes teneri atque reum esse. Nam penes comitia ut regni majestas sit, cum universa regnorum consuetudo docet, tum quia perpetua in Gallia sacrosancta eorum auctoritas esse consuevit."

<sup>3</sup> Id. id., I. 13: "Et nos, quidem, ut reges a Deo, ut et bonum omne, esse agnoscimus, ita intermedio iure gentium, et per populum, ut sunt, ita esse, sane fateamur."

was inferior to the sovereign authority, or "Majestas," of the community; it was derived from it, and was answerable to it. Boucher adds, dogmatically, that no one is born a king; there is no Christian kingdom where hereditary succession has such a force that the right of establishing the king does not remain with the people.<sup>1</sup>

Boucher does not, however, state these principles as merely abstract, but maintains that they were embodied in the actual constitutional systems of the European countries, and he refers specially to the Empire, to Aragon, and to the authority of Parliament in England, and he attributes the comparative absence in France of the constitutional forms of this supreme authority of the community to the recent tyrannical innovations of Louis XI.<sup>2</sup> He cites the deposition of Merovingian and Carolingian kings in France, of Richard II. in England, and the recent deposition of the King of Denmark.<sup>3</sup>

With these writers we may place Mariana, the Spanish Jesuit of the late sixteenth century. He also considers the monarchy to be the best form of government, and he carefully discusses the advantages and disadvantages of succession by inheritance or by election. He finally concludes that hereditary succession is best, but the succession should be determined by law, not by the will of the king, for the commonwealth gave him an authority restrained by laws, and any change therefore must be made with the consent of the "Ordines" (the Estates or Cortes).<sup>4</sup> In another place, discussing the relation of the commonwealth to a king who becomes a tyrant, he argues that the commonwealth, from which the royal authority arises, may call the king to account, and may deprive him of his authority. When it transferred

<sup>1</sup> Id. id., I. 17: "Omnino rex nemo nascitur. Neque ullum omnino vel inter Christianos regnum est, in quo hereditario successio sic polleat, quin penes populum constituendi jus remaneat."

<sup>2</sup> Id. id., I. 21, 22.

<sup>3</sup> Id. id., I. 23, 24.

<sup>4</sup> Mariana, 'De Rege,' l. 3 (p. 34):

"Sic commodius fere cogitabam, hereditarium esse principatum." . . . (p. 37): "Neque pro regis arbitrio successionem etiam inter filios mutandam videri. Praesertim cum leges successionis mutare non ejus, sed reipublicae sit, quae imperium dedit, iis legibus constrictum, ordinum consensu id faciat opus est." Cf. I. 4 (p. 38).

its authority to the prince, it reserved to itself a greater authority.<sup>1</sup>

It may, no doubt, justly be said that these writers, especially the Huguenots and Mariana, express a highly controversial mood. But it should be observed that the same judgment is expressed by Hooker, substantially, but in characteristically measured terms. Hooker deals with the subject in the first book of the 'Ecclesiastical Polity,' when he discusses the origins and first forms of political society. The first form of social authority was, he thinks, that of the father over his family, but that is not the nature of authority in a political society. "Howbeit over a whole general multitude, having no such dependency upon any one, and consisting of so many families as every political society doth, impossible is it that any should have complete lawful power, but by consent of man or immediate appointment of God; because, not having the natural authority of fathers, this power must needs be either usurped, and thus unlawful; or, if lawful, then, either granted or consented unto by those over whom they exercise the same, or else given extraordinarily from God, unto Whom all the world is subject."<sup>2</sup>

He returns to the subject in the eighth book, where he is dealing with the relation of the king to the Church. "First, unto me it seemeth almost out of doubt and controversy, that every independent multitude, before any certain form of regiment established, hath, under God's supreme authority, full 'dominium' over itself, even as a man, not tied with the bond of subjection as yet, unto any other, hath over himself the like power."<sup>3</sup>

Hooker is indeed careful to defend the right of hereditary succession to kingship, but he is also clear in asserting that this hereditary right arises from the "original conveyance" by the community. "The case thus standing, although we judge it as being most true that kings, even inheritors, do

<sup>1</sup> Id. id., I. 6 (p. 57): "Certe a republica, unde ortum habet regia potestas, rebus exigentibus regem in jus vocari posse, et si sanitatem respuat, principatu spoliari. Neque ita

in principem jura potestatis transtulit, ut non sibi majorem reservavit potestatem."

<sup>2</sup> Hooker, 'Eccles. Polity,' I. x. 4.

<sup>3</sup> Id. id., VIII. 2, 5.

hold their right to the power of dominion with dependency upon the whole body politic, over which they rule as kings; yet so it may not be understood, as if such dependency did grow, for that every supreme governor doth personally take from them his power by way of gift, bestowed of their own free accord upon him at the time of his entrance into the said place of government. But the cause of dependency is in that first original conveyance, when power was derived by the whole unto one; to pass from him unto them, whom out of him nature by lawful birth should produce, and no natural or legal inability make incapable. Neither can any man with reason think but that the first institution of kings is a sufficient consideration wherefore their power should always depend on that from which it did then flow. Original influence of power from the body into the king is the cause of the king's dependency in power upon the body."<sup>1</sup> Hooker denies that the individual king must be elected, but affirms that it was from the community that the right of hereditary succession was derived.

We have discussed the position of Althusius with regard to the supremacy of the law, in the last chapter, and need only here draw attention to an important passage in which he sets out the origin and nature of the authority of the administrator or prince. He recognises that while the commonwealth is formed by the free association of all its members, and establishes the laws necessary for this, it cannot itself administer them; and therefore it appoints ministers and rulers, and transfers to them the necessary authority and power; it gives them the power of the sword and commits itself to their care and rule.<sup>2</sup> Althusius is clear that there must be rulers or princes in the commonwealth, but the rulers are appointed by the commonwealth, and their authority is

<sup>1</sup> Id. id., VIII. 2, 9.

<sup>2</sup> Althusius, 'Politica,' xviii. 10: "Nam populus primo se in corpus quoddam certis legibus consociavit, jura necessaria et utilia ad hanc consociationem sibi constituit, eorumque administrationem qua ipse populus

nullo modo fungi potest, postea ministris et rectoribus a se electis demandavit, atque in eos ad muneris sui expeditionem necessariam auctoritatem et potestatem transtulit, gladioque ad eam rem illos accinxit, iisque se regendum curandumque commisit."

always less than that which the commonwealth reserves to itself. Their authority is only to rule according to the just laws of the commonwealth, and they are only God's ministers if they rule for the common good. The prince is not above the laws, but the laws above the prince. There neither is, nor can be, any such thing as that absolute power which, as it is sometimes said, is given to the prince.<sup>1</sup>

Finally, we may put beside Hooker and Althusius the judgment of the great Jesuit, Bellarmine. He is no doubt arguing, not for the direct, but for the indirect authority of the Papal See in temporal matters; but his judgment is clear that, while it is true that the royal or imperial power is from God, it must be understood that it does not normally come immediately from Him, but mediately through the consent of men, for as St Thomas Aquinas had said, lordship and principalities belong not to the Divine, but to the Human Law.<sup>2</sup>

(2) The Conception of the "Sovereignty" of the Community.—We shall, in a later chapter, consider the theory of sovereignty as set out by Bodin, and we do not wish here to anticipate this. It is enough, for the moment, to say that in Bodin's view there must be in every political community some supreme power which makes all laws and magistrates,

<sup>1</sup> Id. id., xviii. 27: "Quantumcunque enim est imperium et jus quod alteri conceditur, minus tamen semper est eo quod concedens sibi reservavit. . . . 28. Transfertur vero in hosce administratores et rectores a membris universalis consociationis sola potestas secundum justas leges administrandi et regendi corpus, et jura universalis hujus consociationis. . . . 32. Hoc agens, minister Dei dicitur, Rom. c. 13. . . . 37. Non est princeps supra legem, sed leges supra principem. . . . 38. Nam contra leges aliquid posse non est potestatis, sed impotentiae nota. . . . 39. Unde et quod dicitur absoluta et plenissima potestas principi concessa, nulla est, nec esse potest."

<sup>2</sup> Bellarmine, 'De Potestate Summi

Pontificis,' III. (p. 51): "Porro quod scribit sanctus Gregorius datam fuisse imperatori coelitus, non significat imperatoriam potestatem esse immediate a Deo, sed esse a Deo in eo sensu, quo dicit apostolus ad Rom. xiii., non est potestas nisi a Deo. Omnis enim potestas a Deo est; sed aliqua immediate, ut Moisis, ut Sancti Petri, ut Sancti Pauli; aliqua mediante consensu hominum, ut potestas Regum, Consulium, Tribunorum—nam (ut Sanctus Thomas docet in 2. 2. Q. 10. Art. 10. et Q. 12. Art. 2) dominia et principatus humani, de jure humano sunt, non de jure divino." Cf. Id. id., xxi. (page 174). For the same principle as held by Molina and Suarez, cf. pp. 343, 344.

and which is subject to no law, except that of God and of nature, and to this power he gives the name of "Majestas."<sup>1</sup> Bodin's work was published in French in 1576, but it is important to observe that some of the Huguenot pamphlets were published a little earlier, or about the same time, Hotman's 'Franco Gallia' in 1573, the 'Droit des Magistrats' in 1574, and the 'Archon et Politie' in 1576, and in some of these we find already developed a conception of a power belonging to the community or its representative authority, which is supreme over all other powers, even that of the king, and this supreme authority they call the "Souveraineté," while they speak of the king as "Souverain."

Hotman, in discussing the power of what he calls the "Concile des Estats," meaning the States General, maintains that it had power to elect and to depose kings, and he goes on to say that even after the election of the king, it reserved and retained in its own hands the "sovereign authority" of the government of the kingdom.<sup>2</sup>

It is, however, in the 'Droit des Magistrats' of 1574 that the distinction between the "Souverain" and the "Souveraineté" is first carefully and completely drawn out. There are magistrates or officers, who are indeed inferior to the "Souverain," and are appointed by him, but do not properly hold from the "Souverain," but from the "Souveraineté."<sup>3</sup> The distinction is clear, but is made even clearer when the author adds that the "Souverain" himself, before he is put in "real possession" of his sovereign administration, swears fidelity to the "Souveraineté."<sup>4</sup> And again, empires and

<sup>1</sup> Cf. pp. 418 ff.

<sup>2</sup> Hotman, 'Franco Gallia,' xx. (in 'Mémoires de l'Etat,' vol. i. p. 712): "Que plus est, mesme après l'election du roi, le Concile se reservoit encores et retenoit par devers soy la souveraine autorité du gouvernement des affaires du Royaume."

<sup>3</sup> "Du Droit des Magistrats" (ed. in 'Mémoires de l'Etat,' vol. ii. p. 748: "Or faut-il entendre que tous ceux cy (the magistrates) encores qu'ils soyent

au-dessous de leur souverain (duquel aussi ils recoyvent commandement, et lequel les installe et approuve) toutes fois ne dépendent proprement du souverain, mais de la souveraineté."

<sup>4</sup> Id. id., vol. ii. p. 748: "Le souverain mesmes, avant qu'estre mis en vraye possession de son administration souveraine, jure fidélité à la souveraineté, sous les conditions aposees à son serment."

kingdoms are fiefs, which owe homage and fidelity to the "Souveraineté."<sup>1</sup>

These are trenchant sayings, and the conception of the king as a vassal of the "Souveraineté" is unusual, to say the least, though not unintelligible; but what we are here concerned with is the sharp distinction between the king who is "Souverain," and some greater authority behind him, which holds the "Souveraineté," for there are those who represent the "Souveraineté" and it is for them to provide for the tenure of the sovereign's fief, if he has lost it by his offences against his subjects.<sup>2</sup> The king or "Souverain" is not above the laws, but is subject to them, for he has sworn to maintain and defend them.<sup>3</sup> While it is not lawful for any private person to resist the tyrant, there are magistrates, inferior indeed to him, but whose function it is to act as bridles and restraints upon the sovereign magistrate. There are such officers in several Christian kingdoms, such as dukes, marquesses, counts, &c.; they were formerly "estats et charges publiques," and were appointed "par ordre legitime," and though these offices have become hereditary, the nature of their right and authority has not changed: such are also the elective officers of the cities, such as mayors, consuls, syndics, &c.<sup>4</sup>

<sup>1</sup> Id. id., vol. ii. p. 776: "Outre tout cela, puisque les royaumes et empires mesmes sont fiefs, devons hommages et services à la souveraineté.

<sup>2</sup> Je di donc au cas où nous sommes, qu'un roi, ou même un Empereur, relevant de la souveraineté, commettant felonie contre ses vassaux, assavoir ses sujets (ce que jamais ne puisse advenir) perd son fief, non pour être adjudgé aux vassaux, mais pour y être pourvu par ceux qui représentent la souveraineté. . . . Or est il ainsi que l'Empereur mesmes, comme nous l'avons cy devant noté, doit hommage à l'Empire, duquel il est le premier et souverain vassal (ce que doit estre encores à plus forte ou pour le moins aussi forte raison estimé de la con-

dition des Roys à l'endroit du Royaume)."

<sup>3</sup> Id. id. (p. 750): "Car pour certain c'est une parole très fausse, et non poinct d'un loyal sujet à son prince, mais d'un détestable flatteur, de dire que les souverains sont contraints à nulles lois. Car, au contraire, il n'y en a pas une, par laquelle il ne doyve et soit tenu de regler son gouvernement, puis qu'il a juré d'estre le mainteneur et protecteur de toutes."

This is followed by a citation of the 'Digna Vox' (Cod. I. xiv. 4) and the story of Trajan giving the sword to be used against him if necessary.

<sup>4</sup> Id. id. (p. 746): "Il n'est licite à aucun particulier d'opposer force à

It is of these officers that the author of the treatise says, as we have seen, that they hold not from the "Souverain" but from the "Souveraineté," to which the "Souverain" himself has sworn fidelity; and he goes on to say that there is a mutual obligation between the king and these officers of the kingdom, for the whole government is not in the hands of the king, but only the "souverain degré" of the government, while each of these inferior officers has his part in it according to his rank.<sup>1</sup>

The pamphlet generally known as 'Archon et Politie,' which was published in 1576, represents the same conception. In discussing the limitations on the arbitrary power of the prince it says that there are inferior authorities, "deputies" of the people; these create the prince and can depose him, and they would be traitors to their country if they suffered the "principauté" to become a tyranny. They, as "souverains magistrats," are above the prince (in their public capacity), while as private persons they are below him.<sup>2</sup> And again,

la force du tyran, de son autorité privée."

Id. id. (p. 745): "Tiercement, il y en a d'autres, lesquels encores qu'ils n'ayent la puissance souveraine et ordinaire à manier, toutes fois sont ordonnez pour servir comme de brides et freins au souverain magistrat."

Id. id. (p. 747): "Je viens maintenant aux magistrats inferieurs. . . ." (p. 748): "Tels sont aujourd'hui les officiers de plusieurs royaumes Chrestiens, entre lesquels il est raisonnable de conter les Ducs, Marquis, Contes, Vicomtes, Barons, Chastelains, qui ont jadis esté estats et charges publics, qui se commettoyent par ordre legitime, et qui depuis, pour estre devenues dignitez hereditaires, n'ont pourtant changé la nature de leur droit et autorité: aussi il faut comprendre en ce nombre les officiers electifs des villes, tels que sont les Maires, Viguiers, Consuls, Capitous, Syndiques, Eschevins et autres semblables."

<sup>1</sup> Id. id. (p. 748): "Par cela il

appert qu'il y a une mutuelle obligation entre un Roy et les officiers d'un royaume: auquel royaume tout le gouvernement n'est pas mis entre les mains du Roy, ains seulement le souverain degré de ce gouvernement, comme aussi les officiers inferieurs y ont chacun leur part selon leur degré, et le tout à certaines conditions d'une part et d'autre."

<sup>2</sup> "La Politique. Dialogue entre Archon et Politio" (ed. in 'Mémoires de l'Estat,' vol. iii. (p. 127): "Car il y a des puissances inférieures et deputez du peuple, autheurs des princes, qui les ayant faits les peuvent defaire, et tels ne peuvent laisser par raison la principauté decliner à tyrannie, car ils trahiroient la patrie qui a constitué tels estats pour empescher la Tyrannie. Si elle survient, c'est aux sujets particuliers de recourir humblement et sans confusion au remede vers ceux là qui sont comme souverains Magistrats pardessus le prince en cest endroit, quoi qu'ils soyent privez et

after discussing the right of subjects, who have by solemn edicts obtained from the prince the right to exercise their religion, to refuse obedience if the prince attempts tyrannically to violate these, and to defend their liberty by all lawful means; the author of the tract goes on to say that this applies also to the other rights of the people. There are, indeed, few kingdoms or principalities whose rulers are not bound and restrained by many laws, to which they have sworn at their "reception," and they have promised the "Souveraineté," that is, the "Estates" composed of the body of all the people, to keep these inviolably.<sup>1</sup>

This conception, that behind the authority of the king or prince there is a greater authority still, and that this resides in the community, was also carefully set out by Mariana. After saying in general terms that the prince should understand that the authority of the whole commonwealth is greater than that of any one person,<sup>2</sup> Mariana devotes a whole chapter to the consideration of this question in detail. He was aware that there were different opinions, that some learned men maintained that the king was greater not only than the individual citizen, but than all the citizens, and that the commonwealth could transfer the supreme power to the prince without any limitation.<sup>3</sup> And, he continues, this seems to

au oessous par un regard ordinaire. Et ne faut point penser que le prince puisse sans tyrannie, oster cest ordre : car cela vient de la première source du gouvernemens establis de Dieu et de nature, comme il en a esté parlé."

<sup>1</sup> Id. (p. 128) "Cela se doit estendre aussi aux autres droits du peuple, lesquels ne peuvent estre abolis sans manifeste confusion et anéantissement des estats, et a plus forte raison, quand les loix reiglent dés long temps la grandeur des princes et magistrats souverains : comme il se trouvera bien peu de royaumes et principautez, dont les principaux gouverneurs ne soient liez et retenus en limites par beaucoup de loix, qu'eux mesmes jurent à leurs reception, et promettent à la souver

ainté (c'est à-dire, aux Estats composés du corps de tout le peuple) de garder inviolablement"

<sup>2</sup> Mariana, 'De Rege,' I. 6 (p. 61): "Quod caput est, sit principi persuasum totius reipublicae majorem quam unius auctoritatem esse, neque pessimis hominibus credat diversum affirmantibus, gratificandi studio. quae magna perniciosa est."

<sup>3</sup> Id id., I. 8 (p. 71): "Video tamen non deesse viros eruditionis opinione praestantes, qui secus statuant, Regem non singulis modo civibus, sed etiam universis majorem esse . . ." (p. 72) "Praeterea cum negare nemo posset, quin reipublica supremam et maximam potestatem possit sine exceptione principi deferre."

be the form of government among some peoples where there is no public "consensus," where the people or the chief men never assemble to deliberate about the affairs of the commonwealth, where men must obey whether the king's government is just or unjust. Such an authority, Mariana, however, says, is excessive, and tends to tyranny; Aristotle had indeed said that it existed among barbarous peoples, but "we" are not concerned with barbarians, but with the government of Spain and with the best form of government.<sup>1</sup> He concedes that the king is supreme in those matters which by the law and custom of the nation are left to his judgment, such as making war and administering justice; in those matters the king has an authority greater not only than the individual citizen, but than all. On the other hand there are matters, such as legislation and taxation, in which the authority of the commonwealth is greater than that of the prince. Finally, and this is the most important part, the commonwealth has authority to coerce the prince if he is vicious and wicked, if he prefers to be feared rather than loved, and becomes a tyrant.<sup>2</sup>

<sup>1</sup> Id id., I 8 (p 72) "Est autem perspicuum, id institutum in quibusdam gentibus vigere, ubi nullus est publicus consensus, nunquam populus aut proceres de republica deliberaturi conveniunt: obtemperandum tantum necessitas urget, sive aequum sive iniquum regis imperium sit. Potestas nimia proculdubio, proximeque ad tyrannidem vergens, qualem inter gentes barbaras vigere Aristoteles affirmatum reliquit. nos hoc loco non de barbaris, sed de principatu qui in nostra gente viget, et vigere aequum est, doque optima et saluberrima imperandi forma disputamus."

<sup>2</sup> Id. id., I. 8 (p. 72) Ac primum libenter dabo, regiam potestatem supremam in regno esse in rebus omnibus, quae more gentis, instituto, ac certa lege, principis arbitrio sint permissa, sive bellum gerendum sit, sive jus dicendum subditis, sive duces magistratusque creandi: majorem non singulis modo, sed universis

habebit potestatem, nullo qui resistat, aut facti rationem exigat Quod moribus populorum ferme omnium fixum videmus, ne a rege constituta retractare cuiquam liceat, aut de ipsis disceptare.

Credam tamen, in diverso quamvis genere, majorem reipublicae quam principis esse auctoritatem, modo universae in unam conspirantis sententiam. Certe ad tributa imperanda, abrogandasque leges, ac praesertim quae de successione in regno sunt, mutandas, resistente multitudine impar unius principis auctoritas sit, et si quae alia gentis moribus universitati reservata haudquaquam principis in arbitrio posita sunt

Postremo, quod caput est, principis malo coercendi potestatem in republica residere, si vitis et improbitate infectus sit, ignoransque verum iter gloriae, metui a civibus quam amari malit. metuque paventibus et percussis imperare, injuriam facere pergat factus tyrannus."

These writers may seem to represent somewhat extreme opinions, and it is therefore important to observe that Hooker and Althusius affirm the same principles. In one passage Hooker says: "Besides, when the law doth give him (the king) dominion, who doubteth but that the king who receiveth it must hold it of and under the law? According to that axiom, 'Attribuat rex legi, quod lex attribuat ei, potestatem et dominium'; and again, 'Rex non debet esse sub homine, sed sub Deo et lege.' Thirdly, whereas it is not altogether without reason that kings are judged to have by virtue of their dominion, although greater power than any, yet not than all the states of those societies conjointly wherein such sovereign rule is given them."<sup>1</sup> And again, with special reference to England: "This is therefore the right whereby kings do hold their power; but yet in what sort the same doth rest and abide in them it somewhat behoveth to search. Wherein, that we be not enforced to make over-large discourses about the different conditions of sovereign or supreme power, that which we speak of kings shall be with respect unto the state and according to the nature of this kingdom, where the people are in no subjection, but such as willingly themselves have condescended unto, for their own most behoof and security. In kingdoms, therefore, of this quality the highest governor hath indeed universal dominion, but with dependence upon that whole entire body, over the several parts whereof he hath dominion; so that it standeth for an axiom in this case. The king is "major singulis, universis minor."<sup>2</sup>

We have already seen that Althusius is clear that the "Majestas" or sovereign authority which recognises no other as superior or equal to itself, belongs and can only belong to the whole political community, and we need only refer here to another passage, as expressing this judgment. The "Majestas" belongs to the people and it cannot transfer this to any other person. It cannot be divided or transferred, it is created by the whole body of the members of the kingdom,

<sup>1</sup> Hooker, 'Ecclesiastical Polity,' viii. 2, 3. <sup>2</sup> Id. id., viii. 2, 7.

and without them it cannot stand. The king, therefore, however great his authority, can never deprive the members of his kingdom of the right to resist him if he acts unjustly. This "Jus," that is, the "Majestas," is the very soul and vital spirit of the commonwealth, and it can never grant it to anyone else without destroying itself.<sup>1</sup>

(3) The Relation of the King to the Courts of Law.—We have seen in former volumes and in the earlier parts of this one that in constitutional theory and practice it was a generally accepted principle that the king could, in normal circumstances, take action against his subjects only by process of law. The famous clause of Magna Carta (39) represents the normal conception of feudal law, and the normal practice of mediæval society. It is therefore important to inquire whether this principle continued to be recognised in the later sixteenth century.

George Buchanan deals with this question under two terms; and first, whether the king should have the power of interpreting the law. Maitland had urged that the king should have this power, but Buchanan replies that he was asking more than the most "imperious" of kings demanded. This power belonged to the judges; to give this power to the king would give him the opportunity to twist the law to his own convenience. If this were once permitted, it would be useless to have good laws; it would be better to have no laws at all than such a "liberum latrocinium," under colour of

<sup>1</sup> Althusius, 'Politica,' xxxviii. 127: "Quis item dicit populum tale jus majestatis in alium a se transferre potuisse. Stat enim illa communis juris-consultorum sententia, jus majestatis nec cedi nec distrahi, nec ulla ratione annullari posse a suo domino. . . Est enim individuum et incommunicabile, neque temporis diuturnitate praescribi potest ullo modo. Nam jus nec majestatis a membris universis et singulis regni constitutum est, ab illis incepit et sine illis consistere et conservari non potest. Nequaquam vero cum rege nascitur, qui etiam plenissimam potestatem habens, non potest membris sui regni sibi inique agenti potestatem et voluntatem resistendi adimere. Unde jus hoc dicitur anima et spiritus vitalis regni et reipublicae, quem alii, citra interitum sui ipsius, communicare nequaquam potest. Natura ergo hujus administrationis regi demandata est, ut imperium suum submittat legi et justitiae." Cf. pp. 360, 361.

law.<sup>1</sup> In the second place, Buchanan contends that any private person had the right to appeal to the courts of law in a dispute between himself and the king about his property; and that it makes no difference in principle whether it is the king himself or his "Procurator" whom he calls into court.<sup>2</sup>

When we turn to the French Huguenot writers we find some very important assertions of the same principles. The "Remonstrance" says that the Courts of "Parlement" were once above the kings, and opposed themselves to their absolute power, while "to-day" they submitted servilely to the commands of these from whom they hoped for advantage.<sup>3</sup> The other Huguenot tracts are clear and emphatic in asserting the principle that the king could only take action against his subjects by process of law. In the tract 'Archon et Politie,' "Archon" asks indignantly whether the king has not got the power of life and death over his subjects, and "Politie"

<sup>1</sup> George Buchanan, 'De Jure Regni' (p. 14): "B. Sed tu mihi regum nomine plus postulare videris, quam qui eorum imperiosissimi sunt sibi sumant. Scis enim ad judices rejici solere hoc genus questionum, cum aliud lex dicere, aliud legis auctor voluisse videtur, perinde atque illas quæ de ambiguo jure aut legum inter se discordia oriuntur . . . cum regi legum interpretationem concedis, hanc tribuis ei licentiam, ut lex non dicat quod lator sentit, aut quod in commune sit æquum et bonum, sed quod in rem sit interpretis; utque is ad omnes eam actiones, commodi sui causa, velut Lesbiam regulam inflectat. . . ."

Vides, opinor, quoniam uno versu des principi licentiam: nempe ut quod vult ille, dicat lex; quod nolit, non dicat. Id si semel recipiamus, nihil proderit bonas leges condere, quæ principem bonum sui officii admoneant, malum circumscribant. Imo, ut dicam apertius, nullas omnino leges habere præstaret, quam liberum latrocinium, atque etiam honoratum,

sub legis præfextu, tollerari."

<sup>2</sup> Id. id. (p. 35): "B. Si privatus quispiam prædium, aut agri sui partem, contra quam æquum est, a rege teneri contendat, quid hic privato faciendum censis? Codetne agro, quoniam regi judicem ferre non poterit?"

M. 'Minime.' Sed non regem, sed procuratorem ejus adesse jubebit.

B. Jam istud per fugium, quo tu uteris quam vim habeat, vide, mea enim nihil refert, an ipse rex advenit, an ejus procurator; utroque enim modo regis periculo litigabitur: ei, non procuratori, ex eventu judicii damnum aut lucrum accedet. Ipse denique reus est, id est, is cujus res agitur."

<sup>3</sup> 'Remonstrance aux Seigneurs,' &c. (p. 74): "Les cours de Parlement qui anciennement estoient par dessus les roys, et s'opposoyent avec grande intégrité à leur puissance absolue, aujourd'hui se laschent servilement aux commandement de tous ceux dont ils espèrent prouffit."

answers that they have this power, but only "avec connoissance de cause, et informations valables," that is, if one may venture a paraphrase, by legal process and on proper evidence.<sup>1</sup> The author of the 'Vindiciae Contra Tyrannos' contends that even to-day the "Senatus Lutetiarum" (the Parlement of Paris) is set in a certain sense as a judge between the king and the people, even between the king and any private person; and he adds that, lest the Parlement should be afraid of the king, the judges could not formerly be appointed except with the nomination of the Parlement, or removed from their office except for a legitimate (legal) cause.<sup>2</sup>

It may indeed again be suggested that Buchanan and the Huguenot pamphleteers represented an extreme and revolutionary position; and it is therefore very important to observe that Bodin, who certainly asserted the doctrine of the absolute authority of the king of France in the strongest terms (as we shall see in a later chapter), sets out a conception of the relation of the courts of law to the king, which is at least analogous to that of Buchanan and the Huguenots. In the first place, it should be observed that Bodin considers at some length the question whether the prince should himself act as a judge, and he is very clear that the prince should not do so.<sup>3</sup> In the second place, Bodin discusses at length the question whether the judges should be perpetual or removable at the pleasure of the prince. He admits that there had been different opinions about this, and even refers to Michel l'Hopital as having been in favour of their being removable.<sup>4</sup> He admits that under a monarchy certain

<sup>1</sup> 'Archon et Politie' (p. 120): "Archon. Quoy, les rois, n'ont ils pas puissance sur la mort et sur la vie de leurs sujets? Politie. Ouy, bien, mais avec connoissance de cause, et informations valables et non autrement."

<sup>2</sup> 'Vindiciae Contra Tyrannos,' Q. III. (p. 97): "Hinc otiam hodie Senatus Lutetiarum qui curia Parium, seu Patriciorum nuncupatur; quasi iudex inter regem et populum quadam tenus constitutus, imo inter Regem et

privatum quemlibet, singulos adversus regis procuratorem asserere, si quid contra jus invadat quasi obligatione tenetur. . . . (p. 98): Ne vero regem metuere Senatores, neque olim in eum gradum, nisi a Senatu nominati eo-optimantur, neque absque ejusdem auctoritate, legitima de causa exactorari poterant."

<sup>3</sup> Bodin, 'De Republica,' iv. 6 (p. 450).

<sup>4</sup> Id. id., iv. 4 (p. 138).

offices, such as those of the governor of the provinces, should be terminable; but, with regard to the judges, his opinion is very different: the judges, and especially those who have to decide on the life, the reputation, and the fortunes of the citizens, and from whom there is no appeal, should hold by a perpetual tenure.<sup>1</sup> He gives an interesting account of the history of the actual practice in France, with reference especially to a law of Louis XI. He admits that the practice had varied, and that by long custom the document appointing judges contained a clause which said that they should hold their office at the king's pleasure; but this clause, he holds, was merely formal.<sup>2</sup> Again, he admits that some maintained that it would be better that the tenure of magistrates should be terminable, but this he says is false, and would be pernicious, for it is evident that princes are beset by flatterers and courtiers, and would make merchandise of the magistracies or take them away from the best men, who hate such courtiers and their vices.<sup>3</sup> This custom of appointing terminable magistracies, Bodin says, savours of a tyranny or

<sup>1</sup> Id. id., iv. 4 (p. 439): "Cum autom juris dicendi aequalitate civitates et imperia maxime omnium egere videantur, collegia iudicum perpetua creabantur, ea potissimum quibus de capite, fama ac fortunis omnibus civium iudicandi sit potestas, provocatione semota: non solum ut diuturno usu iudicandi prudentiam ac peritiam sibi compararet, verum etiam ut plures eadem potestate conjugati, perinde ut magna vis aquarum, difficilior corrumpantur."

<sup>2</sup> Id. id., iv. 4 (p. 441): "Magistratus omnes et ministros magistratuum sua lege perpetuos esse (Louis XI.) iussit . . . sed illa de toto genere officialium lata lex, ne cuiquam imperium nisi volenti, aut morte, aut scelere admisso eriperetur, immobilis hactenus extitit: cui etiam subrogatum est uno capite quo cavetur, magistratus abdicare cogendum neminem eujusunquo criminalis causa,

nisi iudicatus et damnatus sit: cui legi locum esse iussit, non solum se vivo ac spirante, verum etiam Caroli filii principatu: quod etsi jure non poterat, successores tamen legi paruerint: tametsi majorum formula magistratuum tabulis inseritur, ut imperio vel munere fruantur quoad regi liberit. . . . Clausula tamen restat inanis illa quidem."

<sup>3</sup> Id. id., iv. 4 (p. 442): "Putant plerique magistratus meliores futuros ac imperia sanctora, si more majorum precaria darentur, id tamen falsum esse docuimus, et, ut verum sit, perniciosum tamen esset: quia satis unicuique perspicuum est principes adulatoribus et canibus aulicis fere semper obsessos, turpissimum questum ac mercaturam magistratus facturos: aut imperia optimis quibusque qui fero semper aulicorum hominum vitam vitare, vitis omnibus inquinatum oderunt, identidem crepturos."

"domination," not of a monarchy, for a kingdom must, so far as possible, be governed by laws, not by the caprice or mere will of the prince.<sup>1</sup>

(4) The Conception of a Contract between the Ruler and the People.—We can now approach the consideration of this subject, for we have considered its presuppositions; that is, first, that the authority of the ruler was derived from the community; second, the theory of the sovereignty of the community; third, the principle that the person and rights of the individual members of the community were protected even against the ruler by the courts of law.

It is even more necessary to remember that the conception of a contractual relation was the fundamental principle of all feudal society, and was therefore an important part of the normal political tradition of the Middle Ages. We have endeavoured to set this out in previous volumes.<sup>2</sup> It will therefore be convenient to begin our consideration of the development of the theory of a contract between ruler and people in the later sixteenth century by observing the terms in which the resistance of the Low Countries to Philip II. of Spain was justified by William of Orange. We are not here concerned with the great religious movements of that time, nor with the complex or economic conditions and national feeling which no doubt had their place in that resistance; we are concerned with the constitutional principles which were set forward in justification of it; and, in the first place, in the 'Apologie' of William of Orange.

<sup>1</sup> Id. id., iv. 4 (p. 142): "Haec autem precaria tribuendorum magistratuum ratio, tyrannidem aut dominationem non regalem monarchicam sapit. Regnum enim legibus oportet (quantum fieri poterit), non principis arbitrio ac voluntate gubernari; ut quidem domino licet, quem subditi velut aliquem Deum de coelo delapsam, adorant ac metuunt, eiusque arbitria pro naturae legibus habent. De rege aliter statuendum est, quem a sub-

ditis amari potius quam metui oportet: cuius autem amandi ratio compendiaria futura est, si praemia idem omnia, omnes item honores et ac magistratus, paucis quae denotavimus exceptis, ab eo tribuantur, nec nisi iudicio constituto eripiantur. Quibus enim jure ac legibus erepta potestas est, de principe queri non possunt."

<sup>2</sup> Cf. especially vol. iii. part 1 chaps. 2 and 4; part 2 chaps. 5 and 6; vol. v. part 1 chaps. 7 and 8.

It should be clearly understood that to William, Philip was simply the Duke of Brabant, and lord of the other provinces of the Netherlands, that is, that he conceived of their relations to him as the relations of feudal vassals to their feudal lord, bound to each other by mutual obligations and mutual oaths.

William sets out this conception in one passage in specific and detailed terms. Does Philip, he says, not know the condition on which he holds his authority? Does he not remember the oath which he took before they swore allegiance to him, for he has no such power to do whatever he wishes, as he has in the Indies. He cannot violently constrain any one of his subjects, except so far as the customs of his "domicile" allow; he cannot change the "estat" of the country by his ordinance; he cannot impose taxation without the express consent of the country; he cannot bring soldiers into the country without the consent of the country; he cannot arrest any of his subjects without inquiry by the magistrate of the place; and when he has made him prisoner he cannot send him out of the country.<sup>1</sup> William not only set out these and other conditions on which, as he maintained, Philip II. held his authority in the Netherlands, but he also made it plain that these conditions were, if necessary, to be enforced. If the nobles do not fulfil their oath and compel the Duke to do right to the country, they should be condemned as guilty of perjury, faithlessness, and rebellion

<sup>1</sup> William of Orange, 'Apologie,' (p. 46): "Ne sçait-il pas à quoi il est obligé à moi, mes frères et mes compagnons et aux bonnes villes du pais? A quelle condition il tient cest estat? Ne se souvient-il non plus de son serment? . . . Il ne serait pas besoing, messieurs, que je vous representasse ce qu'il nous a promis devant que nous lui aions donné le serment. . . . Vous sçavez, messieurs, à quoi il est obligé, et comme qu'il n'est en sa disposition de faire ce que bon lui semble, ainsi qu'il faict es Indes. Car il ne peust par violence contraindre un seul de ses subjects à chose quelconque, sinon que les coustumes du Banc Judicial de

leur domicile le permettent. Ne peult par aucune ordonnance ou decret en façon quelconque alterer l'estat du pais. Se doit contenter de ses revenues ordinaires. Ne peult faire lever ni exiger aucunes impositions, sans le gré et du consentement expres du pais, et selon les privileges dicelui. Ne peult faire entrer gens de guerre au pais, sans le consentement d'icelui. Ne peult toucher à l'evaluation des monnoies sans le consentement des Estats du pais. Il ne peult faire apprehendre aucun sujet sans information faicte par le magistrat du lieu. L'aiant prisonnier il ne peult l'envoyer hors du pais."

against the estates of the country. By his own oath Philip had admitted that, if he violated it, no service or obedience should be rendered to him. Certainly between lords and vassals there is a mutual obligation, and among other rights the vassals have the right of the Ephors in Sparta, that is to maintain the royal authority of a good prince, and to bring to reason the prince who violates his oath.<sup>1</sup>

It is clear that William of Orange looked upon the relation between Philip and the Netherlands in the terms of the traditions of feudal law, as founded upon contractual conditions; these were embodied in their mutual oaths, and the community had not only the right but the duty of enforcing these conditions.

We find the same conceptions expressed in the declaration of the Netherlands to the Diet of the Empire at Worms in 1578. Their representatives, suspecting the intentions of Don John of Austria, proposed to put the government of the Netherlands in the hands of the Archduke Matthias of Austria, and they maintained that they were within their legal rights, for it had been provided by the "Privileges de Brabant" that if the prince or his lieutenant violated the laws and rights of the country, it was lawful for the Estates, and also for those to whom the duty specially belonged, to refuse him homage and obedience until he had amended and conformed to that which was prescribed by the laws. They cited historical examples of such action, and added that these "Privileges," which had originally belonged particularly to Brabant, had been extended to all the Low Countries in the time of

<sup>1</sup> Id. id. (p. 47): "Si, dis-je, les nobles suivants leur serment et obligation, ne contraignent le Duc à faire raison au pais, ne doibventils pas eus mesmes estre condamnez de perjure, infidelité et rebellion envers les Estats du pais. . . . (p. 48): En somme, par son serment, il veult qu'en cas de contravention nous ne lui soyons plus obligez, nous ne lui rendions aucun service ou obeissance, comme appert par l'article dernier . . . Cer-

tinement entre tous seigneurs et vassaux y a obligation mutuelle, et le dire du Senateur à un Consul sera toujours loué; si tu ne me tiens pour Senateur, aussi je ne te tiendrai pour Consul. . . . Entre autres droits, nous avons ce privilege de servir à nos Ducs, ce que les Ephors servoient à Sparte à leur Rois, c'est de tenir la roiauté ferme en la main du bon Prince, et faire venir à la raison celui qui contrevient à son serment."

the Duchess Mary.<sup>1</sup> We are not here concerned with the historical validity of these contentions, but with the nature of the conception which they represented. It is obvious that while there is no direct reference to a contract, it was implied that the prince who violated the laws was liable to be suspended or deposed; that is, that there was an implicit contract.

It is significant that in the Articles of Agreement which were laid before the Duke of Anjou in the year 1581 by the envoys of the Estates sent to offer him the government, it is clearly stated that, if the Duke or his successors were at any time to violate the terms of the Agreement, the estates would be *ipso facto* released from their fidelity and would be at liberty to appoint another prince or to make such other arrangements as they might think suitable.<sup>2</sup>

<sup>1</sup> Philip Marnix de Ste. Aldegonde *Cœuvres*, vol. vii., 'Oraison des Ambassadeurs du Serenissime Prince Matthias Archiduc d'Autriche' (p. 134): "En tant que par les privileges de Brabant est expressement pourvue et dicté, que si, je ne di point le lieutenant du prince, mais aussi le prince mesme, viole les loix et droictes du pays, il est en ce cas loisible, non seulement aux Estats en general, mais aussi particulièrement, à ceux auxquels appartiendra, de quelques conditions qu'ils soyent, de refuser au roi tout homage et obeissance, si longuement et jusque à tant qu'il ait cogner et amendé sa faute, et qu'il ait en tout satisfait à ce qui est prescript et limité par les loix et ordonnances.

Au reste, si quelqu'un, estant au nom du prince establi au gouvernement du pays, alloit à l'encontre desdictes privileges, il est par le mesme fait déclaré estre deceu de son gouvernement et dignité, et doit estre de tous tenu pour deposé, de maniere qu'aucun ne se peut-joindre à luy, comme a celui qui de fait et sans aucune forme de droict ou solemnité de loix, doit estre jugé non idoine à

exercer aucun office en la Republique, mais aussi tenu pour inhabile à faire testament et infame."

(They give as an example the deposition by the Estates of John, Duke of Brabant, grand-nephew of Philip le Hardi, Duke of Burgundy, and the appointment of his brother Philip, until John should amend; and they say that John recognised by letters under his seal that this action was legitimate.)

"Laquelle loy estant particulière au pays de Brabant au temps de la serenissime Marie, espouse de Maximilien. . . Empereur Auguste . . . fut, par traicté et convenant public, faicte commun et universel par tout le pais bas, ainsi qu'il se trouve par escrit ès annales publiques.

Semblable manière de faire a esté jadis practiquée, par les Hollandais et Zelandais et souvent usurpée en Flandres, comme la fidelité des historiens le nous tesmoigne."

<sup>2</sup> *Id.*, vol. vii. (p. 214), Art. 2: "Et en cas que S.A. ou ses successeurs contrevinssent à ce-dit traicté, en aucuns parts d'icelui, les Etats seront de fait absous et déchargés de toute obeissance serment et fidelité, et pourront

We think that it is with the impression of such a survival in the sixteenth century of the contractual conceptions of the feudal state in our minds that we shall best understand the treatment of the contract between ruler and people in other writers of the century.

George Buchanan asserts the conception of a contract in precise and dogmatic terms, in a discussion of the right to depose a king who becomes a tyrant. Maitland urged that subjects are bound by their oath of obedience to obey the king. Buchanan admits this, but replies that kings also promise to administer the law "ex aequo et bono," and that there is therefore a mutual contract between the king and the citizens. A contract is void if one of the parties violates its provisions, and therefore if the king breaks the bond which united him to the people, he loses whatever rights he had by the contract, and the people is free as it was before the agreement.<sup>1</sup>

The Huguenot pamphlets assert the principles of the contract with equal emphasis. The 'Droit des Magistrats' contends that so far from its being true that the people had wholly surrendered their liberty to the king, it is rather true that they only accepted him on certain conditions, and thus it follows that, if these conditions were violated, those who had power to give this authority had the right also to withdraw it. And again, it was on certain promises and conditions that a king was accepted by his people, conditions founded on equity and natural reason, that he should conduct the government according to the laws, of which he is or ought to be the supreme protector.<sup>2</sup> It is again worth observing that

prendre un autre prince, ou autrement pourvoir aux affaires, comme ils trouveront convenir."

<sup>1</sup> George Buchanan, 'De Jure Regni' (p. 38): "B. Obstricti sumus; sed illi (the kings) contra, priores promittunt se ex aequo et bono jus dicturos. . . . Mutua igitur regi cum civibus est pactio. . . . Qui prius a conventis recedit, contraque quam pactus est facit, nam is pacta et con-

venta solvit? . . . Solutio igitur vinculo, quod regem cum populo continebat, quicquid juris ex pactione ad eum qui pacta solvit, pertinebat, id, reor, amittitur. . . . Is etiam, cum quo erat conventum, aequo fit, atque ante stipulationem erat, liber."

<sup>2</sup> 'Droit des Magistrats' (p. 753): "Je nie qu'il puisse apparoir d'une telle quittance (the contention that the people had wholly surrendered their

the 'Droit des Magistrats,' in a passage to which we have already referred, in which it speaks of kingdoms and empires as fiefs of the "Souveraineté," refers to the feudal law as declaring that the lord loses his fief if he commits "felonie" against his vassals, and applies this to the case of an emperor or king in his relations to his subjects.<sup>1</sup>

The 'Archon et Politie' speaks of the reciprocal pacts and conventions between the prince and the people which may not be violated by either party.<sup>2</sup> The 'Vindiciae Contra Tyrannos' sets out the principle of a "foedus" between king and people. It was the people who made the king, and the people imposed a condition which the king promised to observe. The condition was that the king should reign justly and according to the laws, and when he had promised to do this the people promised that they would faithfully obey him, but, if the king did not fulfil his promise, they would be free from all obligation to him. There are indeed two contracts, one between God and the king and people, the other between the king and the people. God is the avenger if the king does

liberty), et dis au contraire, que les nations, tant que le droit et equité a eu lieu, n'ont créé ni accepté leur Roys qu'à certaines conditions, lesquelles estans manifestement violees par eux, ils s'ensuit que ceux qui ont en puissance de leur bailler telle autorité n'ont en moïn de puissance de les en priver."

Id. (p. 769) (After citing the terms of the Treaty of Arras between Charles VII. and the Duke of Burgundy, that if Charles violated the Treaty his vassals and subjects would be absolved from their oath of allegiance to him) : "Devons-nous en moins estimer d'une promesse et condition sous laquelle un Roy aura esté accepté par son peuple, et qui est mesme fondée sur equité et raison naturelle, assavoir de rejgler son administration selon les loix, desquels il est ou doit estre le souverain protecteur."

<sup>1</sup> Id. (p. 776) : "Outre tout cela,

puisque les royaumes et empires mesmes sont fiefs, devons hommages et services à la souveraineté, venons à considerer ce que porte les droits des fiefs. Il est dit au livre II. Tit. xxvi. Par. 24, et Tit. 47, que le seigneur commet felonnie contre son vassal comme le vassal contre son seigneur. . . . Je di donc au cas où nous sommes, qu'un Roi ou mesme un Empereur, relévante de la souveraineté commettant felonnie contre ses vassaux, à savoir ses sujets (ce que jamais ne puisse advenir) perd son fief, non pour estre adjudgé aux vassaux, mais pour y estre pourveu par ceux qui représentent la souveraineté."

<sup>2</sup> 'Archon et Politie' (p. 114) : "Politie. Mais il y a loi entre les deux parties qui ordonne actions et convenances reciproques, qui ne se peuvent, ni par le Prince, ni par les sujets, sans justice violer."

not keep the first pact, while the whole people and those persons who are responsible for the protection of the people have the same authority if the king does not fulfil his contract with them.<sup>1</sup> It is, however, perhaps more important that the author of the 'Vindiciae' maintains that a contract of this kind was a part of the constitution of almost all contemporary states (imperia) which were worthy to be called states; and he illustrates this from the Empire and other elective monarchies, and then from hereditary monarchies like France, England, and Spain, and smaller states like Brabant. He finds the essential expression of this in the coronation ceremonies and especially in the coronation oaths, and concludes that no one can deny that there is a mutual and binding contract between kings and their subjects.<sup>2</sup>

The author of the 'Vindiciae' sums up the whole matter by declaring emphatically that the king who violates the contract is perjured and unworthy of his office, and that the people who refuse obedience to him have violated no obligation, and he appeals to the principle of the feudal law that the vassal is free from the service if the lord has committed "felonie" against him. And finally he says that even if there were no ceremonies of coronation, if the king had taken no oaths, nature itself would teach men that kings were created by the people that they should rule justly, and that if they do not

<sup>1</sup> 'Vindiciae Contra Tyrannos,' Q. III. (p. 159). "Diximus in constituendo rege duplex foedus initum fuisse; primum inter Deum et regem et populum, de qua super: secundum inter regem et populum de quo nobis jam agendum est. . . . (P. 160): In eo pacto agebatur de creando Rege. Populus enim regem faciebat, non Rex populum. Itaque non dubium est quin populus stipularetur, Rex promitteret. . . . Stipulabatur ille a rege, an non juste et secundum leges regnaturus esset? Hic facturum spondebat. Populus demum se juste imperanti fideliter obsequaturum responderebat. Itaque promittebat rex pure, populus sub conditione; quae si

non impleretur, populus ipso jure omni obligatione solutus censeretur. In primo foedere seu pacto pietas in obligationem venit; in secundo justitia; illo promittit rex, se pie obediturum Deo: hoc se juste imperaturum populo; illo, se gloriam Dei; hoc, utilitatem populi curaturum; in illo inest conditio, si legem meam observaris; in hoc, si jus unicuique suum tribueris. Illius, ni impleatur Deus proprie vindex est; hujus legitime universus populus, quive universum populum tuendum susceperint, regni proceres."

<sup>2</sup> Id. id. (p. 162): "Quod si vero hodierna imperia spectemus, nullum sane est, quod eo nomine dignum con-

do this they are no longer kings and should not be acknowledged by the people.<sup>1</sup>

seatur, in quo inter principem et subditos pactum ejusmodi non intercedat."

He cites the oath of the Emperor Charles V.: "Leges latas custoditurum; novas, inconsultis electoribus non laturum; publica publico consilio curaturum; nil alienaturum oppigneraturumve ex iis, quae ad imperium pertinent, et caetera."

The Archbishop of Cologne requires the emperor at his coronation to swear to defend the Church, to administer justice, &c., and when the emperor has done this, he asks the princes whether they will take the oath to him. He refers to Poland, and the recent coronation of the Duke of Anjou; to Bohemia and to Hungary; and maintains that the same practice obtained even in hereditary kingdoms like France.

(p. 164): "Rex Franciae, quando inauguratur, rogant primo Laudunensis et Bellovacensis, Pares Ecclesiastici, populum qui adest universum, cum ne regem esse cupiat, jubeatque? Unde etiam a populo tunc eligi in ipsa inaugurationis formula, dicitur. Ubi populus consensisse videatur, jurat se leges Franciae privilegiaque ac jura in universum omnia et tuiturum, domanium non alienaturum et cetera. . . . Nec vero prius accingitur gladio, ungitur, coronatur a paribus . . . aut Rex proclamatur, quam populus juserit: neque etiam prius ei pares jurant, quam ipsis fidem dederit, se leges accurate custoditurum. Eae vero sunt, ne patrimonium publicum dilapidet, ne vectigalia, portoria, tributa suo arbitrio imponat, indicatve, ne bellum decernat, pacemve faciat: denique ne quid in publicum, nisi publico consilio statuat. Item sua senatui, sua Comitibus, sua regni officariis constet auctoritas; et cetera, quae perpetuo in regno Francico

observata fuere."

When the king enters any province for the first time, he confirms and swears to observe its privileges—*e.g.*, Toulouse, Dauphiné, Brittany, Provence.

The conditions in England, Scotland, Sweden, and Denmark were much the same as in France, while in Spain they were even more definite, and he cites the tradition that in Aragon the "Proceres" addressed the king at his coronation as follows:—

(p. 166) "Nos qui tantum valemus quantum vos, et plus possumus quam vos, regem vos eligimus cum his et his conditionibus. Inter vos et nos unus imperat magis quam vos" (*referring, no doubt, to the Justiza*).

If the king violated his oath he was to be excommunicated, and his subjects were released from their oath like the vassals of the excommunicated lord.

This was also the rule in smaller States such as Brabant.

(p. 167): "In Duce enim suo inaugurando, conventionibus antiquis, quibus nil fere ad reipublicae conservationem deest, coram Duce perlectis, ni eas omnes observaverit, sibi integrum esse alium quemlibet suo arbitratu eligere, palam ei diserteque protestantur. Ipse vero tum in eas, accepta conditione utroque agnita, sese sacramento devincit. Quod etiam postremo in Philippi Hispaniarum Regis inauguratione observatum fuit. In summa: inter regem et subditos contractum mutuo obligatorium esse, nemo negare possit; nempe ut bene imperanti, bene obediatur, qui quidem jure jurando ab illo primum, deinde ab his confirmari solet."

<sup>1</sup> Id. id. (p. 168): "Quodsi vero conditionis implendae defectu, contractus ipso jure solutus est, quis perjurum populum vocet qui regi

We find a writer of the Catholic League like Boucher setting out the same conception of the contractual relation between the prince and the people; and again with relation to the tradition of the feudal law as to the mutual obligations of lord and vassal, and the doctrine of the feudal law books that the lord would lose his rights for the same offences as those for which the vassal would lose his fief.<sup>1</sup> And, in justification of the deposition of Henry III., Boucher contended that the royal authority depended upon the mutual contract between king and people, in such a sense that, if the king were to violate it, he could not be recognised as king.<sup>2</sup>

It may again be urged that the works which we have just cited were the outcome of violent and revolutionary movements and it is therefore very important to observe that Richard Hooker, in a passage of which we have already quoted part, affirms the same principle of the "compact" between the ruler and the community.

"The case thus standing," he says, "albeit we judge it a thing most true that kings, even inheritors, do hold the right

conditionem, quae implere debuit et potuit, negligentem, legemque, in quam juravit, violantem, obsequium deneget? Quis vero contra, eum regem foedifragum, perjurum, eo beneficio prorsus indignum non censeat.

(p. 169): Etenim, si vassallum clientelae nexu liberat, in quem senior feloniam commisit, etsi sane senior fidem proprie non dat vassallo, sed vassallus ipse. . . . An non multo magis solutus erit populus ea fide, quam regi praestitit, si rex, qui primus ipsi tantquam domino procurator, solemniter juravit, fidem frerit.

An non vero etiam si non isti ritus, non ea sacra, non ea sacramenta intervenirent; satis tamen ipsa natura docet, reges ea conditione a populo constitui, ut bene imperent? Judices ut jus dicant? Duces belli, ut exercitus adversus hostes educant? Quodsi vere saeviunt, injuriam inferunt, hostes

ipsi fiunt; ut reges non sunt ita nec agnosci a populo debere."

<sup>1</sup> J. Boucher, 'De justa abdicatione Henrici III,' i. 19.

<sup>2</sup> Id. id., iii. 3: "Adde quod cum Rege publica fides necessario conjuncta est, ut ne Rex quidem sine ea esse posset. Pendet enim id ex mutuo contractu illo, quo Rex populo fidem suam, huic vicissem suam populus obligavit. Mutuumque adeo promissum est, ut dum populus summum ei imperium defert, et ut in publicum commodum vertat obtestatur, id, vicissim princeps facturum se recipiat, ac iuramento firmet, tanto existimationis studio, ut fidei nomine ac laude, nihil antiquius reges habere perpetuo velint. . . . Ex quo fit, ut qui fidem illam semel abjiceret, ei reliquum nihil sit, quo regis nomine tueri iure posset, ut ob id, titulo isto merito sit privandus."

to the power of dominion, with dependency upon the whole entire body politic over which they rule as kings, yet so it may not be understood, as if such dependency did grow, for that every supreme governor doth personally take from them his power by way of gift, bestowed upon him at his entrance into his said place of sovereign government. But the cause of this dependency is in that first original conveyance, when power was devised by the whole unto the one; to pass from him unto them, whom out of him nature by lawful birth should produce, and no natural or legal inability make incapable. Neither can any man with reason think but that the first institution of kings is a sufficient consideration wherefore this power should always depend on that from which they flow. Original influence of power from the body into the king is the cause of the king's dependency in power upon the body.

By dependency we mean subordination and subjection. . . . May then a body politic at all times withdraw in whole or in part that influence of dominion which passeth from it, if inconvenience doth grow thereby? It must be presumed that supreme governors will not in such case oppose themselves and be stiff in detaining that, the use whereof is with public detriment: but surely without their consent I see not how this body should be able by any just means to help itself, saving when dominion doth escheat. Such things must, therefore, be thought upon beforehand, that power must be limited ere it be granted, which is the next thing we are to consider. In power of dominion all kings have not an equal latitude. Kings by conquest make their own charter. . . . Kings by God's own special appointment have also that largeness of power, which he doth assign or permit with approbation. Touching kings which were first instituted by agreement and composition made with them over whom they reign, how far this power may lawfully extend, the articles of compact between them must show, not the articles only of compact at the first beginning, which for the most part are either clean worn out of knowledge, or else known unto very few, but whatsoever hath been after in free and voluntary

manner condescended unto, whether by express consent, whereof positive laws are witnesses, or else by silent allowance famously notified through custom reaching beyond the memory of man."<sup>1</sup>

It will be observed how careful and how precise is the statement of the theory of "compact" between the ruler and the community. It rests ultimately upon the principle that normally the power of the king is derived from the community, not necessarily immediately in the case of the individual king, but by grant to a particular family; this implies what Hooker calls "subordination and subjection" of the king. He does not admit that this implies the power to revoke the authority granted to the ruler, without his consent, but it does imply that his powers as such must be limited from the outset and throughout by the terms of the "compact." Further, and this is a notable conception, the "compact" does not mean merely some original or primitive agreement, but all the laws and customs of the constitution that has gradually grown up and been accepted. Hooker, in saying this, is not running counter to the conception of the contract, as embodied especially in the coronation oaths of king and people; but he is bringing this into closer relation to the principles of the supremacy of the law, that law which is the living expression of the custom and life of the community. The "compact" is on the king's part the promise to obey the law, and we therefore once again cite a passage in which his relation to the law is expressed.

"In which respect, I cannot choose but commend highly their wisdom by whom the foundations of this commonwealth have been laid; wherein, though no manner of person or cause be unsubject to the king's power, yet so is the power of the king over all and in all limited, that unto all his proceedings the law itself is a rule. The axioms of our regal government are these: 'Lex facit regem,' the king's grant of any favour made contrary to the law is void; 'Rex nihil potest, nisi quod jure potest.' Our kings, therefore, when they take possession of the room they are called unto, have

<sup>1</sup> Hooker, 'Ecclesiastical Polity,' viii. 2, 9, 10, 11. Cf. p. 370.

it painted out before their eyes, even by the very solemnities and rites of their inauguration, to what affairs by the said law their supreme authority and power reacheth." <sup>1</sup>

We turn again to Althusius ; for he states the principles of a contract between the prince and the community from whom he draws his authority, very precisely and emphatically. By the establishment of the supreme magistrate the members of the kingdom bind themselves to obedience to him, for he receives from the community the rule (*imperium*) of the kingdom, but the people and the supreme magistrate enter into an agreement with each other with regard to certain laws and conditions to which they bind themselves by an oath ; and this cannot be recalled or violated either by the magistrates or the subjects. <sup>2</sup>

And again, in terms both general and emphatic, Althusius declares that no kingdom or commonwealth was ever created without a contract between the subjects and the prince, which was to be kept religiously by both, and that if this were violated, all the authority founded upon it would fall to the ground. <sup>3</sup>

The supreme magistrate has only so much power as was expressly granted to him by the members of the community, while that which was not granted remains with the people. An absolute power, or what is called "*plenitudo potestatis*," cannot be granted to the supreme magistrate, for to grant this would destroy that justice without which kingdoms are mere bands of robbers ; an absolute power is not directed

<sup>1</sup> Id. id., viii. 2, 13. Cf. p. 357.

<sup>2</sup> Althusius, '*Politica*,' xix. 6: "Constitutio magistratus summi est, qua illi imperium et administrationem regni, a corpore consociationis universalis delatam suscipienti, regni membra se ad obsequia obligant. Seu, qua populus et magistratus summus inter se mutuo certis legibus et constitutionibus de subjectionis et imperii forma, ac modo pascuntur, juramento ultro citroque fide data et accepta promissave.

Pactum hoc, seu contractum man-

dati . . . cum magistratu summo initum, utramque partem contrahentium obligare dubium non est, adeo ut revocare illum, vel violare neque magistratui neque subditis concedatur."

<sup>3</sup> Id. id., xix. 15: "Itaque nullum unquam regnum, nullave republica instituta fundataque fuit, nisi ultro citroque habito initoque contractu, pactisque inter subditos et futurum eorum principem conventis, et obligatione mutua statuta, quam utriusque religiose conservarent ; et qua violata potestas illa evanesceret ac tolleretur."

to the good of the subjects, but to a private satisfaction. The right (that is, *ius*) granted to the magistrate by the people is less than that of the people, and belongs to another (*i.e.*, the people), it is not his own. <sup>1</sup>

Althusius does not, however, set out this principle of the contract merely as a theory. Like the author of the '*Vindiciae*,' he maintains that it could be found in almost all modern kingdoms, whether elective or hereditary, in France, England, Sweden, Spain, and the German Empire ; and he relates it to the form of oath taken by the princes on their accession. <sup>2</sup>

We venture to think that we have said enough to show that the conception of a contract between king and people was not merely archæological nor unimportant in the sixteenth century. It was set out with force and clearness by the most sober and dispassionate writers like Hooker and Althusius, and it was clearly founded, first, on the relation of the king to the law, second, on the conception embodied in the coronation orders, and third, on the continuing influence of the feudal tradition of the Middle Ages.

(5) The Right of Resistance and Deposition.—In discussing the conception of the sovereignty of the community and of the contract between ruler and people, we have already touched upon this, but the subject is of so much importance that we must deal with it in more detail.

We need hardly repeat the emphatic terms in which William of Orange in his '*Apologie*' and the other documents we have cited with regard to the revolt of the Netherlands,

<sup>1</sup> Id. id., xix. 7: "Tantum autem juris habet hic summus magistratus, quantum illi a corporibus consociatis, seu membris regni, est expresse concessum ; ut quod non datum ipsi est, id penes populum, seu universam consociationem, remansisse dicendum est. . . .

9. Absoluta potestas, seu plenitudo potestatis, quam vocant, summo magistratui dari non potest. . . .

10. Nam qui plenitudine potestatis utitur, repagula, quibus est obserata

humana societas perfringit. Deinde per absolutam potestatem tollitur justitia, qua sublata, regna fuerint atrocissima. . . . Tertio ; talis potestas absoluta, non respicit utilitatem et salutem subditorum, sed voluptatem privatorum. . . .

13. Deinde apparet ex hoc contractu, jus summo magistratui a populo datum, esse minus populi jure et alienum non ipsius proprium."

<sup>2</sup> Id. id., xix. 38-42.

declare that Philip II. had forfeited his authority, as he had violated the agreements upon which it rested.<sup>1</sup>

The question of the right of resistance and deposition was raised in Scotland also, not merely as theory but as a practical question, even earlier; and it was discussed by one of the best known writers and scholars of that time in Europe, that is, by George Buchanan. But behind George Buchanan there was a greater and more powerful figure, that is, John Knox, who not only defended the right of resistance and deposition in principle, but did much to carry it out in fact. We must therefore take account of some of the principles laid down, especially by Knox in the course of that triumphant revolt which Buchanan defends. We are not here concerned to discuss the merits of that conflict, or the character of those who took part in it, least of all of the Scottish nobles, the most unscrupulous and politically incompetent representatives of that class in Europe; but we are greatly concerned with the formulation and development of the principles of the revolt. And for this we must look, before George Buchanan's 'De Jure Regni' was published, mainly to the declarations of the Reformed preachers and of John Knox, as we find them in Knox's history of the Reformation in Scotland. (It is not necessary for our purpose to assume that John Knox's reports of these were always precisely accurate.)

The first statement which we should notice is that of the Reformed preachers to the "Congregation" in reply to the proclamation of the queen regent, Mary of Guise, in August 1557. "In oppin audience they (*i.e.*, the preachers) declair the authority of princes and magistrates to be of God. . . . To brydill the fury and raige of princes in free kingdoms and realms, they affirm it apperteins to the nobilitie, sworne and borne consallouris of the same, and allswa to the Barrouns

<sup>1</sup> William of Orange, 'Apologie' (p. 48): "En somme par son serment il (the prince) veult qu'en cas de contravention, nous ne lui soyons plus obligez, nous ne lui rendions aucun service ou obéissance." Cf. St Aldegonde, 'Œuvres,' vol. vii. (p. 134):

"Au reste, si quelqu'un ? au nom du prince établis au gouvernement du pays, allant à l'encontre des dictes privilèges, il est par le même fait déclaré estre decheu de son gouvernement et dignité, et doit estre de tous tenu pour deposé."

and Pepill, quhais voties and consent are to be requyret in all great and wechty materis of the commonwealth."<sup>1</sup>

At the meeting of the "haile nobility, barouns and broughes in Edinburgh," in October of the same year, the preachers were required to give their judgment on the question whether the Regent "ought to be suffered so tyrannouslie to impyne above them," and John Willock and John Knox spoke for them. The declaration of Willock is reported as follows: "First, that, albeit magistrates be God's ordinance, having of him power and authoritie, yith is not thir power so largelie extended, but that it is bounded and limited by God and His Word.

And secondarlie, that as subjects are commanded to obey thir magistratis, so are magistratis commanded to geve some deutie to the subjectis; so that God, by His Word, has prescribed the office of the one and of the other.

Thirdlie, that albeit God hath appointed magistratis his lieutenanties on earth, and has honoured thame with His auni title, calling them Goddis, that yith he did never so estables any, but that for just causes thei mycht have been deprived.

Fourthlie: that in deposing of princes, and those that had bene in authoritie, God did not alwyse use his immediate powere. . . . And hereupon concluded he, That since the Queen Regent denyed her cheaf deutie to the subjectis of the Realme, which was to minister justice unto them indifferently, to preserve thair libertie from invasion of strangearis, and to suffer them have Godis' Word openlie preached among them; seeing, moreover, that the Queen Regent was an open and obstinat idolatress, a vehement mainteanere of all superstition and idolatrie; and finallic that she utterly despised the counsall and requestis of the Nobilitie, he could see no reason why they, the born Counsalleris, Nobilitie, and Barouns of the Realme, that they should not justly deprive her from all regiment and authoritie amonges tham."<sup>2</sup> Knox reports that he approved Willock's statement, but adds that all this referred to the Regent and not to Queen

<sup>1</sup> Knox, 'History,' vol. i. pp. 410-411.

<sup>2</sup> Id. id., vol. i. pp. 442, 443.

Mary, and that the deposition of the Regent should be conditional upon her refusing amendment.

It was not, however, long before the question of the authority of Queen Mary herself was raised. Knox gives an account of a conversation between himself and the Queen in 1561. "Think ye, quod sche (*i.e.*, Mary), that subjectis having power, may resist their Prince? If those princes exceed their boundis (quod he), madam, and do against that whairfor they should be obeyed, it is no doubt but that they may be resisted, even by power."<sup>1</sup>

In 1564 the General Assembly of the Church appointed certain members to meet the Lords of the Council, and to confer upon complaints that John Knox had spoken lightly of the queen's authority. The proceedings are reported mainly in the form of a dialogue between Knox and Maitland of Lethington. The most important question raised was that of the interpretation of Romans xiii. Knox had distinguished between the ordinance of God and the persons placed in authority, and maintained that subjects were not bound to obey the prince in unlawful things, and might resist him. "And now, my Lord" (he goes on), "to answeir to the place of the Appostle who affirms that such as resiste the power, resistis the ordinance of God, I say, that the power in that place is nocht to be understande of the unjust commandiment of men; but of the just power whairwith God has armit his magistrates and lieutenants to puniche syn and mentene vertew. . . . Then, will ye, said Lethington, mak subjectis to controlle thair princes and rulers? And what harm, said the uther, sould the Commonwealthe ressaif, gif that the corrupt effectiounis of ignorant rulers were moderatit, and so brydillit be the wisdome and discretion of godlie subjectis, that these sould do wrong nor violence to no man."<sup>2</sup>

Maitland appealed to the judgment of the Reformers, Luther, Melancthon, and others, evidently knowing only their earlier opinions, and Knox answered, it is interesting to observe, by citing the Apology of Magdeburg, that is, pre-

<sup>1</sup> *Id. id.*, vol. ii. p. 282.

<sup>2</sup> *Id. id.*, vol. ii. p. 437.

sumably, the Declaration of the Magdeburg Clergy, to which we already referred.<sup>1</sup>

These are important and unambiguous statements of the position of Knox; he refused to admit that the prince represented the authority of God in such a sense that it was never lawful to resist him, and maintained that it was well that he should be restrained by the wisdom of their godly subjects.

It was some years later that George Buchanan published his work entitled 'De Jure Regni apud Scotos,' and we must observe the terms under which he vindicated the right of a community to depose the ruler who abuses his power; and in the first place, his careful criticism of the arguments for the necessary submission of Christian men to rulers, however unjust.

He represents Maitland as urging that St Paul had commanded Christian men to pray for princes, and among them were wicked emperors like Tiberius, Caligula, and Nero. Buchanan answers that what St Paul commands in 1 Timothy ii. is that we must pray for kings and other magistrates that we may live quiet lives in godliness and honesty, and he points out that in order to understand St Paul's meaning we must observe the very careful terms which St Paul uses in the Epistle to the Romans to describe the function of the ruler. He is, St Paul says, a "minister" to whom God has given the sword that he may punish the wicked and protect the good; and he quotes St Chrysostom as saying that St Paul is not speaking of the tyrant, but of the true and lawful magistrate, who represents the power of God on earth. It does not follow that because we are to pray for wicked princes we are not to resist them, any more than because we are to pray for robbers we are not to resist them.<sup>2</sup> Buchanan follows this

<sup>1</sup> *Id. id.*, vol. ii. pp. 442, 453. Cf. p. 286 in this volume.

<sup>2</sup> George Buchanan, 'De Jure Regni' (p. 28): "In Epistola autem ad Romanos regem etiam definit prope ad dialecticam subtilitatem; 'esse,' enim ait, 'ministerium, cui

gladius a Deo sit traditus, ut malos puniat ac bonos foveat et sublevet.' 'Non, enim, de tyranno,' inquit Chrysostamus, 'haec a Paulo scribuntur, sed de vero et legitimo magistratu, qui veri Dei vices in terris gerit; cui qui resistit, certe Dei ordinationi resistit.'

up by pointing out that St Paul's purpose in laying stress upon the Divine authority of the magistrate was to correct the anarchical tendencies of those Christian men who thought that because they were the free sons of God they ought not to be under any human authority, and that in the passage in Romans xiii. St Paul was referring not to any particular magistrate but to the function or office of the magistrate.<sup>1</sup>

When he had thus disposed of the theological argument in favour of non-resistance, after mentioning some cases of the deposition of kings, he goes on to the more serious discussion of the meaning of the authority of the community over the king.

Maitland asks, how can the king who has become a tyrant be called "in jus"? Buchanan answers by asking which is the greater, the king or the law, and when Maitland admits that it is the law, Buchanan asks which is greater, the people or the law, and Maitland admits that it is the people, for it is the people which is the source and author of the law. Buchanan then concludes that, if the law is greater than the king and the people is greater than the law, there is no difficulty about the authority which can call the king to answer to the law. The people is greater than the king and thus when the king gives account to the people it is the lesser who is called to account by the greater.<sup>2</sup> This brings him to the judgment to which we have already referred, that the king is answerable in

Sed, nec statim, si pro malis principibus est orandum, hinc colligere debemus, eorum vitia non esse puni- enda; non magis certe quam latronum pro quibus etiam orare jubemur; nec si bono principi parendum est, ideo malo non est resistendum."

<sup>1</sup> Id. id., p. 28.

<sup>2</sup> Id. id. (p. 33): "M. Quis enim tyrannum e Rege factum in jus vocabit? . . . B. Ad hanc igitur imaginem componamus Regem, legem, et populum. Regis et legis eadem est vox. Uter auctoritatem habet ab altero? Rex ne a lege, an lex a Rege. M. Rex a lege. . . .

(p. 34.) B. Lex igitur rege po-

tentior est, ac velut rectrix et moderatrix et cupiditatum et actionum ejus. M. Id jam concessum est. B. Quid? Populi et legis nonne eadem vox est? M. Eadem. B. Uter potentior, populus an lex? M. Universus opinor populus. . . . Est enim velut parens, certe auctor, legis, ut qui eam, ubi visum est, condere aut abrogare potest. B. Igitur, cum lex sit rege, populus lege potentior, videndum nunc sit, ad quem, regem in jus vocemus. . . . B. Populus igitur rege praestantior. M. Necessè est. B. Si praestantior est, etiam et major. Rex igitur cum ad populi judicium vocatur, minor ad majorem in jus vocatur."

private cases to the courts, and this must be much more true in greater matters.<sup>1</sup>

When we turn to the Huguenot writers, we find they are equally clear about the right of resistance to and deposition of the unrighteous king. Hotman, the 'Droit des Magistrats,' and the 'Vindiciae' all appeal to the precedents of the earlier periods of the French kingdom as showing that the national council or Estates had the right of deposing evil kings.<sup>2</sup> They also cite more recent examples, the 'Droit des Magistrats' and the 'Vindiciae,' the depositions of the Emperors Adolf and Wenceslas and the recent depositions of the King of Denmark and of Mary, Queen of Scots,<sup>3</sup> and the 'Vindiciae' also refers to the depositions of Edward II. of England and of Eric of Sweden.<sup>4</sup> We have already pointed out that the 'Droit des Magistrats' compares the position of the king who holds of the sovereignty with that of a feudal lord, who will lose his fief if he commits "Felonie" against his vassals, that is, his subjects.<sup>5</sup> The Catholics had held that the Church is above the Pope and can depose him for heresy, and the people has the same authority over the king who has manifestly become a tyrant, says the 'Droit des Magistrats';<sup>6</sup> while the 'Vindiciae' maintains that the people is absolved from its obedience to the king if he has violated his "contract," the "people" is greater than the king, and can depose the tyrant.<sup>7</sup>

We have already referred to Boucher, as a representative of the Catholic League in France, as maintaining the right of the community to depose the king who violates that contract with the people upon which his authority depends, and we need only here refer to his detailed discussion of the right to

<sup>1</sup> Id. id. (p. 36): "B. Nunc, tu velim consideres, quam non modo sit absurdum, sed etiam iniquum, de praedicto, de luminibus, de stillicidiis adversus regem judicium dari; parricidii, veneficii, perdeullionis, nullum esse judicium: in minoribus rebus severitate juris uti, in maximis flagitiis summam licentiam et impunitatem permitti." Cf. p. 350.

<sup>2</sup> Hotman, 'Franco Gallia' (p. 655); 'Droit des Magistrats' (p. 66); 'Vindiciae contra Tyrannos' (p. 201).

<sup>3</sup> 'Droit des Magistrats' (pp. 760 and 765); 'Vindiciae,' Q. III. (p. 203).

<sup>4</sup> 'Vindiciae,' id. id.

<sup>5</sup> 'Droit des Magistrats' (p. 76). Cf. p. 374.

<sup>6</sup> Id. (p. 79).

<sup>7</sup> 'Vindiciae,' Q. III. 3 (pp. 160-169).

depose the tyrant. He cites St Thomas Aquinas ('De Reg.' I. 6) as holding that it is lawful for a people to depose the unjust king if it belongs to them to appoint him, and this is followed by a detailed discussion of the question whether and under what circumstances it is lawful to kill the tyrant.<sup>1</sup>

We have already dealt with some aspects of Mariana's theory of the state and government, and we need only recall that, while he is a strong supporter of monarchy, he thinks of laws as having been made to restrain the king, and that these laws have been made by the community from whom the king receives his authority.

He therefore maintains that inasmuch as the authority of the king is derived from the commonwealth, the king can be compelled to give account to the law, and, if he will not amend, he may be deposed; for the community, when it bestowed power on a king, kept the greater power in its own hands.<sup>2</sup>

This is Mariana's general principle, and he goes on to consider how the authority of the community over the prince is to be exercised. He is in this chapter discussing and defending the revolt against Henry III. of France and his assassination. He defends tyrannicide as lawful, but it should be observed he makes a careful distinction between the tyrant who has usurped power and the lawful king who has become a tyrant by abusing his power. All philosophers and theologians, he says, are agreed that the usurper may be slain by anyone.<sup>3</sup> It is different, however, in the case of a prince, who holds his power by the consent of the people, or by hereditary right. His private vices must be tolerated, but, if he injures the commonwealth, lays his hands upon public and private wealth, treats the public laws and religion with contempt, there must be no hesitation. At the same time the nature of the action against the prince must be carefully considered, lest evil should be added to evil.

<sup>1</sup> J. Boucher, 'De justa Abdicatione,' III. 13-19.

<sup>2</sup> Mariana, 'De Rege,' I. 6 (p. 57): "Certe a republica unde ortum habet regia potestas, rebus exigentibus, regem in jus vocari posse, et si sanita-

tem respuat, principatu spoliari, neque ita in principem jura potestatis transtulit, ut non sibi majorem reservavit potestatem."

<sup>3</sup> Id. id., I. 6 (p. 58).

The best and safest course is that a public assembly should meet and consider what is to be done; the prince should first be admonished, and if he will correct his former faults, he should be re-established. If, however, he will not do this, the commonwealth may deprive him of his authority, may declare him a public enemy, may make war upon him and slay him; and it will be lawful for any private person to execute this sentence.<sup>1</sup>

If, however, it is not possible to hold a public assembly, and the commonwealth is oppressed by the tyranny of the prince, and yet men desire to destroy the tyranny and to punish the manifest and intolerable crimes of the prince, the man who follows the public wishes and endeavours to destroy him is not, in Mariana's judgment, to be condemned. He does not think that there is much danger that many will follow this example; and he does not mean that the decision with regard to such action should be left to any single and private person; if the public voice cannot be expressed, learned and grave men should be consulted.<sup>2</sup>

<sup>1</sup> Id. id., I. 6 (p. 59): "Nam si princeps populi consensu aut jure hereditario imperium tenet, ejus vitia et libidines ferendae sunt eatenus, quoad eas leges honestatis et pudicitiae, quibus est astrictus, negligat. . . . Si vero rempublicam pessumdat, publicas privatasque fortunas praedae habet, leges publicas et sacrosanctam religionem contemptui: virtutem in superbia ponit in audacia atque adversus superos impietate, dissimulandum non est. Attente tamen cogitandum quae ratio ejus principis abdicandi teneri debeat, ne malum malo cumuletur, scelus vindicetur scelere. Atque ea expedienda maxima et tuta via est, si publici conventus facultas dotur, communi consensu quid statuendum sit deliberare, fixum, ratumque habere quod communi sententia steterit."

In quo his gradibus procedatur. Monendus in primis princeps erit atque ad sanitatem revocandus, qui si

morem gesserit, si republicae satisfecerit, peccataque correxerit vitae superioris, restituendum arbitror, neque acerbiora remedia tentanda.

Si medicinam respuat, neque spes ulla sanitatis relinquatur, sententia pronunciata, licebit reipublicae ejus imperium detrectare primum. Et quoniam bellum necessario concitabitur, ejus defendendi consilia explicare, expedire arma, pecunias in belli sumptus, imperare populis: etsi res feret, neque aliter se reipublica tueri possit, eodem defensionis jure ac vero potiori auctoritate et propria. Principem publicum hostem declaratum ferro perimere. Eademque facultas esto cuiquam privato, qui spe impunitatis abjecta, neglecta salute in conatum juvandi rempublicam ingredi voluerit."

<sup>2</sup> Id. id. id. (p. 60): "Roges quid faciendum, si publici conventus facultas erat sublata; quod saepe potest contingere. Par profecto, mea quidem

Mariana concludes the chapter with a critical discussion of the Decree of the Council of Constance, which condemned tyrannicide.

Cardinal Bellarmine is cautious and restrained in his discussion of this subject, but, as we have already pointed out, he is clear that the authority of the prince, while it is derived ultimately from God, is derived immediately from the consent of man.<sup>1</sup> In another passage he says that although we are bound by the Divine Law to obey the king as long as he is king, the Divine Law does not say that there are no causes for which the king may be deprived of his kingdom; if this were not so, there would be scarcely any commonwealth, since they have been for the most part established after the expulsion of their kings.<sup>2</sup> It is no doubt true that Bellarmine is really concerned to vindicate the right of the Pope to depose heretical kings, but his words leave little doubt that he recognised the right of the community to depose the king for just cause.

sententia erit, cum principis tyrannide oppressa republica; sublata civibus inter se conveniendi facultate, voluntas non desit delendae tyrannidis, scelera principis manifesta modo et intoleranda vindicandi, exitiales conatus comprimendi; ut si sacra patria pessundet, publicosque hostes in provinciam attrahat: qui votis publicis favens, eum perimere tentaret, haudquaquam inique cum fecisse existimabo. . . . Neque est periculum ut multi eo exemplo in principem vitam saeviant, quasi tyranni sint, neque enim in cujusquam privati arbitrio ponimus; non in multorum, nisi publica vox populi adsit, viri eruditi et graves in consilium adhibeantur."

<sup>1</sup> Cf. p. 372.

<sup>2</sup> Bellarmine, 'De Potestate Summi Pontificis,' xxii (p. 181): "Non ignorabam servire et obedire regi esse juris Divini; et ideo non hoc negavi in meo libro: sed dixi, juris humani

esse, ut hunc aut illum habeamus regem, jure autem divini servare veram fidem ac religionem: quamvis enim jure divino teneamur regi parere, dum rex est, non tamen jure divino cavetur ut regi nullis de causis regnum abrogari posset; alioquin quotquot ab exordio mundi regnis exuti sunt, oranos per injuriam exuti fuissent, neque ulla esset respublica, aut pene nulla, jure instituta: reipublicae siquidem, ut plurimum, exactis regibus constituuntur."

Cf. id. id., xxvi. (p. 200): "Sic igitur, jure divino tenentur populus regi servire, dum rex est: sed si rex desinat esse, quod multis modis fieri potest, nulla remanet obligatio servitutis aut obedientiae. Non est autem de jure divino, ut rex justis de causis deponi non possit."

For a parallel judgment as expressed by Molina and Suarez, cf. pp. 343, 347.

The only important writer among those with whom we have dealt in this chapter who is not willing to approve of the deposition of the king is Hooker. We have discussed his treatment of the "compact" or agreement between the community and its ruler, on which his authority rests, but as we have seen he does not admit that this implies that the community can withdraw its authority without the consent of the ruler. "It must be presumed that supreme governors will not in such case oppose themselves and be stiff in detaining that, the use whereof is with public detriment; but surely without this consent I see not how the body should be able by any just means to help itself, saving where dominion doth escheat."<sup>1</sup> It must, however, be observed that Hooker adds that just on this account the authority which is bestowed upon the ruler must be carefully limited.

"Such things therefore must be thought upon beforehand, that power may be limited ere it be granted."<sup>2</sup>

When we turn to Althusius we find that he deals with this question carefully but dogmatically, and mainly in that chapter in which he discusses the nature of tyranny and the remedies for it. He is concerned with tyranny, "exercitio," and describes it as that by which the foundations and bonds of the commonwealth are destroyed. For these foundations and bonds consist primarily in the mutual promises to observe and defend the fundamental laws, which were made by the community and the king. The violation of the contract between ruler and people, which we have already discussed, is tyranny. Again, Althusius describes the exercise of an absolute power by the supreme magistrate as tyranny. And again, he describes as tyranny the attempt to hinder the meeting of the assemblies of the kingdom and the free expression of opinion in them when they meet.<sup>3</sup>

<sup>1</sup> Hooker, 'Eccles. Polity,' viii. 2, 10.

<sup>2</sup> Id. id. id.

<sup>3</sup> Althusius, 'Politica,' xxxviii. 1: "Tyrannis igitur est juste ac recte administrationi contraria, qua funda-

menta et vinculum universalis consociationis obstinate, perseveranter, et insanabiliter contra fidem datam et praestatum juramentum, a magistratu summo tolluntur et evertuntur.

2. Superioribus capp: proceden-

When he has thus described tyranny, he proceeds to discuss the remedies for it. Like Calvin, he does not allow the private subject to resist or revolt.<sup>1</sup> He is emphatic and unequivocal in maintaining that the tyrant is to be resisted and, if necessary, deposed by the properly constituted authority; the public officers who are responsible and competent to carry this out are the Optimates or Ephori; he sometimes speaks as though these public officers were to act alone, but in another place he seems clearly to mean that they are to call together the General Council of the Estates, and that it is to examine and judge the action of the tyrant. If there are no Ephors, the people should appoint "defensores" for this purpose.<sup>2</sup>

It is interesting to observe that Althusius is aware of the contentions of Albericus Gentilis, which we discuss in a later chapter; but Althusius bluntly replies that the people and the Ephors are superior to the prince, who had received his authority from them.<sup>3</sup>

He concludes the chapter by that assertion which we have already cited, that the indivisible and incommunicable

tibus a cap. 9 et seq., fundamenta et vincula consociationis diximus consistere in fide ultro citroque a corpore consociato et rege data et accepta ad legum fundamentalium et aliarum, in quas tempore initiationis suae juravit summus magistratus, imprimis vero ad illarum, quae consociationem universalem conservant, observationem et defensionem, atque rectam reipublicae gubernationem. . . .

9. Similiter, quando summus magistratus absoluta potestate, seu plenitudine potestatis in administratione sua utitur. . . .

20. Specialis tyrannus est . . . Qui publicos regni conventus et concilia malis artibus prohibet, vel impedit, suffragiave eorum qui mittuntur conducit, limitat, restringit, coarctat, ne quoad sentiunt dicere audeant, velint vel possint."

<sup>1</sup> Id. id., xxxviii. 65: "Quid vero de subditis et privatis ac populo sentiendum est? Nam quae haecenus

diximus, de Ephoris, personis publicis dicta sunt. Plane privati, quando magistratus tyrannus est exercitio, quia non habent usum et jus gladii, neque eo in re utentur."

<sup>2</sup> Id. id., xxxviii. 57: "Nota vera et cognita ut fiat tyrannis ejusmodi (i.e., exercitio), necesse est, ut optimates regni concilium indicant, et generalom omnium ordinum conventum cogant, in eoque tyranni opera et facta examinanda proponant et dijudicanda. . . . Vel si Ephori nulli sint, ad hoc ipsum a populo vindices et defensores publici constituantur."

<sup>3</sup> Id. id., xxxviii. 81: "Par, postea (idem Gentilis dicit) in parem, multo minus in superiorem habet imperium. . . . Ergo Ephori, qui sunt minores Rege, non possunt resistere tyranno. Contrarium ego assero. Revera enim Populus et Ephori sunt superiores principe, quem ipsi constituerunt, a quibus, quam habet potestatem ille acceptit." Cf. p. 450

"Majestas" belongs to the members of the whole kingdom, and cannot be transferred by them to the prince.<sup>1</sup>

(6) Magistrates, Nobles, or Ephors.—There remains one development in the political theory of some of these writers which deserves a separate treatment, that is, the conception that while the supreme authority belongs to the community, and under it to the king, there are officers of the community whose function it is to protect its rights against all attempts on the part of the king to violate them.

We have referred in an earlier chapter to that very important passage in Calvin's Institutes, in which, after he had used the strongest language against resistance by any private person to the public authority, he says that if there were magistrates of the people appointed to resist the licence of rulers, such as the Ephors in Sparta, or the Tribunes of the people in Rome, or the three Estates in modern kingdoms, they were bound to interfere and to protect the liberties of the people.<sup>2</sup>

Whether Calvin derived this directly from some earlier writers we do not pretend to know; but what is clear is that the conception assumed considerable importance in some political writers of the later part of the sixteenth century.

We must also examine it, because though it may at first sight seem strange, it is related to certain experiments or developments in mediæval society. We shall therefore do well to approach the consideration of this conception by again observing its appearance in the 'Apologie' of William of Orange.

He speaks of the nobles as being bound by their oath to compel the Duke of Brabant (Philip of Spain) to do justice to the country; and again, he says, that among the other rights of the vassals of Brabant is the privilege of exercising the same powers as the Ephors of Sparta, that is to maintain the power of a good prince, and to bring to reason the prince who violated his oath.<sup>3</sup>

<sup>1</sup> Id. id., xxxviii. 127. Cf. p. 361.

<sup>2</sup> Cf. p. 266.

<sup>3</sup> William of Orange, 'Apologie'

(p. 47): "Si, dis-je, les nobles suivant leur serment et obligation, ne contraignent le Duc à faire raison au pays,

It is obvious that in this place the conception of the nobles or principal vassals of a state as having the responsibility to check and correct the arbitrary and illegal actions of the king or lord, is derived from the traditions of feudal law, especially as we have them in the Assizes of Jerusalem or in the Pseudo-Bracton;<sup>1</sup> while the comparison of this with the position of the Ephors in Sparta may be derived from Calvin.<sup>2</sup>

It is these conceptions which are developed in the Huguenot tracts. They are clear and emphatic, like Calvin, in maintaining that private persons cannot take action against the lawful prince.<sup>3</sup> But the whole people can do so through its officers who have been appointed to act as a check and restraint upon the sovereign magistrate.<sup>4</sup>

ne doivent ils par eux-mesmes estre condamnez de perjure, infidelité et rebellion envers les Estats du Pays. . . ." (P. 48): "Entre autres droicts, nous (the vassals of Brabant) avons ce privilège de servir à nos Ducs, ce que les Ephores servoient à Sparte à leurs Rois, c'est de tenir la roiauté ferme en la main du bon Prince, et faire venir à la raison celui qui contrevient à son serment."

<sup>1</sup> Cf. vol. iii. part i. chap. 4.

<sup>2</sup> Cf. p. 266.

<sup>3</sup> Cf. 'Droit des Magistrats' (p. 476); 'Vindiciae,' Q. II. p. 43.

<sup>4</sup> 'Droit des Magistrats' (p. 745): "Tiercement, il y en a d'autres, lesquels encore qu'ils n'ayent la puissance souveraine et ordinaire à manier, toutesfois sont ordonnez pour servir de bride et de frein au souverain magistrat. . . ." (P. 748): "Tels sont aujourd'hui les officiers de plusieurs royaumes Chrestiens, entre lesquels il est raisonnable de conter les Ducs, Marquis, Comtes, Vicomtes, Barons, Chastellains, qui ont jadis esté estats et charges publiques, qui se commeyttoyent par ordre légitime, et qui depuis pour estre devenues dignitez hereditaires, n'ont pourtant changé la nature de leur droit et autorité; comme aussi il faut comprendre en ce

nombre les officiers électifs de villes, tels que sont les Maires, Viguiers, Consuls, Capitaux, Syndiques, Eschevins et autres semblables."

'Vindiciae,' Q. II. (p. 63): "Cum de universo populo loquimur, intelligimus, eos qui a populo auctoritatem acceperunt, magistratus, nempe, reges inferiores, a populo dilectos, aut alia ratione constitutos, quasi imperii consortes, et regum Ephori qui universi populi coetum representant. Intelligimus etiam Comitias, quae nil aliud sunt, quam regni cujusque epitome, ad quem publica omnia negotia referantur. . . . Tum Duces, seu Principes tributum, in singulis singuli. Demum Judices et Praefecti singularium urbium, id est Chiliandrae, Centuriones et caeteri qui totidem familiis praerant. . . . Ejus genus sunt in omni regno bene constituto, officarii regni, principes, pares, patritii, optimates, et ceteri ab ordinibus delegati, e quibus compleatur, aut concilium extra Ordinem, parlamentum, diaetae, caeterique conventus, in diversis regionibus, diversa nomina sortiti, in quibus nequid aut respublica aut ecclesia detrimenti capiat, providendum est. Illi vero, singuli, regi inferiori sunt, ita universi superiores."

The author of the 'Vindiciae' distinguishes sharply between the officers of the king and those of the nation, such as the chancellor, the constable, the members of the "parlements," the peers of France, and others.<sup>1</sup>

The 'Droit des Magistrats' says that the whole government is not placed in the hands of the king, but only the "Souverain dégré" of the government: and each of the inferior officers has his share in this, for they have received their authority from the "Souveraineté" to maintain the laws, even by force if necessary, for the protection of those who were under their charge. They are below the "Souverain," but they do not depend properly on the "Souverain" but on the "Souveraineté."<sup>2</sup>

These magistrates are, in case of necessity if the "Souverain" should become a tyrant, to resist him, and the Estates to whom such authority is given by the laws are to set things right and even to punish the tyrant, and must not be thought of as seditious or rebellious if they do this, but as carrying out their duty and the oath which they have taken to God and their country.<sup>3</sup>

<sup>1</sup> 'Vindiciae,' Q. III. p. 88.

<sup>2</sup> 'Droit des Magistrats' (p. 749): "Mais d'autre costé, puis que ces officiers inférieurs du royaume ont receu de par là souveraineté, l'observation et maintenance des lois, entre ceux qui leur sont commis. . . . Je di donc, que s'ils s'ont réduits à tel nécessité, ils sont tenus (mesmes par armes si faire se peut) de pourvoir contre une tyrannie toute manifeste, à la salvation de ceux qu'ils ont en charge."

Id. (p. 748): "Or, faut-il entendre, que tous ceux-cy, encores qu'ils soyent au-dessous de leur Souverain (duquel aussi ils reçoivent commandement, et lequel les installe, et approuve), toutes fois ne dépendent proprement du Souverain, mais de la Souveraineté."

<sup>3</sup> Id. (p. 769): "La sommaire de tout ce que dessus, est. Que le souver-

ain gouvernement est tellement entre les mains du roy, ou autres tels souverains magistrats, que si ce néanmoins, se destournans des bonnes loix et conditions qu'ils auront jurées, ils se rendent tyrans tous manifestes, et ne donnent lieu à meilleur conseil; alors il est permis aux magistrats inférieurs de pourvoir à soy, et à ceulx qu'ils ont en charge, résistans à ce tyran manifeste.

Et quant aux Estats ou autres, à qui telle autorité est donnée par les loix, ils s'y peuvent et doyvent opposer jusques à remettre les choses, et punir mesmement le tyran, si besoin est, selon leurs demerites. En quoi faisant, tout s'en fault qu'ils doyvent estre tenus seditieux et rebelles, que tout au rebours ils s'acquittent du devoir et serment qu'ils ont à Dieu et à leur patrie."

Cf. 'Archev. et Politie' (p. 127):

The whole conception is summed up by the author of the 'Vindiciae.' Princes are chosen by God, and are established by the people; as individuals they are inferior to the prince, but the whole body and those who represent the whole, the officers of the kingdom, are superior to him. The authority of the prince rests upon a contract between him and the people, tacit or expressed, natural or even civil, that the people must render obedience to the prince who rules well, that they will serve the prince who serves the commonwealth, that they will obey the prince who obeys the laws. Of this treatise or contract the officers of the kingdom are the guardians. The prince who violates the contract is a tyrant, "exercitio," and therefore the officers of the kingdom are bound to judge him according to the laws, and if he resists, to compel him by force.<sup>1</sup>

No doubt these conceptions are expressed in violent and drastic terms, but it must be observed that they are related to the mediæval traditions. In the first place, it is obvious that in the feudal system the king was thought of as controlled, if necessary, by the great vassals or tenants-in-chief. This is set out, not only in the Assizes of Jerusalem, but in the law books of the German Empire of the thirteenth century, like the 'Sachsenspiegel' and the 'Schwabenspiegel,' and is illustrated by the constitutional forms of the deposition

"Politie. Car il y a les puissances inférieures et deputez du peuple, auteur des Princes, qui les ayant faits les peuvent defaire, et tels ne peuvent laissez par raison la principauté decliner à tyrannie, car ils trahiroient la patrie qui a constitué tels États pour empêcher la tyrannie. Si elle survient, c'est aux suiets particuliers de recourir humblement et sans confusion au remède vers ceux-là, qui sont comme souverains magistrats par-dessus le Prince, en cest endroit, quoy qu'ils soyent privez et au-dessous pour un regard ordinaire."

<sup>1</sup> 'Vindiciae,' Q. III. (p. 214): "In summa principes eliguntur a Deo, constituuntur a populo. Et singuli prin-

cipe inferiores sunt, ut universi, et qui universos repræsentant, regni officarii, princeps superiores sunt. In constituendo princeps intervenit foedus inter ipsum et populum, tacitum, expressum, naturale, vel etiam civile, ut bene imperanti, bene pareatur, ut reipublicæ inservienti omnes inserviant, ut legibus obtemperanti omnes obsequantur et cetera. Huius vere foederis seu pacti, regni officarii vindicæ et custodes sunt, qui hoc pactum perfide et perveraciter violat, is vere exercitio tyrannus est. Itaque regni officarii ipsum, et secundum leges judicare, et renitentem vi coercere, si alias non possunt, ex officio tenentur."

of the Emperors Adolf and Wenceslas. Even so careful a writer as Bracton admitted that at least some would say that the "Universitas Regni et Baronagium" could compel the king to do justice to an aggrieved person in his court, while the interpolator of Bracton and Fleta assert clearly that the king's "curia," that is, the earls and barons taken together, were superior to him. In the second place, we must remember those very interesting constitutional experiments, the appointment of a committee of the barons to secure the execution of the Great Charter, the demands of the barons in 1244, and the appointment of a committee of twenty-four to superintend the execution of the Provisions of Oxford in 1258 and 1264. In the third place, it should be observed that the conception of some of the great officers of the crown as being properly officers of the nation is implied in the Provisions of Oxford with respect to the appointment and tenure of office of the justiciar, the treasurer, and the chancellor.<sup>1</sup>

The truth is, no doubt, that the Huguenot writers were influenced by the actual conditions of France, by the fact that some of the princes of the blood and many of the nobles were in violent and open opposition to the king, but behind the influence of these conditions we must recognise the continuing influence of traditional conceptions of the Middle Ages and of the feudal system.

It is therefore important to observe that Althusius also maintained the same conception, that there are officers of the commonwealth whom he also calls "Ephori," whose office it is to defend the laws and constitutions of the commonwealth, even against the supreme magistrate.

The Ephors, he says, are entrusted by the consent of the people with authority, as representing them, to create the supreme magistrate, to help him with their counsel in the affairs of the commonwealth, and to restrain his licence in all matters which may be harmful to it, to see that the community is not injured by his private desires and by his action or inaction.<sup>2</sup> It is important to observe that in the conception

<sup>1</sup> Cf. vol. iii. part i. chap 4, vol. v. part i. chap. 8; this volume, p. 31.

<sup>2</sup> Althusius, 'Politica,' xviii. 48: "Ephori sunt, quibus populi, in corpus

of Althusius the powers of the Ephors are drawn from the community, like those of the prince or supreme magistrate, and that, while he thinks that there should be such officers in the commonwealth, if there are not, their functions will be discharged with the consent of the whole] people.<sup>1</sup> Althusius again, like the author of the 'Vindiciae,' finds these officers of the commonwealth in almost all the countries of Western Europe: in France, the princes of the blood, the chancellor, the constable, the marshal, &c.; in England, the peers and the representatives of the counties and cities; and so also in Poland, Belgium, Sweden, Denmark, Hungary, and Spain.<sup>2</sup>

In the German Empire there are "general" Ephors, by whom he understands the Seven Electors, and he even refers to the Golden Bull of Charles IV. as providing that proceedings could be taken against the emperor before the Count Palatine;<sup>3</sup> but there are also "special" Ephors in Germany, by whom he means the dukes, princes, margraves, imperial cities, &c., but they only determined important business in the council of each province.<sup>4</sup>

politicum consociati, consensu, demandata est summa reipublicae (cura), seu universalis consociationis, ut representantes eandem . . . potestate et jure illius utantur, in magistratu summo constituendo, eique ope, consilio, in negotiis corporis consociati juvando, nec non in ejusdem licentia coercenda et impedienda, in causis iniquis et reipublicae perniciosis, et eodem inter limites officii continendo, et denique in providendo et curando omnibus modis, ne respublica quid detrimenti capiat, privatis studiis, odiis, facta omissione vel cessatione summi magistratus."

Cf. id. id. id., 49: "(Ephori) Pacti inter magistratum summum et populum initi vindices; custodes et defensores justitiae et juris, quibus magistratum summum subijciunt, et parere cogunt. . . . Fratres summi magistratus."

Cf. id. id., xviii. 59: "Eliguntur autem et constituuntur ejusmodi Ephori, consensu totius populi . . .

hoc est, suffragiis totius populi de Ephoro constituendo."

<sup>1</sup> Id. id. id., 123: "Quodsi in regno, seu consociatione universali, ejusmodi ephori non sunt (qui tamen, meo judicio, maxime in bene constituta republica necessarii . . .), tum illa, quae ephoris alias demandantur, expediuntur consensu totius populi, tributim, curiatim, vel centuriatim, aut viritim rogato, aut collecto, adeo ut nulla praescriptio vel usurpatio contraria huic libertati et juri regni a magistratu apponi possit."

<sup>2</sup> Id. id., xviii. 110.

<sup>3</sup> Id. id., 79: "Imo Caesar ipse coram principe Palatino convenire potest secundum auream Bullam, Caroli IV. Imperat. VI. 5."

Cf. 'Sachspiegel,' III. 52-3, and vol. v. p. 107.

<sup>4</sup> Id. id., I. xviii. 112: "Specialis Ephorus quilibet, in provincia suae curae et fidei commissa, eam potestatem habet, quod summus magistratus

If we now attempt to sum up the general character of the theories of the source and nature of the authority of the prince, with which we have dealt in this chapter, we find that there is little which is essentially new, little of which we cannot find the sources in the Middle Ages.

That the authority of the prince was derived from God ultimately, but directly from the community, was in fact the normal principle of mediæval political societies, and the influence of the revived study of the Roman jurisprudence had only confirmed this judgment.

When once the question was raised where the ultimate authority in the state was to be found, the normal answer was that it belonged to the community as a whole, for the word "populus" as in the Roman lawyers means the whole community, not any one part of it. It is no doubt true that in the Middle Ages the supreme authority in political society was the law, and not any one person or body of persons; and as long as the law was conceived of as being primarily custom, the question of an authority behind the law would have seemed meaningless. It was only in the later Middle Ages that the question of a law-making power began to be important, and it is with this that we see the first beginnings of the modern conception of sovereignty: no doubt, again, this development was furthered by the revived study of the Roman law, with its clear-cut conception of legislative action. There is no doubt at all where, to the mediæval mind, this supreme power which lay behind the law resided. It was the community, the universitas or populus, which made law. The conception that in the Middle Ages the prince was thought of as having individually and in his own authority the power of legislation is really nothing but an illusion.

When, therefore, the writers with whom we have been dealing in this chapter speak of the "Souveraineté" which was behind and greater than the "Souverain," they were no

in toto regno . . . paucis exceptis, qui in rebus atque negotiis arduis, totam provinciam concernentium, peculiare concilium provinciale senatorum,

statuum et primorum suae provinciae convocabit, in quo ardua negotia communi deliberatione tractentur et decernantur."

doubt using sharper and more dogmatic terms than had been used before, but they were not asserting a new principle.

It is hardly necessary to point out that the doctrine that the prince was controlled by the law and the courts of law in his relation to private persons and properties was a commonplace of mediæval political theory and constitutional law.

The theory of the contract between the prince and the people was again in no sense new in principle, it rested upon the immemorial tradition of the mutual oaths which prince and people made to each other in the Coronation ceremonies, and it was obviously related to the whole character and principles of feudal society.

And finally, the right of the community to resist and even if necessary to depose the prince who persistently violated the laws of the community was founded upon important precedents in various countries, and had been maintained not merely by violent and highly controversial writers like Manegold and John of Salisbury or Marsilius of Padua, but by such careful and judicious writers as St Thomas Aquinas.

### CHAPTER III.

#### THE THEORY OF THE ABSOLUTE MONARCHY.

WE have so far endeavoured to set out the continuance in the sixteenth century of the conception that the king is under the law; we must now consider how far, and in what terms, the conception that the king was above the law was developed in this period. It is, we think, clear that this was an innovation, that there is really scarcely any trace of such a conception in the earlier or later Middle Ages, except so far as it can be found in some of the Civilians, and even among them, as we have pointed out, there had been, and still was, much difference of opinion.

It will be well, we think, to begin by considering the theory of the absolute monarch as it was expressed by a prudent and moderate practical statesman and thinker—that is, by Michel L'Hôpital, who was Chancellor of France from 1560 to 1573. We are not here directly concerned with his relation to the Wars of Religion and his policy of compromise or toleration, nor are we for the moment concerned with his attitude to the States General, to which we shall return in a later chapter, but with his conception of the relation of the king to the law.

It is clear that while he held that kings should govern, not only with moderation and goodwill towards his subjects, but also with justice and "legalité," he condemned all revolt against the monarch, however unjust he might be, and maintained that subjects can never have a just cause to renounce

the obedience which they owe to their sovereign.<sup>1</sup> He claimed indeed that France had lived for many years in tranquillity, because there were good laws under which the people rendered obedience to the prince, while the prince submitted himself voluntarily to the law;<sup>2</sup> but it must be observed that L'Hôpital spoke of the obedience rendered by the King of France to the law as voluntary, not obligatory.

It seems clear to us that these phrases, though incidental, represent L'Hôpital's normal judgment. In the speech which, as chancellor, he addressed to the meeting of the States General at Orleans in 1559, we find him saying that no excuse could be made for those who took arms against the king, for no subject may defend himself against the prince or his magistrates, whether they are good or evil; the obedience which we owe to him is more binding, even, than that which we owe to our fathers.<sup>3</sup> And, in another place, in the same speech, more explicitly still, while he expresses his wish that kings should recognise that the property of their subjects

<sup>1</sup> Michel L'Hôpital, 'Oeuvres Inédites,' vol. i. (p. 380): "Traité de la Reformation de la Justice." "Fidèle avertissement pour les princes français de traiter tels subjects avec telle modération, douceur et bienveillance et principalement avec telle justice et légalité, qu'ilz leur donne à cognoistre leur affection, plus paternelle que seigneuriale, plus tempérées que absolues . . . et qu'ilz tiennent pour ennemis tous ceux qui lui bailleront autre conseil: non que je veuille approuver les rébellions contre les monarques, quelque fascheux, injustes, et exacteurs qu'ils puissent estre, sachant bien que le subject, non plus que l'enfant n'a jamais juste cause de se révolter de l'obéissance de son souverain."

<sup>2</sup> Id. id., vol. ii. (p. 100): "Il y a plus de cent cinquante ans que le royaume de France vit en grande paix et tranquillité parce qu'il y a de bonnes loyx, sous la discipline des-

quels le peuple rend le devoir et l'obéissance à son Prince, et le Prince tout le premier se soumet volontairement à la loi. . . . Aristote et tous les autres politiques . . . conviennent tous en ce point que la république est heureuse, en laquelle le Prince est volontairement obéy d'unq chascun, et lui mesme obéy à la loy."

<sup>3</sup> Id., 'Oeuvres Complètes,' vol. i. (p. 395): "Si l'on disoit que les armes qu'ilz prennent ne sont pas pour offenser aulcun, mais pour se defendre seulement, ceste excuse vaudrait peultestre contre l'estranger, non contre le roi leur souverain Seigneur: car il n'est loisible au subject de se défendre contre le Prince, contre ses magistrats, non plus qu'au fils contre son père, soit à tort, soit à droict, soit que le Prince et Magistrat soit mauvais et discolle, ou soit qu'il soit bon. Encore sommes nous plus tenues d'obéyr au Prince qu'au père."

belongs to them "imperio, non dominio et proprietate," all are bound to obey his laws, except the king himself.<sup>1</sup>

The position of L'Hôpital is interesting; it certainly does not correspond with that of De Seyssel, nor with the opinion of some foreign observers of the French constitution like Machiavelli. It corresponds, however, with a declaration of the President of the Parliament of Paris in 1527, that the king was above the law,<sup>2</sup> and with the judgment which Budé at least sometimes expressed.<sup>3</sup> Whatever may be the origin of this conception in France, we have to observe L'Hôpital's opinion, for it is that of a prudent and responsible politician.

It is, however, in the famous work of J. Bodin, 'De Republica,' published originally in French in 1576 and translated into Latin by himself, and republished in 1586, that we find, apart from some of the Civilians, the first important and reasoned development of the theory that the king was absolute and above the law.<sup>4</sup>

The work of Bodin, whatever may be thought of its intrinsic and permanent value, is indeed a large and comprehensive study of politics, and in order that we may understand his conception of the authority of the king, we must begin by considering, briefly, his general theory of the nature of political society.

He begins with a definition of the commonwealth (Res-

<sup>1</sup> Id. id., vol. i. (p. 392): "Je voudrais aussi que les rois se contentassent de leur revenue . . . estimassent que le bien de leur dictes subjects leur appartient, 'imperio, non dominio et proprietate.' Ainsi les subjects l'aimassent et reconnussent pour roi et seigneur . . . leur obéyssent . . . par vraye obéissance, qui est de garder . . . ses loyx, édits et ordonnances, ausquels tous doivent obéyr, et y sont subjects, excepté le roi seul."

<sup>2</sup> 'Recueil des lois anciennes,' vol. xii. (p. 277): "Nous ne voulons révoquer en doute ou disputer de vostre puis-

sance, ce seroit espece de sacrilege, et scavons bien que vous estes par sus les loix, et que les loix et ordonnances ne vous peuvent contraindre, et n'y estes contrainct par puissance coactive; mais entendons dire que vous ne devez ou ne voulez pas devoir tout ce que vous pouvez, ains seulement ce que est en raison, bon et équitable, qui n'est autre chose que justice."

<sup>3</sup> Cf. p. 293.

<sup>4</sup> Our references are to the Second, the Latin Edition, for this was prepared by Bodin himself.

publica) which is noticeable, "Respublica est familiarum rerumque inter ipsas communium summa potestate, ac ratione moderata multitudo."<sup>1</sup> The commonwealth must indeed be governed by reason, but it must be controlled by a supreme force (or authority); for, as he goes on to say a little later, a commonwealth cannot hold together without a supreme power which compels all its members to form one body;<sup>2</sup> or, as he puts it, in slightly different terms, the supreme authority is the "cardo" of the whole commonwealth: by it all magistrates and laws are created. It is by its strength and power that all lesser societies and all citizens are compelled to form one body.<sup>3</sup> This supreme authority is "legibus soluta," whereas the magistrate is controlled by the laws;<sup>4</sup> and it is this supreme authority to which Bodin gives the name of "Majestas."<sup>5</sup>

In another place he again states the principle of the nature of this supreme power—that is, the "Majestas." Law is nothing but the command of the Supreme Power. The power of Law (*Vis Legum*) is placed in those who have the public "imperium," whether a prince or the people or a magistrate; for if anyone disobeys their commands, they have power to compel obedience.<sup>6</sup> And again there are two forms of public authority: the supreme authority, which is free from laws, and from the authority of magistrates; the other, a legal authority, which is bound by the laws. The former be-

<sup>1</sup> Bodin, 'De Republica,' I. 1.

<sup>2</sup> Id. id., I. 2 (p. 10): "Respublica sine summa potestate, quæ omnia civitatis membra familiasque singulas in unum corpus cogit, consistere nullo modo potest."

<sup>3</sup> Id. id. id. (p. 10): "Est igitur summum imperium quasi reipublicæ cardo, quo magistratus ac leges innituntur, et cujus vi ac potestate collegia, corpora, familiae, singuli cives in unum veluti corpus coguntur."

<sup>4</sup> Id. id., I. 3 (p. 14): "Omnis autem potestas est publica vel privata; publica aut legibus soluta est, eorum scilicet qui summum imperii jus

habent: aut legibus imminuta, qualis est magistratum, qui etiam si privatis imperent, ipsi tamen superiorum imperiis aut legibus tenentur."

<sup>5</sup> Id. id., I. 8 (p. 78): "Majestas est summa in cives ac subditos legibus que soluta potestas."

<sup>6</sup> Id. id., III. 5 (p. 299): "Ac verbum legis aliud nihil est, quam summæ potestatis jussum: . . . Ex quo perspicuum est vim legis in iis positum esse qui publicum imperium habent, seu fuerit princeps, seu populus, seu magistratus, quibus imperantibus, nisi pareatur, cogendi potestas est."

longs to "Majestas," which after God recognises no superior or equal.<sup>1</sup>

This is the first and most fundamental principle of Bodin's political theory; to him there must be somewhere in the State a supreme and absolute authority. He is setting out what in later terms we should call the theory of the sovereignty of the State. We must, however, be very careful to observe that Bodin recognises that there is one immensely important limitation of this absolute power in the State. Supreme power is always subject to the authority of the divine law, of the natural law, and of the law of nations.<sup>2</sup> It is only the positive civil laws which have their source from this supreme power in the State, and which are under its control.

There has been much discussion about the question whether this conception was new. As we have pointed out in previous volumes, the general mediæval conception of law was not that of a command, but of custom—a custom enforced no doubt by the community, but which was not, properly speaking, made by the community, but was rather the expression of its life.<sup>3</sup> Bodin thinks of it under the terms of a command, and his statement of this conception is sharp and dogmatic. We should venture to say that this is probably the result, especially, of the influence of the Roman law, which, though it attached much importance to custom, did, in the main, tend to describe positive law as the expression of the will and command of the Roman people, or of the emperor to whom it had given its legislative authority. This conception

<sup>1</sup> Id. id., III. 5 (p. 300): "Ex quo perspicuum sit, duo imperii publici genera esse, alterum quidem summum, legibus ac magistratum imperio solutum, alterum legitimum, quod legibus obligatur; hoc magistratum est, illud vero majestatis; majestas quidem in republica nihil se ipsa post Deum immortalem majus, nihil etiam sibi æquale habet; magistratus vero principis Majestatem suspicit; ejusque legibus et jussis obligatur: privati denique post Deum immortalitatem Majestatis legibus, ac magistratum imperiis

tenentur."

<sup>2</sup> Id. id., I. 8 (p. 84): "Quid autem sit absoluta, vel potius soluta lege potestas, nemo definiit. Nam si legibus omnibus solutam definiamus, nullus omnino princeps jura majestatis habere comperiat: cum omnes tenet lex divina, lex item naturæ, tum etiam lex omnium gentium communis, quæ a naturæ legibus ac divinis, divisas habet rationes."

<sup>3</sup> Cf. vol. ii. part i. chap. 6, part ii. chap. 8; vol. iii. part i. chap. 3. vol. v. part i. chap. 5.

of law was not, however, peculiar to the Civilians ; it is clear that, even as early as the ninth century, the conception of law, as representing the deliberate will of the community, was expressed in such famous words as those of the " *Edictum Pistense*," " *Quoniam lex consensu populi et constitutione regis fit* " (M. G. H. Leg., sect. ii. vol. ii. 273) ;<sup>1</sup> and by the end of the thirteenth century at least law was thought of, not only as customary but as being made.<sup>2</sup> The theory of Bodin was, therefore, not, strictly speaking, new, but we think it may properly be said that it represents a much sharper and more dogmatic enunciation of the conception.

So far, then, we have in Bodin a dogmatic statement of the absolute power of the State, limited only by the divine law, the natural law, and the law of nations. But Bodin not only maintains that there is this absolute power in the State, but seems to assert that this authority rests upon force. Reason itself, he says, teaches us that the commonwealth is founded upon force, and he argues that Aristotle, Demosthenes, and Cicero were in error when they thought that in the beginning princes and kings were given their authority on account of their justice.<sup>3</sup>

Bodin's discussion of this is somewhat meagre and inadequate ; it is incidental to his contention that in the State man has lost his natural liberty. He had in an earlier passage defined this natural liberty as that of a soul good and guided by nature, which, under God, rejects all authority but that of itself and of true reason.<sup>4</sup> He now defines the citizen as a

<sup>1</sup> Cf vol i chap 19, p 238

<sup>2</sup> Cf vol iii p 45 ff, and vol v. part i chap 5

<sup>3</sup> Id id, I 6 (p 46) "Ea nos ipsa ratio deducit, imperia scilicet ac republicas vi primum coaluisse, etiam si ab historia deseramus quamquam, pleni sunt libri plena antiquitas, plenae leges, primum illud hominum genus, nihil prius habuisse, quam obvios quosque spoliare, diripere, occidere, aut in servitutem adigere. . . Atque in eo falli mihi videntur Aris toteles inquam, Demosthenes, Cicero

qui Herodotum (opinor) secuti, principio reges ob summam integritatis ac justitiae opinionem principatum adeptas fuisse arbitrantur. hunc heroica nobis ac aurea secula finxerunt, quae aibi certissimis ac testimonis refutasse nobis videmur "

<sup>4</sup> Id id, I. 3 (p 14) "Est enim naturalis libertas hujusmodi, ut anima bene a natura informata, imperium alterius post Deum immortalem renecat, praeterquam sui ipsius, id est rectae rationis, quae a divina voluntate per se ipsa nunquam aberrat "

freeman who is subject to the supreme authority of another, and says that liberty could not have been taken from man except by great force ; the citizens, therefore, have lost something of their natural liberty when they were subjected to the authority of another.<sup>1</sup>

We could wish that Bodin had developed in more detail what he meant by "the force" which created the commonwealth, and his conception of liberty, but he did not, as far as we have seen, do so. Indeed, it seems to us that his reference to the fact that man had lost his "natural" liberty in society is little more than a preliminary to the judgments upon actual political conditions.

There is another and more serious error, he says, and he attributes it to Aristotle—that is, the contention that a man is not a citizen (*civis*) who does not share in the public authority.<sup>2</sup> And this leads to another and most important general principle—that is, that the people can transfer to one man, and without limit of time, its authority over the citizens, which includes the power of life and death, an authority which is not subject to any laws, and which he can hand on to any successor whom he wishes.<sup>3</sup> The prince who has this power has "Majestas," while the prince who is bound by the laws, or holds authority only for a time, and has to render account to the people, does not hold this "Majestas."<sup>4</sup> In another place Bodin asserts that the prince should not swear to the laws, for this is to destroy

<sup>1</sup> Id. id., I 6 (p 45). "Est autem civis nihil aliud quam liber homo qui summae alterius potestati obligatur (p. 46) Libertas autem, sine vi maxima, nec nisi perruptis naturae legibus, eripi potuisse verisimile est . . . Ex quo intelligitur veram esse civis, quam posumus definitionem, id est liberum hominem, qui summae potestatis, imperio teneatur. . . Ita quoque civibus omnibus aliquid de libertate naturali detrahitur, ut summae alterius potestati subiciantur "

<sup>2</sup> Id id., I. 6 (p 51) 'Gravius

tamen peccatur ab us, qui civem esse negant, qui non sit imperii, suffragiorum, concilique publici particeps. Haec est Aristotelis disciplina, quam in statu populari tantum locum habere confitetur "

<sup>3</sup> Id id., I 8 (p 82). "Nam populus summam perpetuumque imperium in cives, ac vitae necisque potestatem, legibus omnibus solutum, uni ex civibus tribuere potest, ut quemcunque vellet imperii successorem designare posset "

<sup>4</sup> Id id., I 8 (pp 78 82).

the "Majestas," and to confuse the government of one man with that of a few, or of the people.<sup>1</sup>

Bodin has thus set out the principle that there must be in any political community some authority which is supreme and absolute, above the laws, because it makes the laws. It is not our function here to discuss the truth of this conception, how far it is a truism, and how far it is an illusion. It is not our part here to discuss the later history of this conception, but we think it well to point out to the student of political theory that, as this theory was profoundly different from that of the Middle Ages, it was also wholly different from that of Locke, to whom the State has no more of an absolute authority than the individual. It must also be remembered that this conception of Bodin is not the same as that of Hobbes, for this supreme or sovereign power is not free from all law, for it is not the source of all law. Above the positive law, which is made by the sovereign, there are, in the view of Bodin, as we have seen, the divine law, the natural law, and the law of nations (*Jus Gentium*).<sup>2</sup>

This is not, however, the only limitation upon the supreme power. As we have already pointed out, Bodin maintains that the prince should not swear to maintain the laws; the prince has power by his own will to make laws and to amend them, if "Aequitas" demands it; but a "Conventio" or contract between the prince and the citizens binds them both, and cannot be changed without mutual consent; in this matter the prince is in no sense superior to his subjects.<sup>3</sup>

<sup>1</sup> Id. id., I. 8 (p. 94): "Plerique tamen ita statuunt, et quidem ii qui plus in eo genere sapere sibi videntur, principem in leges patrias jurare oportere. Quae quidem disciplinae jura majestatis, quae sacrosancta esse debent, omnino labefactant et convellunt, et unius potestatem cum paucorum populivie imperio conturbant."

<sup>2</sup> Cf. p. 414.

<sup>3</sup> Bodin, id., I. 8 (p. 87): "Hoc igitur tenemus, principi leges a se latas sua voluntate, ac sine subditorum consensu abrogare, vel quadam ex

parte legibus derogare, vel subrogare, vel obrogare licere, ac semper liceisse, si aequitas ipsa id postulare videatur. . . . At conventio inter cives ac principem mutuam habet obligationem, a qua discedi sine mutuo consensu non potest. In quo genere princeps nihil habet, quo subditis superior esse videatur."

Cf. I. 8 (p. 99): "His ita constitutis, sequitur principem summum, pactis conventis aequae ac privatos obligari: sive cum exteris, sive cum civibus contraxerit."

Bodin, unfortunately, does not, as far as we have seen, attempt to define or describe these contracts between the prince and his subjects. As we have seen in the earlier part of this volume, this question was much discussed by the Civilians of the fourteenth and fifteenth centuries, and we have the impression that their conception may have arisen especially from their familiarity with the contractual conceptions of feudalism, partly also from the question of the obligation of treaties made between the emperor and various Italian cities.<sup>1</sup>

Custom, Bodin clearly refused to recognise as having any authority over the prince. Bartolus and Baldus give custom an important place in their treatment of law, as was also done by some Civilians and Canonists of the fifteenth century.<sup>2</sup> Bodin, on the other hand, emphatically says that customs have little authority as compared with law, and were entirely under the control of the prince.<sup>3</sup>

There is, however, another limitation upon the authority of the prince. Bodin contemptuously rejects the vulgar opinion that all things belong to the prince. This is a mere confusion with the principle that all things are under his "Imperium" and "Dominatus." "Proprietas" and "Possessio" belong to the individual; and he cites a judgment of the Parliament of Paris that the prince can bestow his own property on whom he will, but not that of another person; the prince cannot lay his hands upon other men's wealth "sine justa causa."<sup>4</sup>

<sup>1</sup> Cf. pp. 16-19; pp. 153-156.

<sup>2</sup> Cf. pp. 16-19; pp. 150-153.

<sup>3</sup> Id. id., I. 9 (p. 154): "Legum etiam vis multo major est quam morum; nam legibus mores antiquantur, leges moribus non item, sed in magistratum officio ac potestate positum est leges, quae consuetudine quodammodo exolverunt, ad usum revocare; consuetudo nec poenas, nec praemia proponit, quae legum propria sunt, nisi lex quicquam permittat quod antea vetitum esset; denique consuetudo precariam vim habet, et quamdiu principis arbitrio videbitur:

at si consuetudini sanctionem subiciat, legem efficit. Ex quo perspicitur leges ac mores ab eorum, qui summam in reipublicae potestatem habent, arbitrio ac voluntate pendere."

<sup>4</sup> Id. id., I. 8 (p. 100): "Quanto aequius judicatum pridem est in Curia Parisiorum, principem quidem, quod sua intersit, res largiri posse, quod intersit alterius, non posse. . . . Eadem Curia decrevit, principem legibus civilibus derogare posse, dum tamen id fiat sine fraude cuiusquam. . . . (p. 103) Hoc igitur fixum sit principi, alienis opibus ac bonis manus afferre, aut ea

So far, then, we have seen that, with the limitations which we have just considered, Bodin is clear that there must be in every State a supreme and absolute power, not subject to the laws, but the source of the laws, which he calls *Majestas*, and that this power may be given by the community to one man as prince, who will be supreme and absolute.

Bodin maintains that this power is, properly speaking, "indivisible," and contends dogmatically that there can be no such thing as a mixed constitution. There are only three possible forms of government—monarchy, aristocracy, and democracy; the mixed government is simply a "popularis status."<sup>1</sup> There are only three forms of commonwealth; the "*Jura Majestatis*" must belong either to the whole body of the citizens or to a minority of them or to one man. These forms cannot be combined with each other. The only "temperatio" of this which he allows, is that in the monarchy the honours and offices may be open to all; in the "popular" form they may be confined to the best and most noble, and in the aristocratic form they may be open to the poor as well as the rich.<sup>2</sup>

This is not unimportant, but it does not modify Bodin's general principle that the supreme power ("*Majestas*") is absolute and above all positive laws, and this is brought out very clearly in a passage in which he deals with the relations of the magistrate to the supreme power. The magistrate, he says, must carry out the commands of the prince, so long as they are not contrary to the laws of God and of Nature; the prince ought indeed to maintain the laws and customs of the

largiri cuiquam, sine justa causa non licere . . . (p. 104) Nam quod omnia principis esse vulgus jactat, ad imperium et ad dominatum pertinet, salua cuique rerum suarum proprietate et possessione."

<sup>1</sup> Id. id., II. 1.

<sup>2</sup> Id. id., II. 7 (p. 234): "Statuamus igitur tres tantum, nec plures rerum publicarum formas, simplices illas quidem, nec ulla confusione permistas: id est jura majestatis, omnia omnibus

simul coacervatis civibus, aut minori civium parti, aut uni tribuamus: temperatio vero sit illa, cum in unius statu honores et imperia omnibus; aut in populari potestate, optimis aut nobilissimis tantum; aut in optimatum imperio, tenuibus aequae ac divitibus communicantur: qua quidem temperatione, jura majestatis, non propterea divellentur, nec monarchia democratiae, nec aristocratia utriusque permiscetur."

country, but the magistrate must not refuse to obey his commands even against them, for it is not his function to judge whether the prince's commands are just or not. He is careful to explain that the well-known words of the rescript of the Emperor Anastasius, bidding the judges not to accept any imperial rescript which was contrary to the laws (Cod. I. xxii. 6), must be understood as only applying to cases where the rescript did not contain a "derogating" clause. The magistrate may indeed remonstrate, but if the prince repeats his command, he must obey.<sup>1</sup>

We may sum up Bodin's theory of the supreme (sovereign) power in the State in the words of another passage. He begins indeed by repudiating the notion that the words in which Samuel set out the oppressive nature of kingship (1 Sam. viii. 9-18) should be taken as a true description of the "*iura maiestatis*," but concludes by saying that the first and chief character of "*Maiestas*" is the power of giving laws to all and every citizen, without the consent of superiors or equals or inferiors.<sup>2</sup>

So far, then, we have considered the general principles of Bodin; we must now turn to his discussion of the actual nature of the governments of the European States with which he was acquainted and their relation to law, and here he is compelled to admit that it was difficult to

<sup>1</sup> Id. id., III. 4 (p. 289): "Ergo magistratus iussa principis exequetur, quae a divinis, quae a naturae legibus non crunt aliena. . . . Tametsi enim princeps imperii leges ac mores servare juratus, et iniuratus, ex officio debet: si tamen contra iusiurandum, contraque principis officia quid imperet, non ideo magistratus imperata recusabit: quia non est in officio magistratus positum diiudicare id quod princeps in legibus humanis sanciat justum sit neene . . . (p. 290) Ac tametsi Anastasia lege (Cod. I. 22, 6) rescripta principum contra leges indulta privatis a magistratibus suscipi prohibeantur, hoc tamen ita verum est,

nisi legibus derogatum fuit singulari clausula rescripto comprehensa: principem tamen sui officii, uti diximus accurate iudex admonebit: quod si rationibus principem a proposita susceptaque sententia divellere non potest, mandatis iterum a principe repetitis, obedire oportet, etiamsi publicis utilitatibus damnum allatura videantur."

<sup>2</sup> Id. id., I. 9 (p. 153): "Hoc igitur primum sit ac praecipuum caput Majestatis, legem universis ac singulis civibus dare posse; neque tamen id satis est, sed id fiat oportet, sine superiorum, aut aequalium, aut inferiorum necessario consensu."

find a true monarchy. In the ancient world he found that the Spartan monarchy was only nominal; the government was really in the hands of the people.<sup>1</sup> In Rome, after the expulsion of the kings, men attempted to divide the supreme authority, but in the end the Plebs obtained the power of making laws, and gradually possessed themselves of the other "iura maiestatis," in spite of the resistance of the optimates.<sup>2</sup> In Spain and England he thinks that the laws were made "rogatione populi" and could not be annulled except in the assemblies of the people;<sup>3</sup> and again, in England, he says that by ancient custom laws were made "consensu ordinum";<sup>4</sup> though he says in another place that while the English estates had a certain authority, the "iura maiestatis" belonged to the prince.<sup>5</sup> Of the contemporary Empire he says that the emperor swore to observe the laws of the Empire, and was bound by the laws and decrees of the princes;<sup>6</sup> and in another place the "Maiestas" of the Empire resided in the assembly of the princes and nobles, and the emperor could not make laws or appoint officials without their consent. In Bodin's judgment the Empire was not a monarchy but an aristocracy.<sup>7</sup>

In France alone did Bodin find a government which had the nature of a supreme and sovereign monarchy. The estates could indeed humbly present their petitions to the prince, but he controlled all things at his will, and whatever he commanded had the force of law. The notion that the prince should be controlled by the authority of the people was dangerous and disturbing to the commonwealth; there was indeed no reasonable ground why the subjects should control their princes or why the assemblies of the people should have any authority, except to appoint a "procurator" for the prince if he were a minor, or insane, or a captive; and he warned them that such a government would not be that of

<sup>1</sup> Id. id., II. 1 (p. 177).

<sup>2</sup> Id. id. id (pp. 178-180).

<sup>3</sup> Id. id., I. 8 (p. 90).

<sup>4</sup> Id. id., I. 8 (p. 95).

<sup>5</sup> Id. id., I. 8 (p. 91).

<sup>6</sup> Id. id., I. 8 (p. 87).

<sup>7</sup> Id. id., II. 1 (p. 223).

the people, but of the "optimates."<sup>1</sup> Bodin also maintained that the coronation oath of the French kings was not an oath to keep the laws,<sup>2</sup> and that in France laws had often been abrogated without the meeting or consent of the estates.<sup>3</sup> France was a pure monarchy, while the estates had no power except to petition the king to do this or that.<sup>4</sup>

We must, however, be careful to observe that in one place, as we have already seen, Bodin dealt at length with the question of the permanent tenure—that is, the independence of the judges—and contended that they should be irremovable except by process of law, for a precarious tenure of the judicial office was appropriate to a tyranny and not to a monarchy, which should be governed, as far as might be, by laws, not by the mere will of the prince.<sup>5</sup> How far this conception is reconcilable with Bodin's general position we find it difficult to say; we have drawn attention to a similar apparent incoherence in the theory of Budé.<sup>6</sup>

That Bodin thought that a monarchy of the absolute kind was the best form of government appears to us clear. In the last book of his "De Republica" he compares the various forms of government with each other, and concludes: Monarchy has its inconveniences and dangers, but those which belong

<sup>1</sup> Id. id., I. 8 (p. 89): "Atque in eo quidem principis majestas elucet, cum populi tribus et ordines, humili habitu ad principem rogationes ferunt, nec ullam imperandi prohibendive, nec suffragiorum potestatem habent; sed princeps arbitrio suo, ac voluntate, omnia moderatur, et quaecunque decrevit, ac jussit, ea legum vim habent. Eorum igitur, qui principem imperio populari teneri, ut quidem libris per vulgatis tradunt, minuenda opinio est; id enim seditiosis hominibus ad res novandas materiam praebeat, ac rerum publicarum perturbationem affert. Neque enim ulla ratio probabilis adduci potest, cur subditi principibus imperent, aut popularibus comitis ulla potestas tribui debeat, praeter

quam in ipsius principis infantia, vel furore, vel captivitate, ut ei procurator, legatusve, comitiorum suffragiis creari posset; alioquin si Reges legibus comitiorum ac populi jussis teneantur, inanis est illorum potestas, inane regium nomen futurum: nec tamen sub tali principe respublica popularis esse potest, sed optimatum aut paucorum coetus, in quo leges ac edicta, non ejus qui praeest, sed eorum, qui aequa potestate suffragium habent, auctoritate, ac nomine imperantur."

<sup>2</sup> Id. id., I. 8 (p. 88).

<sup>3</sup> Id. id., I. 8 (p. 92).

<sup>4</sup> Id. id., II. 1 (pp. 181, 182).

<sup>5</sup> Id. id., IV. 4 (cf. this volume, p. 381).

<sup>6</sup> Cf. this volume, p. 296.

to an aristocracy or democracy are much greater. The best form of government is that of one man, whose authority is not to be shared with the people or the "Patres"; all legislators, philosophers, historians, and theologians hold that this regal government is the best, not only for the convenience of the prince, but for the safety and happiness of the people. This supreme authority of the prince must not be shared with the assemblies of the people and nobles, or the "Maiestas imperii" will inevitably give place to anarchy. We must not give heed to the seditious clamour of those who maintain that the prince must be subject to such assemblies of the people, and that it is from them that the princes receive their authority to command and forbid. Any tyranny is better than the domination of the people. Tyrants will consider the danger of their actions, but the violence and fury of the peoples takes no rational account of their own or of other's interests.<sup>1</sup>

Bodin's judgment seem to us clear and emphatic, as well as the audacity with which he appeals to the authority of legislators and philosophers—a somewhat strange appeal. He dogmatically asserts the absolute authority of the King of France, who was the source of law, and free from the law; in him it was that there resided that "Maiestas"

<sup>1</sup> Id. id., VI. 4 (p. 710): "Haec monarchiae incommoda ac pericula gravissima quidem: sed ea quae ab aristocratia et democratia pendent, multo graviora . . . (p. 712) Quod igitur superius in optimo civitatis statu imperium unius esse oportere diximus, nec cum populo patribusque communicandum; quod item legum latores, historici, philosophi, theologi, una voce regale civitatis genus omnium optimum ac beatissimum iudicant, id non ad principis comoda pertinet, sed ad populorum suorum foelicitatem, vitamque tutius beatiusque degendam. At summa principis potestas optimatum populivo coetibus nec subiugari, nec circumcidi nec ulla sui parte communicari, sine pernicie potest, alioquin

majestatem imperii vel in pestiferam anarchiam, vel in popularem perturbationem prolabi necesse est. Id autem attentius ponderandum nobis est, ne seditiosis popularium ac imperitorum voces exaudiamus, qui principes populorum coetibus, et comitiis subiuciosos, ab iisque imperandi ac prohibendi leges accipiendas esse putant: qua quidem re non modo monarchiarum pulcherrimarum sed etiam subditorum interitus sequatur necesse est. . . . (p. 713) Quaecumque tamen tyrannis videtur tolerabilior populi dominatu. Etenim tyranni suo periculo progredi cogitant; populi vero impetus ac furor, nec sui, nec alieni rationem habet."

or sovereignty which, as he contended, must always exist somewhere in a political society.

If we attempt to sum up the most important aspects of Bodin's political theory, we must observe first the singular significance of his suggestion that the State rests upon force, and that it was not, at least in its original form, related to justice, while it was to be directed by reason. Unhappily he did not, as far as we have seen, develop the conception, and it is therefore difficult to determine how far it was really important in his mind.

It is in his theory of the absolute and supreme authority, subject only to the natural and divine law, which resides in the State, that we find the most significant aspect of his work, but for our present purpose its importance lies specially in his judgment that this supreme and absolute power may be given by the commonwealth to one man; and that the king, in the proper sense of the word, is one who possesses this authority. There can be, in Bodin's judgment, no such thing as a mixed government, no combination of the monarchical and aristocratic and popular elements. It is here that Bodin breaks away most completely from the mediæval tradition and the great mediæval political thinkers, and even substantially, if not formally, from the principles of such men as De Seyssel.

It is true that Bodin, speaking not as a theorist but as an observer, evidently recognised that it was almost impossible to find any such monarchy in Western Europe, with the exception of France; while he maintained stoutly but without any great amount of historical evidence, that the King of France was in this sense supreme and absolute, the source of law, and not subject to law, and that it was in him that there resided that "Maiestas," that supreme or sovereign power, without which there can be no "Respublica."

It is in the work of Bodin that we find the most highly developed assertion of the absolute authority of the prince. There are, however, some other writers of the last part of the sixteenth century who, in varying terms, assert a theory of the same kind, some of whom also restate the theory that the absolute

authority of the prince is founded upon the divine law—that is, they restate that theory of the “Divine Right”—whose earlier appearance in the sixteenth century we have considered in Part III. of this volume.

One of the most important of these was Thomas Bilson, Bishop Winchester, who in 1586 published a work entitled ‘The true difference between Christian Subjection and Unnatural Rebellion.’ This treatise is in the form of a dialogue between Philander, a Jesuit, and Theophilus, the Christian.

Bilson was indeed in a position of some difficulty. The primary purpose of his treatise was to prove the necessity of submission to the royal authority in England, but he finds himself compelled to defend, or at least to excuse, the revolt of the Protestants in various continental countries against their Catholic superiors.

We may begin by observing that Bilson cites St Paul and St Peter as teaching that kings are appointed by God, and must be obeyed; and the familiar Gregorian examples of David’s submissive conduct to Saul, and asserts dogmatically that God expressly commanded the people to be subject to their king and not resist him.”<sup>1</sup> In another place he says: “Princes appoint penalties for others, not for themselves. They bear the sword over others, not others over them. Subjects must be punished by them and they by none, but by God whose place they supply. . . . No man may break the laws of princes without punishment, but the princes themselves, who may not be charged with the transgressions (of their own laws). For it was wisely spoken, he is wicked that saith to a king, thou art an offender. And if it be a monster in nature and policy to suffer the children to chasten the father, and the servants to punish their master, what a barbarous and impious a thing is this, to give the subjects power of life and death over the princes.”<sup>2</sup>

Again, more explicitly still: “The servant is not so surely bound to his maister, as the subject is to the prince; power

<sup>1</sup> Bilson, ‘The True Difference,’ &c., part iii. pp. 7, 8, 12, 37.

<sup>2</sup> Id. id. id. (pp. 97, 98).

of life and death the maister hath none, the prince hath; refuge against the maister hath the servant to the common governor of them both, which is the magistrate, the subject hath no refuge against his sovereign, but only to God by prayer and patience, and therefore the prince may demise the servant, if the maister be like to corrupt him; but no man can discharge the subject, though the prince go about to oppresse him.”<sup>1</sup>

It would be difficult to find a more dogmatic and unqualified statement of the unlimited authority of the prince, or words which so directly and emphatically repudiate the tradition of mediæval civilisation.

When, however, we turn to Bilson’s treatment of the political conditions in continental countries, we seem to find ourselves in another world. The Jesuit brings up the conduct of the Protestants on the continent, and cites Beza’s defence of the French nobles in taking up arms. Bilson defends them on the ground that the king had been in the hands of the Guises, and while he would not undertake to defend all that Protestant writers had said about resistance to kings, he urged that the constitutional system of different countries varied. He goes on: “The Romans, we know, could never abide the very name of a king. The Commonwealths of Venice, Milan, Florence, and Genoa are of the same mind. Many States have governors for life or for years, as they best liked that first created their policies, and yet a sovereignty still remains somewhere in the people, somewhere in the senate, somewhere in the prelates and nobles that elect it: a magistrate, who hath his jurisdiction allotted and prefixed unto him, thus far and no further, and may be resisted and recalled from any tyrannous excesses by the general and publike consent of the whole State whom he governeth.

In Germany the emperor himself hath his bounds appointed unto him which he may not passe by the laws of the empire; and the princes, dukes, and cities that are under him have power to governe and use the sword as God’s

<sup>1</sup> Id. id. id., p. 262.

ministers, in their charge. And though, for the maintenance of the empire, they be subject to such orders as shall be decreed in the convent of all their States, and, according to that direction are to furnish the emperor with men and monies for his necessary wars and defence: yet, if he touch their policies, infringe their liberties, or violate the specialties which he by oathe and order of the empire is bound to keepe, they may lawfully resist him, and by force reduce him to the ancient and received form of government, or else repel him as a tyrant, and set another in his place by the right and freedom of their country. Therefore the Germans' doings or writings can help you little in this question. They speak according to the lawes and rights of the empire, themselves being a verie free State, and bearing the sword as lawfull magistrates to defend and protect their liberties, and prohibit injuries against all oppressors, the emperor himself not excepted."<sup>1</sup>

In another passage Bilson's contention is set out again in more general terms. The Romanist, Philander, brings forward the revolts in Scotland, France, and the Low Countries, as well as those in Germany. The Protestant, Theophilus, contends that the reformers had been barbarously slaughtered, but adds: "I must confesse that except the laws of those realms do permit the people to stand on their right, if the princes should offer them wrong, I dare not allow their arms. . . . Philander: Think you their lawes permit them to rebel? Theophilus: I busie not myself in other men's commonwealths as you do, neither will I rashly pronounce all that resist to be rebels; cases may fall out in Christian kingdoms when the people may plead their right against the prince, and not be charged with rebellion. Philander: As when, for example? Theophilus: If a prince should go about to subject his kingdom to a foraine realme, or change the forme of the commonwealth from inperie to tirannie; or neglect the lawes established by common consent of prince and people, to execute his owne pleasure; in these and other cases which might be named, if the nobles and commons join together

<sup>1</sup> Id. id. id., pp. 266-270.

to defend their ancient and ancestral liberty, regiment, and lawes, they may not well be counted rebels. Philander: You denied that even now, when I did urge it. Theophilus: I denied that bishops had authoritie to prescribe conditions to kings when they crowned them; but I never denied that the people might preserve the foundation, freedom, and forme of their commonwealth, which they forprised when they first consented to have a king. Philander: I remember you were resolute that subjects might not resist their princes for any respects, and now I see you slake. Theophilus: As I said, so I say now, the lawe of God giveth no man leave to resist the prince; but I never said that kingdoms and commonwealths might not proportion their States as they thought best by their public lawes, which afterwards the princes themselves may not violate. By superior powers ordained of God we understand not only princes, but all politike States and regiments, somewhere the people, somewhere the nobles, having the same interest to the sword, that princes have in their kingdoms; and in kingdoms when princes bear rule, by the sword we do not mean the prince's private will against his lawes, but his precept derived from his lawes, and agreeing with his lawes: which though it be wicked, yet may it not be resisted by any subject with armed violence. Marry, when princes offer their subjects not justice but force, and despise all laws to practise their lusts: not any private man may take the sword to redresse the prince; but if the lawes of the land appoint the nobles as next to the king to assist him in doing right, and withhold him from doing wrong, then they be licensed by man's law, and so not prohibited by God's, to interpose themselves for the safeguard of equitie and innocence, and by all lawfull and needful means to procure the prince to be reformed, but in no case deprived when the sceptre is inherited."<sup>1</sup>

In these passages Bilson admits that the laws of some countries might contain provisions for restraining the prince's actions, and that in extreme cases the community might defend its ancient liberty and laws against him; and he also

<sup>1</sup> Id. id. id., pp. 279, 280.

makes it clear that, by the "superior power ordained of God," he did not mean only the prince, but all "politike States and regiments." Like Calvin, he did not allow that any private person might by force resist the prince, but it was different with the constitutional authorities of the community. He even admitted that the community might depose an elected prince, like the emperor, though he emphatically asserted that this did not apply to the case of an hereditary prince. He suggested that such a constitutional limitation of the authority of the prince existed in the empire and possibly in other continental countries, but he did not suggest that they existed in England; and he at least seems to suggest that the monarchy in England was absolute, and that its "divine right" could not be questioned.

We turn next to a group of Scottish writers whose work was in some degree related to the deposition of Mary, Queen of Scots, and to George Buchanan's defence of this. In a treatise published in 1581 by a Scotsman, Cunerus, who was Bishop of Louvain, the "divine right," and the principle of non-resistance, are set out in very explicit terms. He cites Samuel's description of "the manner of the king" (1 Sam. viii. 11, &c.) as being a statement of his rights—although he admits that it had been variously interpreted—for though the king, in doing such things as Samuel described, might be committing grave sins, the people must not resist. The king is the lord of the land, and the kingdom has been given him by God, and even his wicked actions must be endured by his subjects.<sup>1</sup>

A more important work was published the same year by Adam Blackwood, entitled 'Pro Regibus Apologia,' which

<sup>1</sup> Cunerus, 'De Christiani Principis Officio' (Ed. Mons, 1581), p. 63: "De quo quidem jure vario hoc loco loquuntur interpretes. Caeterum tamen nemo negat, quin hac ratione jus regis dici posset, quoniam si Rex haec faciat, licet aliquando graviter peccet, populus tamen jure pati debeat, et non resistere: quoniam rex dominus

terrae est, et regnum Regi datum a Deo est, ut supra diximus. Non quod Rex possit, recta conscientia, bonis omnibus subditorum, et subditis ipsis pro libidine frui: sed quoniam omnia regiae potestati subdita sunt, ut etiamsi praeter modum exigat, tolerari tamen debeat."

is a formal reply to George Buchanan's 'De Jure Regni apud Scotos.' Blackwood was a Scotsman, but had been educated in France, and was a counsellor or judge at Poitiers.<sup>1</sup>

Blackwood was an uncompromising defender of the theory of the unlimited authority of the king. He admitted indeed that neither the ancient empire of Rome nor the contemporary empire had this character,<sup>2</sup> but he maintained that the position of the Kings of Scotland was wholly different: the lives and fortunes of their subjects were in their power and they recognised no superior. This was also, he says, the character of the monarchy in the kingdoms of France, England, Spain, Portugal, and others, in that the people could not be admitted to any share in the supreme power; for this was the true nature of monarchy, that its authority could neither be divided nor shared.<sup>3</sup>

This is a thoroughgoing statement, and the treatise is in the main an expansion of it. In the first place, Blackwood maintains that the monarchy in Scotland was founded upon force, the kingdom was created by Kenneth, and the people had therefore no legal rights; the king, he seems to mean, granted to certain great men the "dominium" of certain provinces, but retained in his own hands the "potestas et imperium."<sup>4</sup> The royal authority, he again contends, was founded in many kingdoms not on election but on the force

<sup>1</sup> Cf. D. N. B.

<sup>2</sup> Adam Blackwood, 'Pro Regibus Apologia,' IV., pp. 51 and 54.

<sup>3</sup> Id. id., IV. (p. 55): "Scotorum Regum longe diversum jus est, quibus capita fortunaeque civium sunt obnoxiae, cum ii nulla conditione populo teneantur, nec superiorem ullam praeter solius numinis potestatem agnoscant. Eodemque jure suis regibus adstricti sunt Galli, Angli, Hispani, Lusitani, alique permulti quorum res rationesque omnes ita regibus addictae sunt, ut ne volentibus quidem populus in ullam supremam potestatis et imperii societatem admitti queat. Ea siquidem est monarchiae natura, ut sine hoc imperio consistere non possit,

quod nec dividatur nec communicatione cum alio profanetur."

<sup>4</sup> Id. id., VI. (p. 65): "Quod si praesentem Scotici regni conditionem spectemus, nec ab owo quod dicitur, eius initia repetamus, Pieticae ditionis accessione Kennethus rex non protulisse fines imperii, sed regnum inchoasse videbitur, ac virtute bellica peperisse, quod ante nullum erat. . . . Ut autem intelligas nihil in huic Scotico populo fuisse juris, sed fisco cecisse omnia, Rex arbitrato ea suo proceribus quibusdam erogavit, ut penes eos, eorumque posteris, provinciarum dominium esset, penes se potestas et imperium."

of arms, or on some other system of law, and by this he means the law of hereditary succession, which the people cannot abrogate.<sup>1</sup>

Blackwood goes on to maintain that the authority of kings was analogous to that of the father over his family, or of the master over his slaves: they impose upon them whatever laws they please, they do not receive these from them, and they rule them according to their own judgment.<sup>2</sup> He appeals to the history of Scotland and cites a passage from Hector Boece to show that the supreme power and authority of law had lain with the king.<sup>3</sup> He admits indeed that in Rome the authority which had at first belonged to the kings was transferred to the law, but maintains that this was not the case elsewhere; for, he says, nowhere was such a bridle (*fraenum*) imposed upon kings, and their authority subjected to that of the multitude, nowhere was a law imposed upon kings which should restrain their supreme authority. The prince is a living law in the world, and his power and jurisdiction cannot be controlled by any other law than his own will.<sup>4</sup> A little further on he asks what can be more absurd than to say that the king declares the law, while the people makes it.<sup>5</sup>

<sup>1</sup> *Id. id.* (p. 71): "Non jam animadvertis, Buchanane, quam solidum sit hoc disputationis tuæ principium, quam firmo nitare fundamento, cum tot regna non electione sed vel armis, vel alio jure quaesita reperiamus? Quamquam autem ea vi et armis initio posita fuere, legibus tamen retenta et jure posteris tradita nemo non intelligit, jure, inquam, non popularium suffragiorum . . . sed agnationis atque sanguinis; quam populus nec abrogare, nec ex ea derogare quidquam potest. Est enim regia dignitas, legis et naturæ donum, quod extra populi commercium perpetua regni consuetudo stabilivit."

<sup>2</sup> *Id. id.*, VII. (p. 80): "Rex hominum coctui praeest, non secus ac pater familiae, dominus servis, navi gubernator, quibus imponunt quas volunt leges, non accipiunt; quibus

imperant non ipsorum judicio sed suo: quos regere, quos tueri, non ex ipsorum nutu ac voluntate, sed a natura prescripta lege tenentur."

<sup>3</sup> *Id. id.*, VIII. (p. 84): "Nam si rerum nostrarum annales evolvamus, summam juris ac legum potestatem penes reges fuisse reperiemus."

<sup>4</sup> *Id. id.*, IX. (p. 96): "Nusquam enim gentium hoc fraenum regibus iniectum inveneris, ut multitudinis imperio submiserint fasces, et legem acceperint supremæ ditionis atque potestatis suæ moderatricem. Princeps enim animata lex est in terris, cujus potestas atque jurisdictio non alia lege quam ipsius voluntate in angustum cogi potest."

<sup>5</sup> *Id. id.*, XIII. (p. 119): "At quid absurdius dici potest, quam juris dicendi regem, legum ferendarum auctorem esse populum."

Blackwood's statements are curiously inconsistent with the political conceptions of De Seyssel. His notion of an absolutely unrestrained monarchy goes indeed much further than even Bodin; for in another place he maintains dogmatically that not only the persons but the property of all the people are in the power of the king. It is only the use of this which belongs to private persons.<sup>1</sup>

It is no wonder that Blackwood, in another place, should seem to be indignant that Aristotle should have described the Persians and other Asiatic monarchies as being really barbarous.<sup>2</sup>

The treatise of Blackwood is somewhat crude, and shows little acquaintance with contemporary conditions and theories, but it may be one source of the opinions of a work which was important by reason of its authorship, that is, 'The True Law of Free Monarchies,' written by James VI. of Scotland and published first in 1598 before he became King of England, and republished in London in 1603.<sup>3</sup>

In this work James unites the secular theory of the absolute king and the theological theory of his absolute authority as being by divine right. He opens the work with a general statement of the proper functions of a monarchy. The office of a king is to maintain justice and judgment, to establish good laws for the people, and to procure peace for them. In his coronation oath he swears, first, to maintain the religion "presently professed" in the country; secondly, to maintain all the good laws made by his predecessors; and thirdly, to maintain the whole country and every estate therein in all their ancient privileges and liberties.<sup>4</sup>

This has a very constitutional sound, and seems to restrain the authority of the king. James was describing, so far, the

<sup>1</sup> *Id. id.*, VI. (p. 68): "Neque enim ita rerum ignarus es, ut nescias non modo personas omnium regibus obnoxias ac veluti mancipio nexuque teneri, verum etiam res omnes popularium, atque fortunas ita regum esse proprias, ut usu dumtaxat, ac fructu,

singulorum esse videntur."

<sup>2</sup> *Id. id.*, VI. (p. 68).

<sup>3</sup> Our citations are from the edition of 1603.

<sup>4</sup> James I., 'The True Law of Free Monarchies,' B. 3.

office or duty of the king, but when he turns to the duty of the subjects we find quite another mode of thought. He cites the speech of Samuel (1 Sam. viii.) on the nature of kingship, and explains what this implied. "First, he (Samuel) declares unto them, what points of justice and equitie their king will break in his behaviour unto them. And next, he putteth them out of hope that wearie as they will, they shall not have leave to shake off that yoke, which God, through their importunities, hath laid upon them."<sup>1</sup>

Again, James cites the example of David's conduct to Saul, as Gregory the Great had done, and concludes: "Shortly, then, to take up in two or three sentences, grounded upon all these arguments out of the lawe of God, the dutie and alleageance of the people to their lawfull king, that obedience, I say, ought to be to him, as to God's lieutenant in earth, obeying his commands in all things, except directly against God, as the commands of God's minister, acknowledging him a Judge, set by God over them, having power to judge them, but to be judged onely by God, whom to onely he must give count of his judgement . . . following and obeying his lawful commands, eschewing and flying his furie in his unlawfull, without resistance, but by sobs and teares, to God."<sup>2</sup>

This is indeed the theory of the divine right of the king and of passive obedience in a most extreme form. James does not cite directly any authority for this doctrine except the Scriptures, but we may conjecture that he derived it from writers like Tyndale.

He goes on to show that this absolute power of the king was also founded upon the "Fundamental and Civile Lawe, especially of this country." He admits that in the first ages it may be true that various commonwealths chose a ruler for themselves, but this, he says, has nothing to do with Scotland, for Scotland was conquered by King Fergus, who came from Ireland, and he and his successors imposed their laws upon the country, "and, so it follows, of necessity, that the kings were the Authors and Makers of the lawes, and not the lawes of the kings." He does not ignore the existence

<sup>1</sup> Id. id., B.<sup>2</sup> Id. id., C.

of the Parliament, but in it "the lawes are but craved by his subjects and onely made by him at their rogation and with their advice. For albeit the king make daily statutes and ordinances, injoyning such paines thereto, as he thinks meet, without any advice of Parliament or Estates, yet it lyes in the power of no Parliament to make any kinde of lawes or statute, without his sceptre be put to it, for giving it the force of a Law."<sup>1</sup>

So much for Scotland, but James also maintains that "the same ground of the king's right over all the lande, and subjects thereof, remaineth alike in all other free monarchies, as well as in this"; and, with special reference to England, he contends that William the Conqueror made himself King of England by force, and made his own laws.<sup>1</sup>

The king then is the source of all law, and he is over all law; he is "maister over every person that inhabiteth the same, having power over the life and death of every one of them. For although a just prince will not take the life of any one of his subjects without a cleare law: yet the same lawes, whereby he taketh this, are made by himself, or his predecessors. And so the power flowes alwayes from himselfe."<sup>2</sup>

The king should, indeed, govern according to his law, "For albeit it be true that I have at length proved, that the king is above law, as both the author and giver of strength thereto; yet a good king will not onely delight to rule his subjectes by the law, but even will conforme himself, in his own actions thereunto, always keeping that ground, that the health of the commonwealth be his chiefe law."<sup>2</sup>

The king may mitigate or suspend a general law, but "a good king although he be above the Law, will subject and frame his actions thereto, for example's sake to his subjectes," but he does this "of his own free will, but not as subject thereto."<sup>3</sup>

Having thus set out his conception of the absolute authority of the king as founded upon divine law, and the principle that the king is the source of law and above law, he considers some arguments against this. James had evidently

<sup>1</sup> Id. id., C.<sup>2</sup> Id. id., D. 1.<sup>3</sup> Id. id., D. 2.

heard of the theory of a contract between king and people, and he is at pains to show that this conception had no value, "For, say they, there is a mutuall paction, and contract bound up, and sworne betwixt the king and the people, whereupon it followeth, that if the one part of the Contract or the Indent bee broken upon the king's side, the people are no longer bound to keep their part of it, but are thereby freed of their oath. For (say they) a contract betwixt two parties of all lawe frees the one partie if the other breake unto him.

As to this contract alledged, made at the coronation of a King, although I deny any such contract to be made then, especially containing such a clause irritant, as they alledge: yet I confesse that a King at his coronation, or at the entry to his kingdome, willingly promiseth to his people, to discharge honourably and truly the office given him by God over them. But presuming that thereafter he breake his promise unto them, never so inexcusable, the question is, who should be judge of this breake, giving unto them this contract were made to them never so sickler, according to their alleageance."<sup>1</sup>

We return to France and may observe the contentions of Pierre de Belloy in a short treatise entitled 'Apologie Catholique,' published in 1585 and directed against the Catholic League and its refusal to admit that Henry of Navarre could be recognised as the legitimate heir to the French crown. He admitted that there were laws of the emperor (*i.e.*, of the Roman law) which declared a heretic to be incapable of inheritance, but these, he maintained, applied only to private persons and not to kingdoms or empires, for these could not be taken from their true lords for heresy or for any other cause, for they are held immediately from God Himself, and not from men; subjects are bound to obey and serve their princes, and cannot question their justice.<sup>2</sup>

<sup>1</sup> Id. id., II.

<sup>2</sup> Pierre de Belloy, 'Apologie Catholique,' ed. 1585 (fol. 30): "Or, autre chose est des Empires et Royaumes, qui ne peuvent estre arracher de 'a

main de ceux qui en sont les vrais Seigneurs, soit pour heresie, ou autre raison queleconque, pourcee qu'ils sont tenus immédiatement de la main de Dieu Eternel, non des hommes. . . . De

And again, the people have no right to control the actions of the king, but may only lift their eyes to heaven and remember that it is by the divine will that the sceptre has passed into the hands of him who bears the crown, whether he is good or bad. This is specially the case where the king comes to the throne, as in France, by legitimate succession, and where, by the law of the monarchy, the people have not only placed all their power in the hands of the king, but have tied themselves to the succession of the Blood Royal.<sup>1</sup>

A more important work, which also sets out the theory of the absolute monarchy, was published in 1596; this was the 'De Republica' of Peter Gregory of Toulouse.

He cites the Aristotelian classification of the three good forms of government—good because they are directed to the wellbeing of the whole community.<sup>2</sup> He refuses to admit that there are strictly any mixed governments: the supreme power must lie either with the king, or the "Optimates," or the people.<sup>3</sup> He indeed admits the three forms, but pays no further attention to the aristocracy and the popular government, and assumes that the people had transferred all their authority to the prince.<sup>4</sup>

It is, however, with the nature of the French monarchy that he is really concerned. The king holds supreme authority, he does indeed protect the people from oppression by the nobles, he admits plebeians to the magistracy and the public

sorte que les sujets n'ont que voir sur les Rois, et ne sont nez que pour les oboir et servir, quels que leurs Princes soient, sans s'informer plus avaut de la justice d'iceux."

<sup>1</sup> Id. id. (fol. 31): "Il dy donc que ce n'est pas au peuple de controoler, qu'avec humilité, et obeyssance, les actions et qualités de son Roi, mais il doit seulement lever les yeux au ciel, et considerer en soy-mesme que par la volonté Divine le sceptre est tombé és main et pouvoir de celuy qui porte la Couronne, soit-il bon ou mauvais; singulierement quand il y est appellé par legitime succession telle qu'est en

nostre France, en laquelle par Loy Monarchique le peuple n'a pas seulement remise toute sa puissance en la main et pouvoir du Roy, ains qui plus est, s'est lié les mains et n'y peut pourveoir tant que rostera quelque masse de sang royal, selon la Loy du Royaume, par laquelle le Roi ne meurt jamais, pour qu'incontinent le mort saisit le vif plus proche masle du defunct par agnation."

<sup>2</sup> Peter Gregory of Toulouse, 'De Republica,' I. 19; V. 1, 2.

<sup>3</sup> Id. id., V. 1-3.

<sup>4</sup> Id. id., III. 4, 6.

offices, he governs the country through various councils or courts, he gives the cities municipal laws and officers; but all this is under the royal authority and can be changed by him at his discretion. All, however, is to be done justly and for the welfare of the people, or the monarchy would degenerate into tyranny.<sup>1</sup>

He maintains indeed that the famous passage in 1 Samuel viii. describes the abuse of the royal authority, not its legitimate use, unless indeed such actions should be required for the public good<sup>2</sup>; but the absolute power of the prince has been given him by God, he is God's vicar, and we must recognise in him the majesty and image of god.<sup>3</sup>

Gregory repudiated emphatically the opinion, which he attributes to Aristotle, that the man who rules over an unwilling people is a tyrant, for, as he maintains, if this were true, there neither has been, nor could be, a State which deserves the name of a monarchy; for a State which depends upon the will of the people cannot be called a monarchy, but a democracy; the supreme power in such a State resides in the people and not in the prince. The king who violates the

<sup>1</sup> Id. id., V. 18: "In Galliae Monarchia Status nunc talis est qui omnes rerum publicarum salubres leges contineat. Nam penes unum regem omnium rerum summa, verum non ut tyrannus moderatur rempublicam aut regnum, sed habet concilia virorum electorum, et ita optimatum habet diversos senatus, qui quotidiana negotia justitiaeque merita, populo distribuunt, citra appellationem nomine tamen principis, suo tamen privilegio et sibi concessa potestate. Habet et democraticas bonas illas leges princeps in regno, ut libertas populi conservetur, a nullo optimatum operimetur, legibus regatur diligenter, ad æquum et bonum redactis: non excludit princeps plebeios a magistratibus, ab administratione reipublicae, sed eos idoneos admittit; concedit civitatibus suis decuriones, consules, legesque municipales; quae

omnia habent rerum publicarum mixtionem; at sub monarchia tamen, quia in potestate principis est, seu regis, haec omnia mutare, si sibi videatur. Attamen praesumitur, non nisi juste, et ad salutem populi et ejus utilitatem, mutare aut tollere; alioquin et ipsius monarchia degeneraret in tyrannidem."

Cf. id. id., IX. 12.

<sup>2</sup> Id. id., IX. 1, 5, and 8; III. 2, 10.

<sup>3</sup> Id. id., VI. 2, 9: "Neque in principibus tam inspicere vel considerare debemus quid ipsi per se et tanquam homines sunt, sed quantum illis concessum et permissum a Deo sit. Neque in principibus tam personam singularem reveremur, quantum majestatem Dei et imaginem potestatemque consideremus et reveremus ex parte illius cujus delegati sunt, et vicarias in terra partes gerunt."

Cf. id. id., III. 1, 10: "Postquam

laws of nature and the laws of God is indeed a tyrant, but not the king who disregards the "political" and civil laws.<sup>1</sup> He develops the last principle in the next part of his treatise, and while he admits that the prince must obey the supreme law of God and of nature, he maintains that he is not bound by his own laws or those of his predecessors, except for some fundamental laws, such as that of the hereditary succession, which the king cannot violate.<sup>2</sup> The prince has power to make, to interpret, and to abrogate all general laws, and the right to issue "privilegia," and thus to "derogate" from the law; he even has the right to use a "non-obstante" clause in such "privilegia."<sup>3</sup>

On the other hand, like Bodin and many of the Civilians, he admits that if the law of the prince had passed into a contract, he could not annul it, for the obligation of a contract belongs to the natural law, to which, as a political and rational being, the prince is subject. As in the Civilians, this conception is brought into relation with the feudal law.<sup>4</sup>

It is also true that Gregory urges upon the prince that it is well to take counsel; and he gives a short account of the Councils in Greece and in the Carolingian times, and he finds the traces of these in the meetings of the three Estates, which are called together by the king that he may learn from

enim commissa est potestas a Deo principi in subditis absoluta."

Id. id., XXVI. 7, 8: "Omnis jurisdictio in statu monarchiae, gladioque potestas, a solo Deo, ut princeps ejus vicario monarcha pendet."

<sup>1</sup> Id. id., VI. 18, 15: "Tamen admonendi sumus, non bene mea sententia Aristotelem et eius asseclas sensisse omnes qui invito populo praesunt, esse tyrannes reprobos: nam si hoc verum esset, nullum esset, aut fuisset regnum quod monarchiae nomen habuerit: quod enim pendet ex arbitrio populi, illud non regnum aut monarchia, sed democratia dici debet, in qua suprema potestas non penes principem sit, sed penes populum; neque negandum quidem, leges naturae

et divinas non servantem et contra eas agentem, tyrannum facto esse: at non ita, si contra leges politicas agat et civiles."

<sup>2</sup> Id. id., VII. 5, 8, 17, 20.

<sup>3</sup> Id. id., IX. 39.

<sup>4</sup> Id. id., VII. 20, 26: "Quando etiam lex et constitutio principis transit in contractum revocare non potest in praesudicium eorum quibus ius in eadem quaesitum est. . . . 26. Quia obligatio est de iure naturalis, cui etiam princeps subicitur. . . . et licet princeps sit solutus legibus, non tamen dictamine rationis naturalis et lege naturae, quia et princeps est animal politicum et rationis particeps. . . . 36. Contractus servari debent proculdubio inter vasallos et principes."

them the grievances of the people, and sometimes that he might inform them of the necessity of going to war, or of other public affairs, for which the assistance of the subjects was required. He mentions three causes for which especially they might be called: first, the appointment of a regent, in the case of a minority, or when the king was insane, or a prisoner, and he mentions as examples the captivity of King John, the insanity of Charles VI., and the minority of Charles VIII. Second, to deal with conspiracies, the reform of the Commonwealth, or the oppression of the people by the nobles. Third, when it was necessary to impose new "tributes" and aids upon the people, to lay before them the urgent affairs of the kingdom and the king, which justly required the help of the subjects.<sup>1</sup>

Gregory was, however, careful to add that the people must not imagine that this was done by the kings because the King of France was dependent on these assemblies, for he could impose and exact taxes without their consent. It must be understood that the King of France was not dependent on the assemblies, as in Poland and elsewhere, but the assemblies were dependent upon the king, who summoned them at his pleasure, for the kingdom was an hereditary monarchy, otherwise the kingdom would not be a monarchy but a democracy.<sup>2</sup>

Finally, he also discusses the question of the deposition of the prince. He admits that the depositions of the Emperor Henry IV. by Pope Gregory VII., and of Frederick II. by Innocent IV., were justifiable; and that even the deposition of the Emperor Wenceslas by the electors may have been lawful, as the empire was elective; but he denies that hereditary monarchs could be deposed.<sup>3</sup> The monarch is dependent on God only; it is to God only that he will give account for the souls of his subjects. All his jurisdiction and

<sup>1</sup> Id. id., XXIV. 1-3, 4 and 5.

<sup>2</sup> Id. id., XXIV. 53: "Quae proferuntur a rege non ut ideo populus arbitretur a rege non ut ideo populus arbitretur ex eius nutu monarchiam regiamque potestatem pendere. Nam et sine consensu populi potest iure suo

princeps tributa imponere et exigere: sed ut paterne subditos moneat, causam necessariam esse ex qua coguntur propter utilitatem publicam, ab illis subsidia petere."

<sup>3</sup> Id. id., XXVI. 4, 11.

the power of the sword in the monarchy is from God only; his subjects have no authority to deal with him judicially.<sup>1</sup> In an earlier passage he had indeed asserted that while the authority of the prince was absolute, his function was to maintain justice and to be the defender and father of his subjects, and that, if he did not fulfil the function, he was a tyrant<sup>2</sup>; but a little further on he condemns in the strongest language those who dared to conspire against an unjust prince.<sup>3</sup>

The most important defender in this period, after Bodin, of the absolute authority of the king was William Barclay, a Scotsman indeed by birth and early education at Aberdeen University, but he studied law at Bourges and became a Professor of Civil Law, first at Pont-à-Mousson and later at Angers.<sup>4</sup> His most important work, 'De Regno et Regali Potestate,' was published in 1600, and while it is in large measure a reply to George Buchanan, it surveys the whole question of the source and nature of the royal authority.

If we make the attempt to set out Barclay's opinions in some reasoned order, we may begin by observing that he discusses the conception set out by Buchanan (and Hooker, as we may remember) that man had first created kings to remedy the disorders incident to life without a controlling authority, and then made laws for the purpose of restraining the arbitrary actions of the king.<sup>5</sup> He maintains that laws are made not to bind the king, but to take the place of his personal authority when he was absent.<sup>6</sup> He thinks indeed that princes should

<sup>1</sup> Id. id., XXVI. 5, 24: "Monarcha solum a Deo pendit, et illi soli ipse pro animabus subditorum redditurus est rationem."

Id. id., XXVI. 7, 9: "Omnis iurisdictionis in statu monarchiae, gladiique potestas a solo Deo, et princeps eius vicario monarcha pendet: ideo subditi qui carent potestate, iuridice in eum animadvertere non possunt."

<sup>2</sup> Id. id., IX. 12.

<sup>3</sup> Id. id., X. 2, 8: "Non dico porro bene agere subditos, qui ob

iniustitiam principis, manus audaces, temerarias inferant, et factiones architectentur, aut conirationes hac occasione vel alia etiam graviore in legitimum suum principem moliantur: nam hoc detester, abominer, et maiestatis poena atrociori dignum existimo."

<sup>4</sup> Cf. Allen, 'Political Thought in the Sixteenth Century,' p. 386 ff. (Cf. D. N. B.)

<sup>5</sup> J. Barclay, 'De Regno,' I. (p. 24).

<sup>6</sup> Id. id., II. (p. 83).

take advice, and speaks of the evil effects of neglecting this,<sup>1</sup> but he is also clear that, finally, it is the king who decides what is to be law.<sup>2</sup> He repudiates indignantly Buchanan's assertion that the Scottish constitution required that laws should be made with the consent of the "Proceres" and the approval of the people,<sup>3</sup> and asserts dogmatically that, both in Scotland and in France, the king made laws without the consent of such a body as the "Senate."<sup>4</sup> This is important, but more important is his emphatic statement that no one is a king who is bound by the laws.<sup>5</sup>

Barclay's main principles will become clearer if we examine his conception of the source and character of the royal authority.

He maintains that the royal authority is Divine. He is careful indeed to explain that this does not necessarily mean that the man whom God destined for the government was king before the consent of the people was given. Saul, he says, was chosen by God, but was made king "populi suffragio," and it was the same with David.<sup>6</sup> What Barclay means is that when the king has been, by the Divine permission, lawfully constituted by men, God gives him an authority which is superior to that of the whole people, for, when it is said that God has established the king, it is meant that God has confirmed his authority in such a sense that it cannot be violated or controlled by the people.<sup>7</sup>

This, he maintains, is true also of the king who succeeds by hereditary right, unless the lawful heir is by nature incapable, or there is some grave doubt about the right order

<sup>1</sup> *Id. id.*, I. (p. 41).

<sup>2</sup> *Id. id.*, I. (pp. 44-47).

<sup>3</sup> *Id. id.*, I. (p. 43).

<sup>4</sup> *Id. id.*, II. (p. 98).

<sup>5</sup> *Id. id.*, II. 61.

<sup>6</sup> *Id. id.*, II. 2 (p. 111).

<sup>7</sup> *Id. id.*, III. 2 (p. 112): "Quod igitur positum est, regnum a Deo esse . . . id eo pertinet, ut intelligamus Deum Regibus, seu instinctu, seu permissio divino ab hominibus legitime constitutis, eam autoritatis praero-

gativum impertiri, quae omnis populi potestatem superet. . . . (p. 113). Dicitur etiam constituere Regem Deus, quod potentiam dominationis, instituto Regi delatam ita confirmat, ut infringi a populo aut infirmari amplius nulla ratione possit. Neque enim ut Reges creare, ita et creatos abdicare, aut in ordinem cogere, populorum arbitrio commissum est, idque infra pluribus demonstrabitur."

of the succession; and he refers to the succession in Scotland in the time of Robert Bruce and the dispute about the succession in France between Philip of Valois and Edward III., which was determined by the "Ordinum et Optimatum conventus."<sup>1</sup>

The authority of the king is thus derived from God, and Barclay illustrates this by a reference to Samuel's description of the "Jura Regis" (1 Samuel viii.). Such royal conduct as Samuel describes, Barclay says, would be unjust, but cannot be judged by men.<sup>2</sup> Kings and princes who acknowledge no superior are reserved to the judgment of God; others must answer to the king for their actions, but the king only to God. Those, therefore, who claim authority to judge the king, who is the vicar of God, are guilty of a great offence against God.<sup>3</sup>

It is interesting to observe that Barclay finds himself compelled to repudiate or explain away St Thomas Aquinas. Boucher had cited St Thomas ('De Regimine Principum,' I. 6) as saying that if the people had the right to appoint the king, it was also within their right to depose him if he became a tyrant.<sup>4</sup> Barclay endeavours to meet this by suggesting a doubt whether the 'De Regimine Principum' was a genuine work of St Thomas, and then argues that, even if it were genuine, the principle only applied when the king was elective.<sup>5</sup>

Barclay thus maintains that the authority of the king is in such a sense Divine that revolt against him is revolt against God.

We turn from his theological arguments for the contention

<sup>1</sup> *Id. id.*, III. 2 (p. 120).

<sup>2</sup> *Id. id.*, III. 6 (p. 141).

<sup>3</sup> *Id. id.*, III. 6 (p. 142): "Nempe ut intelligamus, Regibus tantum et Monarchis sive Principibus, qui alienam dominationem non agnoscunt, id esse tributum, ut Dei solius iudicio reserventur: caeteri omnes humanum subeant, quia homines super se habent. Itaque Magistratum, Magnatum et Principum populi inferiorum, Rex seu Princeps summus; Regis vero,

Dominus ipse opera interrogabit. Hic soli Deo, illi Deo et homini poenas meritas, debitasque persolvere tenentur. Et vero populus magnam Dei iniuriam facit, qui de Rege vicario ipsius, et summo secundum eum inter homines constituto, iudicandi sibi potestatem arroget."

<sup>4</sup> Cf. this vol., p. 401; and vol. v. pp. 95-97.

<sup>5</sup> Barclay, 'De Regno,' VI. 20 (p. 489).

that the prince had an absolute authority to the legal. He maintains that this was the judgment of such eminent Jurists as the Speculator (*i.e.*, Durandus the elder), Bartolus, Baldus, Paulus de Castro, Ludovicus Romanus, Alexander, Jason, Albericus, and others. He sums up their opinion as being that the Pope and the prince, when acting "ex certa scientia," can do anything "supra ius, contra ius, et extra ius," for the prince has "plenitudo potestatis," and when he wills anything "ex certa scientia," no one can question his authority. It is sacrilegious to dispute about the authority of the prince. The prince can establish laws by his sole authority, though it is "humanum" that he should consult the "Proceres"; the prince can annul all "positive" laws, for he is not subject to them, but they to him, for God has subjected all laws to him. The commands of the prince have the force of laws, the prince is in truth "legibus solutus."<sup>1</sup>

It should be observed that with regard to this last point Barclay recognised that there was an interpretation very different from his own; that was the interpretation of Cujas, who, as we have seen, had maintained that the words "legibus solutus" only applied to certain laws. Barclay mentions the opinion, but only to repudiate it.<sup>2</sup>

<sup>1</sup> Id. id., III. 14 (p. 193): "Ac ne festinantem demoremur, dum singulos et ordine recenseamus, quae sit Juris Doctorum haec in parte sententia, ex Speculatore, Bartolo, Baldo, Paulo Castrensi, Ludovico Romano, Alexandro, Felino, Alberico, aliisque magni nominis interpretibus facile discet.

Papam scilicet et Principem ex certa scientia, supra ius, contra ius et extra ius omnia posse. Atque in Principem quidem esse plenitudinem potestatis, et postquam aliqua vult ex certa scientia, neminem posse ei dicere, cur ita facis; et solum Principem constituere legem universalem, populum vero legem particularem. Et quod cum Princeps sit causa causarum, non est de eius potestate inquirendum, cum primae causae nulla sit causa: quoniam illud quod primum est, aliud ante se habere

non potest. Et esse crimen sacrilegii instar disputare de potestate Principis. Et Principem solum posse condere statuta, licet humanum sit, quod consilio Procerum utatur, denique Principem posse tollere leges positivas, quia illis non subicitur, sed illae sibi. Et Deum Principi leges subiecisse, et nullam legem eius celsitudini imponi posse. Et licet de iure aliquid non valeat, si tamen Princeps de facto mandat servari, proinde est, ac si de iure valeat quo ad subditos. Et solum Principem soli Deo habere de peccato reddere rationem, et soli coelo debere innocentiae rationem. Et temerarium esse velle maiestatem regiam ullis terminis limitare. Et Principem vera esse solum legibus."

<sup>2</sup> Id. id., III. 15. Cf. this volume, pp. 315-318.

The nature of Barclay's conception of the absolute and Divine authority of the prince seems then to be clearly as well as emphatically expressed; but we must observe that he makes two exceptions to his principle of non-resistance and implicit obedience. If the prince behaves with intolerable cruelty and tyranny, not to private individuals but to the whole commonwealth of which he is the head, or to some important part of it, the people has the right to resist, while it must not withdraw its proper reverence, or take vengeance for the wrongs done.<sup>1</sup> This is an important concession; but in another place Barclay goes still further. He repudiates indeed Boucher's contention that any private person may punish the tyrant when the public authority had deprived him of his kingdom; but he admits that the community may slay the prince who endeavours to destroy it, not indeed because the community is superior to the prince, but because, if he endeavours to overthrow the commonwealth and kingdom, he has deprived himself of all lordship, and has in law and in fact ceased to be king.<sup>2</sup> In another place he gives as examples of the conditions under which a country may take arms against the king, the conduct of Nero, and of John Baliol, who promised to acknowledge the overlordship of Edward I. in Scotland.<sup>3</sup>

It is also very important to observe that while Barclay sets out the principles of the absolute authority of the prince

<sup>1</sup> Id. id., III. 8 (p. 159): "Qua propter si Rex, non in singulares tantum personas aliquod privatum odium exerceat, sed corpus etiam Reipublicae cuius ipse caput est, id est, totum populum vel insignem aliquam eius partem, immani et intoleranda saevitia seu tyrannica direxit: populo quidem hoc casu resistendi iniuriae illatae, non recedendi a debita reverentia propter acceptam iniuriam, praesentem denique impetum propulsandi, non vim praeteritam ulciscendi ius habet."

<sup>2</sup> Id. id., VI. 22 (p. 503): "Quod itaque scribo, Reipublicam posse eum occidere, qui in ipsam hostiliter agat,

id, si de illo Principi intelligatur qui hostili animo, id est animo perendi Reipublicam agat, verissimum quidem est; sed non ea ratione quam tu proponis, quia scilicet Reipublica, sive quod tu vis, Populus Principi superior, sit, publica quoque penes populum potestas autoritasque resideat: hanc enim falsam et mendacem esse, multis iam modis, multisque in locis perspicue ostendimus, sed ea solum ratione, quod qui perendae Reipublicae, et Regni penitus evertendi animum gerit; is senet Dominatu et Principatu omnino exiit, atque ipso iure, sive ipso facto, Rex esse desinit."

<sup>3</sup> Id. id., III. 16 (p. 211).

in general terms, though with special reference to France and Scotland, he was aware that these were not recognised in all countries, and he seems to be perplexed about the German Empire and Poland.<sup>1</sup>

That Barclay's judgment with regard to the absolute authority of the prince continued to be held by him is evident from another treatise, published in 1609, a year after his death. This was the work entitled 'De Potestate Papae,' which was concerned mainly with the refutation of the contention of those Roman Catholic writers who maintained that the Pope could, for sufficient reasons, depose kings. We are not here concerned with this question, but it is worth while to observe that Barclay repeated his judgment that the king was subject to God only, to no human or temporal punishment, and that, as the Jurists had said, he was "legibus solutus."<sup>2</sup> He admits indeed that the form of government in any commonwealth was a matter to be determined by human law, and even the decision who was to be prince; but when this had once been settled, obedience to him, in all things not contrary to the commands of God, was required by natural and Divine ordinance.<sup>3</sup>

Finally, there were two writers in England, by profession Civilians and Professors of Roman Law, whose work we might have discussed in Part III. of this volume; but although they were Civilians, their work was primarily related to constitutional conditions in England. The first of these,

<sup>1</sup> Id. id., IV. 13.

<sup>2</sup> Id., 'De Potestate Papae,' XII. (p. 94): "Nam in primis quid ei magis contrarium, quam quod tota antiquitas Christiana semper censuit, Reges solo Deo minores esse, solum Deum iudicem habere, nullis legibus hominum subiecti, nullisque poenis temporaliter plecti vel coerceri posse, ac proinde quod iuris doctores dixerunt, 'Princeps legibus solutus est.'" Cf. Id. id., XXXI. (p. 249).

<sup>3</sup> Id. id., XXVII. (p. 211): "Nam licet de iure humano sit, ut haec aut

illa reipublicae forma utamur, vel hunc aut alium Principem habeamus: tamen ut eum quem semel accepimus revereamus, eique in omnibus quae Dei mandatis non repugnant, submisso pareamus, non humanae solum, sed naturalis et divinae ordinationis; idque neminem arbitror negaturum, 'qui potestati resistit, Dei ordinationi resistit.' Inde fit, ut quod initio arbitrii et voluntatis erat, id, post datam de subiectione fidem, statim in obsequii necessitate convertatur."

Albericus Gentilis, is justly famous for his work on the Law of War, in which he, at least in some measure, anticipated the great work of Grotius. He had been Professor of Civil Law in Perugia, but, adopting the Reformed opinions, he fled from Italy and finally found a refuge in England, and was made Professor of Civil Law in Oxford.<sup>1</sup> In 1605 he published a short work, 'Regales Disputationes Tres,' in which he discussed the source and nature of the authority of the king, with special reference to England.

Supreme princes, Albericus says in the first of these 'Disputationes,' have no superior, but are above all men; they are absolutely supreme, for they recognise no authority over them except God, neither man nor law. The prince is "legibus solutus," and "quodcumque placet principi" is law. This is not a barbarous rule, but that of the Roman Law, the most excellent of all the system of law of men.<sup>2</sup> Again, a little later, the prince is God on earth, and his authority is greater than that which formerly belonged to the father over his son, or to the master over his slave<sup>3</sup>; and in another place he even seems to suggest that the authority of the law of the prince is simply that of his will, without any reference to reason.<sup>4</sup>

Albericus admits indeed that this was not true of all forms

<sup>1</sup> For a careful account of Albericus, cf. Professor T. E. Holland's edition of his work, 'De Jure Belli,' 1878.

<sup>2</sup> Albericus Gentilis, 'Regales Disputationes Tres' (ed. London, 1605), 'Disputatio Prima' (p. 8): "Supremi sunt (principes) quibus nullus est superior, sed ipse supra omnes. . . . Atque in his haesitare non oportet. Illic haesitetur, dum quaeritur, isti supremi quales sunt. In qua quaestione bonam profecto operam, et bene longam navavit Bodinus.

Ille est hinc absolute supremus, qui nihil supra se, nisi Deum agnoscit: nec cuiquam reddere rationem, nisi Deo habet. . . . Et hoc igitur supremi-tatis est ut nihil supra se unquam cernat principatum, neque hominem,

neque legem. Ergo et absoluta haec potestas est, et absque limitibus. 'Princeps legibus solutus est,' erit lex, et eadem, quod lex est quodcumque placet principi. Et haec lex non barbara, sed Romana est: id est praestantissima in legibus hominum."

<sup>3</sup> Id. id. id. (p. 11): "Princeps est Deus in terris, eius potestas maior est, quam quae olim fuit patris in filium, domini in servum."

<sup>4</sup> Id. id. id. (p. 24): "'Quod principi placuit' inquit lex. Sufficit pro ratione voluntas inquit Angelus. Et verba illa (inquit Bodinus) rescriptorum, placitorum, 'Ita nobis placet,' apponuntur ita, ut ostendat principis a se pendere vim, non a ratione."

of monarchy. There were some in which authority rested upon certain agreements, and the subjects had reserved to themselves their own laws and privileges; he refers to Alciatus, and cites as examples of such conditions the imperial cities of Germany, some of the papal states in Italy, the provinces of "Lower Germany" (meaning, no doubt, the Netherlands), which had for so many years been defending their liberties, and the long and successful resistance of the Swiss to the Austrians."<sup>1</sup>

Albericus, however, contends that the English monarchy had not this character, but that in England the king had an absolute authority subject to no control by the public law. He refers to the important distinction made by Baldus between the ordinary and the extraordinary powers of the prince, and he identifies the latter with that which was meant in England by the Prerogative. The first is bound by the laws; the second is so absolute that the prince could take away a man's lawful right without any cause.<sup>2</sup>

<sup>1</sup> Id. id. id. (p. 14). "Generaliter vero ad potestatem hanc principis, quam absolutam contendimus, addendum est, hoc ita a nobis proponi, his qui simpliciter et plenarie subditi sunt; non autem qui venissent in deditionem certis foederibus, ut quia reservassent sibi suas leges et privilegia. Nam isti quantum ad plenitudinem potestatis, non dicuntur subditi, quod post alios declarat Alciatus.

Et de his non subditis tradit exemplum in civitatibus Germaniae imperialibus, et in parte maiore pontificiae Italiae ditionis. Nos notare exemplum in provinciis Germaniae inferioris libenter solemus, quae iam annos plurimos pugnant pro libertate contra illam plenitudinem potestatis. Pro qua libertate adversus eandem dominationem, et adversus eandem domum Austriacam pugnarunt Helveti duo ac feliciter."

Cf. for Alciatus, p. 299 of this volume

<sup>2</sup> Id. id. id. (p. 10): "In aliis

regibus est princeps noster quem legibus solutum audimus. Quod est potestatis solutae, vel (ut loquimur) absolutae. Atque absoluta potestas est plenitudo potestatis. Est arbitrii plenitudo, nulli vel necessitate, vel iuris publici regulis subiecta. Quod ex Baldo acceptum dicunt alii. Est potestas extraordinaria et libera. Est illa quam in Anglia significamus nomine (ut ego quidem existimo) regiae Prerogativae.

Atque sic interpretes iuris communiter scribunt, esse in principe potestatem duplicem, ordinariam adstrictam legibus, et alteram extraordinariam, legibus absolutam. Atque absolutam definiunt, secundum quam potest ille tollere ius alienum, etiam magnum, etiam sine causa."

Cf. id. id. id. (p. 25).

Cf. for the conception of an extraordinary as well as an ordinary authority in the prince, the opinion of Baldus, p. 20 of this volume.

It is true that in another place he seems to admit that he might concede that the prince could not, even in his "plenitudo potestatis," take away his subjects' property without just cause; but he seems to mean that this was not of much importance, for the absolute prince himself determines what is a just cause.<sup>1</sup>

He was indeed aware that it had been argued that no people could be found so senseless as to confer such an absolute authority upon the prince; but this contention was, he says, false, and he appeals to Aristotle, and also to Bodin, who had shown that such absolute kingdoms existed even to-day in Asia, Africa, and Europe, and he refers to that learned prince (meaning presumably James I.) who had maintained that the Hebrew monarchy had been of this kind.<sup>2</sup>

Albericus admits, however, like Bodin and the Civilians, that all princes were subject to the Divine Law, the Law of Nature, and the Law of Nations, and, like Bodin and many Civilians, that he was bound by his contracts.<sup>3</sup>

In the third of these 'Regales Disputationes,' "De Vi Civium in Regem semper iniusta," he does not add much of importance; he condemns all violence offered to the prince by his subjects; but he again makes the important reservation that

<sup>1</sup> Id. id. id. (p. 27): "Etiam illud dare possum aliis et doctori mi Thobio Nonio, Principem nec de plenitudine potestatis posse privare subditos dominio rerum suarum, sine iusta causa, quicquid de aliis doctoribus antea posui. Sed sic dicimus, de hac tamen causarum iustitia censere, id esse arbitrii Principis absoluti. In quo sit differentia cum Principe alteri, cui arbitrii non est, iudicare de causis, at ex legibus iudicare habet."

<sup>2</sup> Id. id. id. (p. 18): "Profertur tertium (argumentum), quod non reperitur usquam populum adeo amens, qui tantam unquam detulerit principi potestatem. Imo populus posuerit aliquas principis leges, quem ultra eis progredi non liceret. Quod idem est argumentum falsum, ut contra ostensum de Aristotele est. Cui addo

Bodinum peritissimum, qui hodieque dominatus in Asia, Africa, Europa ostendit, sicut dominorum in servos. Doctus Princeps contendit, et talem fuisse regem Ebraeorum, de quo audit scilicet illa, 'Haec est ratio ipsa regis, qui regnabit supra vos. Filios vestros accipiet, &c,' in primo Samuelis."

<sup>3</sup> Id. id. id. (p. 17). "Princeps, inquit Baldus, supra ius, scilicet civile, infra ius, scilicet naturale et gentium. Non supra divinum ius, ut idem scribit hic, et Bartolus et Angelus.

Ligatus Princeps et lege contractus, ut hic idem et Jason "

(p. 30) "Tertius casus in actu, qui fit inter principem et privatum, ut in contractu, ut Princeps solutus non est huiusce legibus."

this does not apply to the cases when the prince was subject to a judge or a guardian, as was alleged to be the case in France and the Netherlands.<sup>1</sup> It is worth noticing that Albericus was aware of the arguments which had been drawn from the feudal laws in favour of the right to resistance, but he repudiated this on the ground that the nature of feudal authority was wholly different from that of a king: it was of the nature of a contract.<sup>2</sup>

The authority of the prince is greater than that even of a father: and it belongs to the Divine law, the natural law of nations, and was not established by men alone.<sup>3</sup>

Albericus does not add much to the general theory of the absolute monarchy and its Divine authority, but he is of some interest as asserting that whatever might be the case in other countries, the English monarchy possessed in its Prerogative an extraordinary authority subject to no laws or limitations except those of the Divine and natural law, and of contract.

The other work of this same time is that of James Cowell, Professor of Civil Law in Cambridge, 'The Interpreter,' published in 1607.

He had indeed in an earlier work, 'Institutiones Juris Anglicani,' published in 1605, set out constitutional conceptions similar to those of St Germans and Sir Thomas Smith. He distinguished in this work two elements in the laws of

<sup>1</sup> Id. id., III., "De Vi Civium in Regem" (p. 99): "Vim omnem civium iniustum semper in Principem esse defendimus (this does not apply to a prince like the Doge of Venice, who should rather be called a magistrate). Sed neque de illo Principe loquimur, qui iudicem aliquem habet, aut custodem. Quemadmodum sub custode faciunt quidam Regem Galliarum, et plurimi Belgae Principem suum."

<sup>2</sup> Id. id. id. (p. 111): "Sextum (argument in defence of the right of resistance) . . . quod sicut potest feudatarius vi obsistere violento domino, imo etiam proditori obsistere potest:

ita et subditus possit obsistere simili domino suo. Hoc enim argumentum tanto est infirmius, quanto ius feudi ligat vasallum minus. Feudum non dat domino imperium in vasaellum, est enim quidam contractus, quo quis alteri obligatur, non autem imperium conceditur . . . Alia subditorum, alia vassalorum iura."

<sup>3</sup> Id. id. id. (p. 101): "Cui respondemus ad enunciatum, quod imo Principi amplius debemus quam patri. . . Est iuris divini potestas Principis: non a solis hominibus constituta. Est iuris naturalis gentium."

England, the 'Consuetudines Veteres' and the 'Statuta'; the first are approved "communi sponsione," and by the oath of the king; while the second were sanctioned by the common counsel of the kingdom. They do not arise from the will of the king alone, but are established by the consent of the whole kingdom called together for the purpose by the king; but the king's approval is also necessary.<sup>1</sup> The king is indeed superior to the laws in this respect, that he can grant "privilegia" to individuals, or municipal bodies, or societies (collegiis), but only so far as they do not injure any third person.<sup>2</sup>

Two years later, however, in 1607, Cavell set out in 'The Interpreter' political principles which certainly seem to be very different. This work is in form a dictionary of legal terms in alphabetical order; and we may conveniently begin by noticing the article on the king. "Thirdly," he says, "the king is above law by his absolute power (Bracton, lib. pri. 8); and though for the better and equal course of making laws, he does admitte the 3 Estates, that is, Lords Spirituall, Lords Temporall, and the Commons into counsell, yet this, in divers learned men's opinions is not of constraint, but of his own benigntie, or by reason of his promise made upon oath at the time of his coronation. For otherwise were he a subject, after a sort, and subordinate, which may not be thought without breach of duty and loyalty. For then must we deny him to be above the law, and so have no power of dispensing with any positive law, or of granting especiall priviledges and charters unto any, which is his onely and clear right, as

<sup>1</sup> James Cowell, 'Institutiones Juris Anglicani' (ed. Cambridge, 1605), I. 2, 3: "Consuetudines nimirum veteres, tam communi populi sponsione quam Regis sacramento comprobatas, et statuta, quae ad dictorum consuetudinem vel supplementum vel etiam emendationem, communi regni consilio sanciantur."

I. 2, 4: "Jus scriptum apud nos, saltem quod in usu est, continent statuta. Illa autem non a sola principis voluntate proficiuntur, sed uni-

versi regni consensu per Regem ad hoc convocati stabiliuntur. Sic tamen ut Regis approbatio necessario requiratur."

I. 2, 8: "Jus civile Anglorum potest eorum consensu mutari, quorum consilio est promulgatum."

<sup>2</sup> Id. id., I. 2, 5: "In hoc tamen Rex Anglorum legibus est superior, quod privilegia pro arbitrio suo, dummodo tertio non iniuriosa, personis singulis, vel etiam municipiis aut collegiis, concedere potest."

Sir Thomas Smith well expresseth (lib. 2. cap. 3, 'De Repub. Anglorum'), and Bracton (lib. 2. cap. 16, 3), and Britten (cap. 39). . . . And though, at his coronation he take an oath not to alter the lawes of the land : yet, the oath notwithstanding, he may alter or suspend any particular law that seemeth hurtfull to the public estate (Blackwood, 'Apologia Regum,' 11)."

There are clearly two conceptions expressed in the passage. First, the King of England does normally consult Parliament in making laws, but Cowell will not say that this is necessary ; and second, that there is in the king an absolute power, which is above law ; but Cowell may not here mean much more than the power of dispensing with the law or of granting "privileges" in special cases.

We go on to the article on "Parliament." "In England we use it for the assembly of the king and the three Estates of the realm, *videlicet*, the Lords Spirituall, the Lords Temporall, and Commons, for the debating of matters touching the commonwealth, and especially the making and correcting of laws. Which assembly or court is of all other the highest and of greatest authority, as you may recall in Sir Thomas Smith, 'De Rep. Ang.,' 2. 1, 2, &c. . . . And of these two one must be true, that either the king is above the Parliament, that is the positive laws of the kingdom, or else that he is not an absolute king (Arist., lib. 3, Politic, cap. 11). And, though it be a mercifull policie, and also a politique mercie (not alterable without great perill) to make laws by the consent of the whole Realme, because so no one part shall have cause to complaine of a partialitie : yet simply to bind the prince to or by those laws were repugnant to the nature of an absolute monarchy. See Bracton, lib. 5, Tract. 3, ca. 3 nu. 3. . . . That learned Hotoman in his 'Franco Gallia' doth vehemently oppugne this ground . . . but he is clean overborne by the pois of reason."

This does not add much to the contentions of the last passage, but there is perhaps a slightly different emphasis ; for though Cowell uses the highest terms of the authority of Parliament, he maintains that an absolute king must be above Parliament and the positive laws of the kingdom.

In the article on Prerogative he declares very emphatically that the King of England is an absolute king. He explains that by the Prerogative he understands "that especiall power, pre-eminence or privilege that the king hath in any kind, over and above the ordinarie course of the common law, in the right of the crown. . . . Now for these regalities which are of the higher nature (all being within the compass of his prerogative, and justly to be comprised under that title), there is not one that belonged to the most absolute prince in the world which will not also belong to our king, except the custom of the nations so differ (as indeed they doe) that one thing be in the one accompted a regalite, that in another is none. Onely by the custom of the kingdom, he maketh no laws without the consent of the 3 estates, though he may quash any laws concluded of by them. And whether his power of making laws be restrained (*de necessitate*) or of a godly and commendable policy, not to be altered without great perill, I leave to the judgment of wiser men. But I hold it incontrovertible that the King of England is an absolute king."

It is clear that Cowell conceives of the "Prerogative" as being some ultimate and reserved authority possessed by the King of England over and above his ordinary powers, which was comparable with the "absolute" power of other kings ; this suggests a comparison with Albericus Gentilis ; and, while he admits that by the custom of the country he made no laws without the consent of Parliament, he will not say whether this was necessary or merely good policy.

In the article on Subsidies he makes a somewhat curious suggestion. He defines a "Subsidie" as "a tax or tribute assessed by Parliament and granted by the Commons to be levied of every subject" ; and adds : "Some hold the opinion, that the subsidie is granted by the subjects to the prince in recompense or consideration, that whereas the prince, of his absolute power, might make laws of himself, he doth of favour admit the consent of his subjects thereto, that all things in their own confession may be done with the greatest indifference."

If we now endeavour to sum up the development of the theory of the absolute prince in the sixteenth century, it seems to us clear that there were two elements in this, one theological, the other legal; but neither of these has any real relation either to the Renaissance or to that great religious movement which we call the Reformation and Counter-Reformation.

If we begin with the conception that the authority of the prince is absolute because he is the representative of God, and because his authority is therefore equivalent to that of God, it is obvious that it rested upon little except the tradition of the unfortunate phrases of Gregory the Great, and a superficial interpretation of some passages in the Old and New Testaments. Writers like Tyndale and Bilson among those who followed the Reformed movement, and Barclay among those who adhered to Rome, had evidently no serious or critical foundation for the view; while Luther once held it but later abandoned it; and Calvin and Hooker among the Reformed, and the great Jesuits like Suarez and Bellarmine among the Romanists, repudiated it. It is quite impossible to relate this in the sixteenth century to any one of the theological movements of the time in particular.

The nature of the legal conception of the absolute king is more complex. We recognise here the effects of the revived study of the Roman Jurisprudence in the *Corpus Juris Civilis*. The great Jurists were indeed perfectly clear that all political authority in the Roman State was derived from the people; but they wrote at a time when practically the legislative power belonged to the emperor; their conception of law and its source was for practical purposes represented in the words of Ulpian, "*quod principi placuit, legis habet vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omni suum imperium et potestatem conferat*" (Dig. I. 4, 1). The normal mediæval conception of the nature and source of positive law was much more complex; it rested upon the principle that positive law was primarily custom; and this was expressed in the words of Gratian, founded indeed upon St Isidore: "*Humanum genus duobus regitur,*

*naturali videlicet iure et moribus*" (Gratian, 'Decretum,' D. 1). When the conception of deliberate legislation gradually took shape the law was thought of as representing the action of the whole community, of the king doubtless, but also of the great and wise men, and as requiring the consent of the whole community. The words of the 'Edictum Pistense' of 864, "*quoniam lex consensu populi et constitutione regis fit*" (M. G. H. Leg., sect. ii. vol. ii. 273) are not, as some careless observers have sometimes seemed to think, mere empty phrases, however incidental in their original context they may have been; rather they represent the normal conception of men in the Middle Ages.

The revived study of the Roman law therefore brought into the political thought of the Middle Ages a new and revolutionary conception; and while there is little trace of this even in the fourteenth and fifteenth centuries outside of the technical work of the Civilians, we can hardly doubt that it did gradually exercise considerable influence, and that the development of the theory of the absolute authority of the king or prince in the sixteenth century may, at least in part, be traced to this.

Again, it was from the revived study of the Roman law that there came the conception that the emperor was "*legibus solutus*," was not only the source of law, but was above it, or, if we may put it so, outside of it. What the original meaning of the phrase may have been, we do not feel competent to discuss. It is difficult to reconcile the view that it meant that the emperor could do or command whatever he pleased with the terms of the rescript of Theodosius and Valentinian of 426 A.D. "*Rescripta contra ius elicita ab omnibus iudicibus praecipimus refutari*" (Cod. I. 19, 7). What is quite certain is that the conception that the prince could normally ignore and over-ride the law was contrary to the whole tradition of mediæval society from Hincmar of Rheims in the ninth century (cf. vol. i. pp. 230-235) to John of Salisbury in the twelfth (cf. vol. iii. pp. 137-142), Bracton in the thirteenth (cf. vol. iii. p. 38), Fortescue in the fifteenth (cf. this vol. p. 143), and Hooker in the sixteenth; and, as we have seen, the principles of the

political theorists correspond with the constitutional traditions in Spain as well as in England. It is true that the mediæval Civilians were by no means certain or clear in their interpretation of the words "legibus solutus"; such a statement as that which Jason de Mayno attributes to Baldus, that the Pope and the prince could do anything "supra ius et contra ius et extra ius," may have corresponded with Jason's own opinion (cf. this vol., p. 83 and p. 149), but it can scarcely be said to have been asserted by the Civilians generally. As we have seen, in the sixteenth century Alciatus and the most important French Civilians from Connon to Cujas frankly criticised or repudiated the whole conception (cf. this vol., part iii. chap. 5). And even Budé and Bodin seem clearly to confirm the judgment that the "Parlement" could protect private rights against the king.

At the same time, the conception that the king was not only the source of law, but above it, was apparently present in the Roman law, and we see the reflection of it even in such a prudent and judicious official of the French Court as Michel L'Hôpital.<sup>1</sup>

Bodin clearly held the principle that the king was above the law, when he maintains that in spite of the rescript of Emperor Anastasius (Cod. I. 22, 6) the magistrates must obey the command of the prince even when he knew it to be contrary to the law; <sup>2</sup> and Barclay sums up the opinion of the Civilians as he understood them as being that the Pope and the prince, who have "plenitudo potestatis," could do anything "supra ius, contra ius et extra ius," for he was "legibus solutus."<sup>3</sup>

This conception was even more revolutionary than the first, and more completely contrary to the whole character of the political civilisation of the Middle Ages, for, as we have so often said, the foundation of this was the principle that the law was the supreme power in the commonwealth. We do not, we think, go too far if we say that it is surely the foundation of any rational system of society that the authority of the law is greater than that of any individual member of the community.

<sup>1</sup> Cf. p. 415 ff.

<sup>2</sup> Cf. p. 424.

<sup>3</sup> Cf. p. 448.

It is no doubt true and important that we can see in the work, especially of the Huguenot pamphleteers and of Bodin, the development of a conception that there must be in every community an authority behind the positive law, and greater than that law; and we may ask how far this was related to the theory of an absolute monarchy. It is obvious that, properly speaking, it has nothing to do with it. The "Maiestas" might in theory belong either to the whole community, or a few, or to one; there is no necessary relation between the conception of an ultimate supreme power and that of an absolute monarch, nor indeed does Bodin pretend that there is; but that there may have been in some men's minds a confused impression that there was such a relation, is possible.

## CHAPTER IV.

## REPRESENTATIVE INSTITUTIONS IN PRACTICE.

WE have dealt with these in the fourteenth and fifteenth centuries, and have seen their importance as illustrating the general conceptions of men in Central and Western Europe about political authority; we must now inquire what place they occupied in the sixteenth century, in fact and in political theory. In this chapter we shall consider briefly what we know about the meetings of these representative bodies, especially in Castile and in France, and the part they played in public affairs, while in the next chapter we shall put together some of the contemporary theories of their powers and importance.

When we examine the proceedings of the Cortes of Castile we find that they were meeting frequently, and that they were occupied not only with questions of taxation, but with a variety of important public affairs. The first and most important of these, however, was legislation, and we have a very important statement with regard to this in the prologue to the proceedings of the Cortes at Toledo in 1480. In this year Ferdinand and Isabella, in calling together the representatives of the town, said that they did this because the conditions of the time required the provision of new laws, and they describe the process of legislation, as being carried out with the consent of their Council, but on the petition of the Cortes.<sup>1</sup> It is deserving of notice, too, that Ferdinand and

<sup>1</sup> 'Cortes,' vol. iv. Toledo, 1480. Preface: "E nos conociendo que estos casos occurrian al presente in que esce necesario y provechoso proveer de remedio por leyes nuevamente fechas, ansi para escutar las pasadas, como

Isabella declared that all royal "mercedes e facultades" contrary to "desta ley" were to be treated as null and void, and that it was provided that royal Briefs using the phrases "proprio motu e certa sciencia" or containing a "non-obstante clause" were to be treated in the same way.<sup>1</sup>

We may compare the terms in which the Cortes at Valladolid in 1506 promised obedience and fealty to the Queen Joanna, and her husband Philip; that is according to the laws and "fueros" and the ancient custom of the country. In another clause they declared that the kings (*i.e.*, the former kings) had laid it down that when it was necessary to make laws, the Cortes should be summoned, and that it was established that no laws should be made or revoked except in Cortes; they petitioned that from henceforth this procedure should be followed.<sup>2</sup>

para proveer e remediar los nuevos casos, acordamos de enbiar mandar a les cibdades e villas de nuestros Reynos que suelen enbiar procuradores de Cortes en nombre de todos nuestros Reynos, que enbiasen los dichos procuradores de Cortes asi para jurar al principe nuestro fijo primogenito heredero destos Reynos, como para entender con ellos e platicar e proveer en las otras cosas que sean necessarias de se proveer por leyes para la buena gouernacion destos dichos Reynos.

Los quales dichos procuradores . . . nos preguntaron e dieren ciertas peticiones, e nes suplicaran que sobrellas mandamos proveer o remediar como viesemos que complia a servicio de Dios e nuestro, a bien de la republica, e pacifico estado destos dichos nuestros reynos, sobre las otras cosas que nos entendimos ser complideras, con acuerdo de las perlados e caualleros e doctores del nuestro Consejo, proueimes e ordanamos, e statuimos los leyes que se siguen."

<sup>1</sup> Id. id., Toledo, 1480, 84 (p. 164): "E queremos e ordanamos que todos e quales quier mercedes e facultades

que de aqui adelante fueron fechas e dadas contra al tenor desta ley, e contra lo enella contenido, sean en si ningunas e de ningund valor, aunque contenen en si quales quier clausulas derogatorias e no obstantias."

95: Clause abolishing offices created since 1440, on the death of the present occupant, and even if they were renewed by Briefs "proprio motu e certa sciencia" and containing a "non-obstante" clause, these were to be treated as "ningunas e de ningund valer."

<sup>2</sup> Id. id., Valladolid, 1506, Preface: "Y prometen que les seran buenos e leales vasalles e suditos naturales, . . . segund las leyes e fueros e antigua costumbre destos Reynos lo dispone. . . ."

(p. 225) 6: "Y por esto los rreys estableçieron que, quando obiesen de hazer leys, para que fuesen provechosas a sus rreynos, e cada provincia fuese bien probeyda, se clamasen Cortes e procuradores y entendiesen enellos, y por esto so estableçio ley que no se fiçiesen ni rrebocasen leys syno en Cortes: suplican a vuestras altezas que agora e de qui adelante se guarda

Again at Valladolid in 1518 and in 1523 the Cortes petitioned Charles (the Emperor Charles V.) that the "Cartas e Cédulas de suspensyones" which had been given by him and his predecessors should be revoked, and Charles assented.<sup>1</sup> At the Cortes in Madrid in 1534, in response to a petition to the same effect, Charles said he did not intend to issue any such Briefs.<sup>2</sup>

In the proceedings of the Cortes at Valladolid in 1523 we have a formal declaration by the king, that the answers given by him to their petitions and "capitulos" were to be enrolled and carried out as laws and pragmatic sanctions made and promulgated by him in Cortes.<sup>3</sup> The Cortes at Madrid in 1534 petitioned the king that all the "capitulos proveydos" in past and present Cortes should be recorded in one volume, with the laws of the "Ordinamiento," as amended and corrected, and that every city and "villa" should have a copy of the book; the king replied that he was providing for this.<sup>4</sup>

Towards the end of the century we find in the proceedings of the Cortes of Madrid of 1579-82 an important petition and reply with respect to the laws of the kingdom. The Cortes petitioned Philip II. that no law or pragmatic was henceforth to be made or published until it had been before them (*sin darle primero parte della*). The king replied that it was just that the kingdom should receive satisfaction on this point.<sup>5</sup>

e faga asy, e quando leys se obieren de hazer, manden llamar sus rreynos e procuradores dellos, por que para las tales leys seran dellos muy mas entera mente ynformadas, y vuestros rreynos juste e derechamente proveydos: e porque fuera desta horden, se an fecho muchas prematicas, de que estor vuestros rreynos se syenten por agrabiados, mande que aquellos ssean rebistos, e probean e rremedian los agrabios quolas tales prematicas tienen.

R. (Royal reply) que quando fuere noscesario, su alteza lo mandará proveer de manera que se dé cuenta dello."

<sup>1</sup> Id. id., Valladolid, 1518, 23; 1523, 62.

<sup>2</sup> Id. id., Madrid, 1534, 42.

<sup>3</sup> Id. id., Valladolid, 1523 (p. 402).

<sup>4</sup> Id. id., Madrid, 1534 (1).

<sup>5</sup> Cortes of Castile. 1563 to 1598 (ed. Madrid, 1877, &c.); vol. vi., Madrid, 1579-1582, III. (p. 8-10): "Por tanto: suplicamos humildemente a vuestra Majestad, sea servido de mandar que de aqui adelante, estando el Reyno junto, no se haga ley, ni pragmatica, sin darle primero parte della, y que antea no se publique; porque demás de ser esto lo mas con-

It appears to us that it is perfectly clear that the Cortes throughout maintained that the only normal method of legislation was by the king in the Cortes, and that they vigorously protested against any attempt on the part of the crown to override this legislation by any royal Brief, as they had done in earlier centuries.

It is no doubt true that if the control of legislation was, at any rate during the first half of the century, among the most important of the functions of the Cortes, the control of taxation was of equal significance, as it had been in the fourteenth and fifteenth centuries. There can be no doubt that the constitutional rule in Spain was that the king could not, except for his ordinary revenues, impose taxation without the consent of the Cortes, and that this principle was recognised throughout the century.

In 1515 the Cortes met at Burgos, and the crown laid before it a statement on the War of the Holy League, and intimated that the King of France was about to make war on Spain, and asked for assistance. The Cortes thanked the crown for its communication, and in view of the situation granted the same aid as it done at Burgos in 1512.<sup>1</sup> In 1518 the Cortes in Valladolid petitioned Charles V. to abolish all the new impositions which had been laid upon the kingdom, against the law, and Charles replied that if they would give him the details he would see that the matter should be dealt with according to justice.<sup>2</sup> At the Cortes held at Santiago and Corunna in 1520, the Bishop of Badajos reported the election of Charles to the empire, represented the great expenses which his coronation would involve, and asked the Cortes to continue the "servicio," which had been granted at

veniente al servicio de vuestra Majestad, lo recibirá por el mayor favor y merced que se puede significar.

R. (king's reply): A esto vos respondemos; que tendremos mucha cuenta con mandar que en lo que per esta vuestra peticion nos suplicais, se dé al Reyno satisfazion, como es justo."

<sup>1</sup> 'Cortes,' vol. iv., Burgos, 1515 (pp. 247-249).

<sup>2</sup> 'Cortes,' vol. iv., Valladolid, 1518 (82): "Otro sy, suplicamos a vuestra Alteza nos haga merced do mandar quitar todas las nuevas ynposiciones que sean puestas en estos Reynos contra las leyes e prematicas dellas.

A esto vos rrespondemos que declareys adonde estan puestas, y que lo mandaremos probeer conforme a justicia."

Valladolid in 1518, for three years more. This gave rise to a protracted discussion of the question whether the king's request for a grant, or the petitions and other business of the procurators should be considered first. The Cortes by a large majority agreed that the general business should be considered first, but the crown steadily refused to sanction this, as contrary to precedent. The majority still persisted, but gradually became smaller, and when at last the procurators of Valladolid went over to the minority, the grant to the crown was made.<sup>1</sup>

The conflict was, however, renewed at Valladolid in 1523 Charles V. again asked for the "servicio," and promised that if it was granted within twenty days, he would reply to the petitions of the Cities. The Cortes had demanded that these should be heard first, and that the "servicio" should be considered afterwards, and Charles again refused, saying that this was contrary to the traditional usage, while the Cortes contended that they had received written instructions from their Cities, that they were not to grant the "servicio" until their petitions had been considered, and suggested that they should be sent to lay the matter before them.<sup>2</sup> The dispute about the precedence of petitions and grievances was continued at Toledo in 1525, and Charles promised that the petitions should be answered before the Cortes separated.<sup>3</sup>

<sup>1</sup> Id. id., 'Santiago y la Coruña,' 1520 (pp. 300-321).

<sup>2</sup> Id. id., Valladolid, 1523 (p. 352): Declaration of the king: "Que otorgado el servicio dentro de veynte dias, que los capitulos que fueren dados y suplicaciones generales y particulares que traeys de vuestras cibdades e villas, los mandaré ver e responder como mas convenga."

(p. 355): Statement of Cortes: "Fuese el servicio pasado dela Corunna y que no fueren oydos los procuradores tan complidamente como quisieran. Este enfermedad se aria de curar con medicina contraria, que primeramente fuesen complidamnte oydos y despachados sus negocios y remediados los

agravios que pretenden, y despues desto avia de ser pedido el servicio."

(p. 357). The king refused, and insisted that this was contrary to the traditional custom.

(pp. 358, 359). The Cortes deliberated and reported that the cities had given them written instructions that they were not to make a grant until their petitions had been examined, and they asked the king—

(p. 361): "Nos mande hazer correos alas cibdades fuziendoles saber todo lo suçedicho, y aun presindiendo de los que se componen con la voluntad de vuestra alteza."

<sup>3</sup> Id. id., Toledo, 1525-6.

It should be observed that among the petitions presented at Valladolid in 1523 was one that the king should not ask for such grants, for the country was poor, and the royal revenue had increased greatly since the time of the Catholic kings (Ferdinand and Isabella), and the king replied that he would not ask for a "servicio," except for a just cause, and in Cortes, and according to the laws of the kingdom.<sup>1</sup> It is clear that Charles recognised that the power of imposing such taxation did not belong to the crown, except in and with the Cortes.

When we come to the later part of the century it is clear that the authority to grant a subsidy (servicio) still belonged to the Cortes; the king (Philip II.) asked for it, and the Cortes granted it.<sup>2</sup> We find also that the dispute about the precedence of subsidies and petitions was again renewed in 1563 and 1566,<sup>3</sup> and that the king again promised that he would answer the petitioners before the Cortes terminated.<sup>4</sup>

But we also find a new and protracted dispute about certain other forms of the royal revenue. At the Cortes of Madrid in 1566 the king asked for a subsidy, and the Cortes granted it, but complained of certain new "rentas, &c.," which had been imposed by the crown, and presented a formal petition in which they urged that the former kings had ordained by laws made in the Cortes that no new "rentas, pechos, derechos, monedas" nor other forms of tribute should be created or collected without a meeting of the kingdom in Cortes, and the authorisation of the procurators, as was established by the law of the Ordinance of King Alfonso.<sup>5</sup>

<sup>1</sup> Id. id., Valladolid, 1523, 42 (p. 378) (Reply of king): "Aesto ves respondemos que no entendemos pedir servicio, saluo con justa cause y en Cortes, e guardando las leyes del rregno."

<sup>2</sup> Cf. Cortes of Castile, 1563-1598. Cortes of Madrid, 1563, 1566; Cordova, 1576; Madrid, 1573, 1579.

<sup>3</sup> Id., Madrid, 1563, 1566.

<sup>4</sup> Id., Madrid, 1563.

<sup>5</sup> Id., Madrid, 1566 (p. 414), Petition

III.: "Otrosi decimos; que los Reyes de gloriosa memoria, predecesores de vuestra majestad, ordinaran y mandaran por leyes fechos en Cortes, no se creasen ni cobrasen nuevas rentas, pechos, derechos, monedas, ni otros tributos, particulos, ni generalmente, sin junta del Reyno en Cortes, y sin otorgamiento de los procuradores dél, como consta per la ley del Ordinamento del sinor Rey Don Alonso."

The king replied apologetically, urging the great wars in which he had been involved, and his great need of money; he said that he would rejoice if he could relieve the country of these burdens, but did not give any promise.<sup>1</sup> The Cortes by a majority voted that they did not authorise any new "rentas" without the assent of the Cortes.<sup>2</sup> The question was raised again in the Cortes at Cordova in 1570 and at Madrid in 1576, and the king argued in much the same terms.<sup>3</sup>

It should be observed that the king, while contending that the conditions of the time compelled him to levy them, did not deny their illegality, and that he made no attempt to levy the "servicio" without obtaining the consent of the Cortes.

Legislation and taxation were not, however, the only public affairs which came before the Cortes. In 1476 the Cortes complained of the administration of justice, and asked that for two years they should be allowed to appoint certain persons who should reside in the royal Court, and the crown assented.<sup>4</sup>

In 1525 Charles V. agreed that the Cortes should appoint two of their number to reside at Court as long as was necessary to see that what had just been authorised by the Cortes was carried out.<sup>5</sup> Among other public matters with which the Cortes dealt, one of the most interesting was the union of the kingdom of Navarre. At the Cortes of Burgos in 1515 Ferdinand announced his intention of carrying this out, and the Cortes, in the name of the kingdom of Castile and Leon, accepted this.<sup>6</sup> Other matters brought before the Cortes included the alienation of the royal patrimony, 1476 and 1480; the naturalisation of foreigners, 1476, 1523; affairs concerning

<sup>1</sup> Id., Madrid, 1566 (p. 154).

<sup>2</sup> Id., Madrid, 1566 (pp. 208, 209).

<sup>3</sup> Id., Cordova, 1570, Petition III.; Madrid, 1576, Petition I.

<sup>4</sup> 'Cortes,' vol. vi., Madrigal, 1476, 3.

<sup>5</sup> Id. id., Toledo, 1525, 16: "A esto vos respondemos que nos plazze que para la expedición y ejecución de lo otorgado en estas Cortes, podays

diputar dos personas de entre vosotros que resydan en nuestra corte por el tiempo que fuere nescessario, como me lo suplicays; y para en lo de adelante, mandamos a los del nuestro consejo que lo vean y platiquen sobrello, y lo provean como vieron que cumple al bien destes nostros rreynos."

<sup>6</sup> Id. id., Burgos, 1515 (p. 249 ff.).

the relations of Church and State, 1512, 1525, including the interference of the Inquisition in matters which did not concern religion, 1579; and the royal marriage, 1525.

The conception of the nature of legislative authority in France does not appear to us to have been so clear in France in the sixteenth century as in Spain; and it is not always easy to distinguish between administrative and legislative action. In spite of this, however, it seems to us that from the beginning to the end of the century, the principle of an absolute power in the king to override ancient law, or to create new law, would have been recognised only by a few.

We find a commission appointed by Charles VIII. in 1497 to collect and publish the customs of different parts of the kingdom, but it must be carefully observed that Charles authorised this only on the condition that the collection and record had the approval of the Three Estates of each district, or at least the larger and wiser part of them.<sup>1</sup> It would appear that the work had not been completed, and in 1506 Louis XII. appointed another commission to carry it out, subject to the same conditions.<sup>2</sup> This recognition of the place of customary law, and of the principle that it rested primarily upon the recognition of the country, is obviously of great importance.

The authority of the Provincial Estates in constitutional matters and in legislation, so far as these concerned particular provinces, is sometimes very emphatically stated. It was on the representations and requests of the Three Estates of Provence that Louis XII. in 1498 united this province to the French crown, with the promise to maintain all its liberties, customs, and laws.<sup>3</sup> On the occasion of the marriage of Louis XII. to Anne of Brittany in 1499 it was provided in the Letters Patent, issued on the occasion by the king, that no new laws or constitutions should be made, which might change the rights and customs of Brittany, except in the manner which had been observed in the Duchy; that is, that if occasion

<sup>1</sup> 'Ordonnances,' vol. 21 (p. 18).

<sup>3</sup> Id., vol. 21 (p. 39).

<sup>2</sup> Id., vol. 21 (p. 332).

should arise for some change, it was to be done by the Parliament and Assembly of the Estates of the province.<sup>1</sup>

It was with the advice of the Three Estates of Normandy that in 1499 Louis XII. transformed the "Exchequer Court" of Normandy into a "Parlement."<sup>2</sup> We find in 1532 another example of the importance of the Provincial Estates in constitutional matters, in the provision for the perpetual union of Brittany to the French crown. The Estates petitioned Francis I. that the Dauphin should be recognised as their duke, and that various things done contrary to their customs should be revoked and annulled, as having been done without the knowledge and consent of the Estates; and they also petitioned that Brittany should be in perpetuity united to the kingdom of France. The king accepted their request, and declared his eldest son to be the Duke of Brittany, according to the custom that the eldest should succeed to the Duchy, notwithstanding anything that might have been done before to the contrary, without the knowledge and consent of the Three Estates.<sup>3</sup>

It is true, however, that in one important case we find that Louis XII. overrode the Estates of Provence. In 1501 he issued an Ordinance establishing a "Parlement" in Provence, and he did this after consultation with some notable persons of his Great Council, of the "Parlement" and of Provence; but there is no direct reference to the Estates.<sup>4</sup> An Ordinance of 1502 seems to indicate that some representation had been

<sup>1</sup> Id., vol. 21, 1 (p. 149): "C'est a savoir que en tout que touche de garder et de conduire le pays de Bretagne et les sujets d'icelui, en leurs droits, libertes, franchises, usaiges, coustumes et tailles . . . en maniere que aucune nouvelle loi ou constitution n'y soit faite, fors en la maniere accoustumée par les Roys et Ducs predecesseurs de nostredite cousine la Duchesse de Bretagne. . . ."

7. Item, et en tant que peut toucher qui s'il advenoit que de bonne raison il y eust quelque cause de faire mutacions, particulièrement en aug-

mentant, diminuant on interpretant lesdits droits, coustumes, constitutions ou etablissements, que ce soit par le parlement et assemblées des estats dudit pays, ainsi que de tout tems est accoustumé, et que autrement ne soit fait, nous voulons et entendons que ainsi se fasse, appelez toutes voyes, les gens des trois estats dudit pays de Bretagne."

<sup>2</sup> Id., vol. 21 (p. 215).

<sup>3</sup> 'Recueil des Anciennes Loix,' vol. 12., No. 191 (p. 375).

<sup>4</sup> 'Ordonnances,' vol. 21 (p. 280).

made by the Three Estates of Provence, presumably against the creation of the "Parlement," and the king had appointed a commission to inquire into the matter, and had in the meanwhile suspended the operation of the Ordinance of 1501. Louis XII., having heard the report of the commission and the representations of the Estates, now "de nostre plein science, pleine puissance et autorité royal et provençalle" confirms the creation of the Parlement.<sup>1</sup>

In 1535 we find an Ordinance of Francis I. which appears to us as though it were intended to impose certain limitations upon the meetings and proceedings of the Three Estates of Provence. They are not to meet more than once in the year, and then under Letters Patent from the king; they were to be presided over by deputies of the king, and were only to deal with matters mentioned in the Letters Patent, but they might make representations to these deputies, who might deal with them according to the powers which they had received, or report them to the king. The royal governor is forbidden to call together the Estates, except on matters of great urgency or danger. The king forbids the Estates to make Statutes or Ordinances, or any act of administration of justice, and declares these null and void if they should do so.<sup>2</sup>

<sup>1</sup> Id., vol. 21 (p. 298).

<sup>2</sup> 'Recueil,' vol. 12, 221, 32 (p. 422) (1535): "Quant au fait des trois estats de nosdits pays, Contez et terres adjacentes (Provence, etc.) . . . statuons et ordonnons, qu'il ne pourront eux assembler, si n'est par nos lettres patentes, une fois l'année, en tel temps et lieu qu'il nous plaira ordonner par nosdites lettres. Esquels estats présideront ceux qui par nous seront députés, et non autres, et y sera tout seulement traicté et conclud des affaires mentionnez en icelles. Bien pourront les gens desdits estats déduire et remonstrer les affaires à nosdits deputez, pour y estre pourveu selon le pouvoir que leur sera baillé, ou nous en faire le rapport."

grand sénéchal et tous autres d'assembler lesdits estats, si ce n'est ou il y auroit cause urgente et necessaire, ou péril éminent, auquel cas s'assembleront par permission dudit gouverneur qui est à present, ou sera pour le temps advenir, ou son lieutenant, l'un desquels assistera et sera présent a ladite assemblée, en laquelle pourvoyront audit éminent péril, et le plutost que faire se pourra, nous advertiront de ce qu'aura esté fait. . . ."

34. Inhibons et défendons aux gens desdits estats, de ne faire statuts et ordonnances, n'aucun autre acte d'administration de justice. Et si aucuns en ont fait par cy devant, ou faisoient par après, les avons déclaré et déclarons nuls et de nul effect."

33. Defendons audits gouverneur,

We shall return to the position of the Provincial Estates, especially with regard to taxation, but in the meanwhile we may say that it is evident that they continued to have a very considerable constitutional importance.

When, however, we endeavour to determine what was the constitutional position and importance of the States General in France in the first half of the sixteenth century, we have found it difficult to form a precise opinion. It is not correct to say that they were wholly forgotten or ignored; the assembly, which seems to have the character of a meeting of the States General, held at Tours in 1506, dealt with the marriage of Francis, Count of Angoulême (afterwards Francis I.), and the daughter of Louis XII.<sup>1</sup> It was provided by the Treaty of 1514 between Louis XII. and Henry VIII. of England, that the Treaty should be ratified not only by the Parliament in England, but by the Three Estates to be called together for the purpose in France.<sup>2</sup> Francis I. commanded his mother in 1525 to assemble "aucun nombre" of good and notable persons of all the provinces and cities of France, that they might give their consent to the Edict which he made in Madrid transferring the kingdom to his son (to be resumed by himself when he should be set at liberty).<sup>3</sup> In the Treaty of Madrid of the same year between Francis and Charles V., it was provided that the hostages given to Charles should remain with him until the Treaty had been approved and ratified by the States General, as well as "registered" by the Parlements of Paris and the provinces.<sup>4</sup>

It is true that the "Ordonnances" by which Francis I. entrusted the government of France in 1515, and again in 1523, to his mother, gave her what may be taken as meaning a complete authority to make "Ordonnances," Statutes, and Edicts, with the advice of the Council, but they also specifically include the power to call together the Estates of the kingdom, or any part of it, to report to them the affairs of the kingdom,

<sup>1</sup> 'Ordonnances,' vol. 21 (p. 335).

12, No. 130 (p. 243).

<sup>2</sup> 'Ordonnances,' vol. 21 (p. 555),  
Clause 26.

<sup>3</sup> 'Recueil,' vol. 12, No. 132 (p. 251).

<sup>4</sup> 'Recueil des Anciennes Lois,' vol.

and to ask for aids and money, and other things, which might be needed.<sup>1</sup>

As we have often said before, we are not in this work writing a Constitutional History, nor are we concerned to disentangle the highly complex conditions, political and religious, which brought about the civil wars of France in the latter part of the sixteenth century; our task is only to endeavour to observe and understand the nature and history of the political ideas and theories of Western Europe. It is therefore not our part to explain why it was that with the death of Henry II. in 1559 the political conditions of France seem to have changed so suddenly; it is enough for us to observe that they did thus change.

In the year after Henry's death, his successor, Francis II., summoned the States General to meet at Orleans in December. Francis II. died on 5th December, but notwithstanding the Estates were opened on 13th December, with a speech by Michel L'Hôpital, the chancellor. How far the speech as reported and printed in his works corresponds exactly with what he said on the occasion we cannot pretend to say; but it contains some very important observations, both on the history of the States General and on their functions as conceived by a great royal official.

It was certain, he said, that the ancient kings were wont to hold the Estates frequently, though they had been disused for some eighty years. The Estates were an assembly of all the subjects or their deputies, and the purpose of holding them was that the king should communicate with his subjects on the most important matters and receive their opinions and counsels, that he should hear their complaints and grievances, and provide for these as might be reasonable. The Estates had therefore been called together for various causes, as circumstances required, to ask for help in men and money, or to set in order "la justice," or to provide for the government of the country, or for other business.<sup>2</sup> (By the words "the

<sup>1</sup> 'Recueil,' vol. 12, No. 30 (p. 42).

<sup>2</sup> M. L'Hôpital, 'Œuvres Complètes,' vol. i. p. 378 (ed. 1824): "Or

government of the country" he seems to mean, specially, the determination of the succession, for he refers to the Estates as having decided that the succession to Charles IV. belonged to Philip of Valois and not to Edward III. of England.) The king, he said, is not bound to take counsel with his people, but it is good and honourable he should do so.<sup>1</sup> The former Estates had been most useful to the kings, and Louis XII. had discontinued the meetings, not because he feared to give the people authority, but because he did not wish to impose this burden upon them.<sup>2</sup> The purpose for which the Estates had now been summoned was to find means to appease the seditions in the kingdom, caused by religion.<sup>3</sup>

This speech of L'Hôpital appears to us to be of very considerable importance in relation to the development of political conceptions in the years which followed, and it is also specially important not only because he was a great officer of the crown, but because, as we have pointed out in the last chapter, he held very strongly that the authority of the king was not, in the strict sense, subject to the law, and that resistance to him was never lawful.<sup>4</sup> It is therefore the more important that he should, like Commines,<sup>5</sup> look upon the States General as a normal and reasonable form of the representation of the whole community, disused as he says (not quite correctly) for some eighty years, but traditional and useful. And it is also important to observe that he looks upon the function

messieurs parce que nous reprenons l'ancienne coustume de tenir les estats, ja delaissez par le temps de quatre-vingts ans, ou environ, ou n'y a memoire d'homme qui y puisse atteindre: je diray en peu de paroles, que c'est de tenir les estats, pour quelle causes l'on assemblent les estats. . . .

Il est certain que les anciens roys avoient coustume de tenir souvent les estats, qui estoient l'assemblée de tous leurs subjects, ou des députez par eulx. Et n'est aultre chose tenir les estats que communiquer par le roy avec ses subjects, de ses plus grandes affaires, prendre leur adviz et conseil, ouyr aussi

leurs plaintes et doléances, et leur pourvoir ainsi que de raison. . . . Les estats estoient assemblez pour diverses causes, et selon les occurrences et les occasions qui se présentirent, ou pour demander secours de genz et deniers, ou pour donner ordre à la justice et aux gens de guerre . . . ou pour pourvoir au gouvernement du royaume, ou aultres causes."

<sup>1</sup> Id. id., p. 382.

<sup>2</sup> Id. id., p. 385.

<sup>3</sup> Id. id., p. 386.

<sup>4</sup> Cf. pp. 415, 416.

<sup>5</sup> Cf. p. 214.

of the Estates when they met, as being, not merely to supply money, but also to give their opinion and counsel upon the highest and most important affairs of the country.

When we turn from L'Hôpital's opinion as to the nature and functions of the States General to the actual proceedings of their meeting at Orleans, apart from the question of taxation, to which we shall return later, we find that the Three Estates presented separately their "cahiers" with their complaints and requests, and in January 1561 the king issued a general "Ordonnance" "sur les plaintes, doléances et remonstrances des deutez des trois estats."<sup>1</sup> The Estates were also concerned with the question of the Regency during the minority of Charles IX., and in his "will and testament" L'Hôpital says that the question was brought before the Estates, and that they entrusted the "tutela" of the young king to his mother, and appointed the King of Navarre to help and advise her.<sup>2</sup>

We do not pretend to deal with the history of the disastrous years that followed, the outbreak of the civil wars, the attempts at a settlement of the religious difficulties, and the massacre of St Bartholomew in 1572. The Edict of pacification of May 1576 was followed in August by the meeting of the Three Estates at Blois; and it is at least evident that they were clear about their own importance, and asserted their constitutional authority. This is illustrated in the terms of the address to the king by the nobles, the composition of which is attributed to M. de Beaufremont. They thanked God that the king had been pleased to call together the General Council of the kingdom, that is the Estates, to which his ancestors had always turned when it was necessary to set things in order.<sup>3</sup> More

<sup>1</sup> 'Recueil,' vol. 14, No. 8 (p. 64).

<sup>2</sup> M. L'Hôpital, 'Œuvres,' vol. ii. p. 507: "Ea controversia, cum ad tres ordines delata esset . . . vel acquitate ducti, quid enim æquius quam filii tutelam matri committi? Vel assiduo nostro auditu, tutelam regii corporis et bonorum matri detulerunt, regem Navarrae adjutorem et consiliarium matri dederunt."

<sup>3</sup> 'Recueils des Pièces concernants

la Tenu des États Généraux, 1560-1614,' vol. iii., No. 48 (p. 453), ed. Paris, 1789: "Nous louons Dieu, Sire . . . de ce qu'il vous a plu convoquer et assembler sous le nom des États, le Conseil Général de votre Royaume, seul et solitaire remede, auquel ves majeurs ont toujours recourus, comme à l'ancre sacré, pour remettre toutes choses en leur intégrité et perfection."

important, however, is that the Third Estate demanded, first, that the States General should meet again after five years, and after that every ten years; and secondly, that the Ordinances made by the king should have a legislative character, and should not be revoked except in another meeting of the Estates.<sup>1</sup>

It was, however, twelve years before the Estates met again, in 1588, and again at Blois; and this time the Estates were largely under the control of the Catholic League; but it would appear that they were now even more determined to assert their constitutional position. The meeting of the Estates was opened by a speech of the king (Henry III.), and in this he declared on his oath that he would bind himself to observe all that he had decreed as sacred laws, and would not reserve to himself any liberty for the future to depart from them for any cause or under any pretext. It is true that Henry went on to say that in doing this he might seem to be submitting to laws of which he was himself the source, and which themselves exempted him from their authority, and that he was thus imposing upon the royal authority more limits than his predecessors, but, he says, it was a token of the generosity of a good prince to submit to the laws and to bind himself to maintain them.<sup>2</sup>

<sup>1</sup> Id. id., vol. ix., No. 108 (p. 274): "Il vous plaira que de dix ans en dix ans il sa fasse une pareille convocation et assemblée des états . . . et néanmoins que pour cette fois, et afin de tenir plutôt la main à l'exécution de ce qui sera avisé aux présents états, ils seront indiqués et remis à cinq ans prochains."

Id. id. id. (p. 272): "Il vous plaise, suivant les promesses connues en votre proposition, que ce qui sera par vous ordonné, suivant la remontrance des trois états, ne pourra être révoqué, soit en général ou en particulier, sinon en pareille assemblée et sur pareil avis des états, enjoignant à tous juges, même à ceux de vos cours souveraines, en cas que pour faire ou juger au contraire

de ce qui aura été avisé auxdits états, leur fussent présentées lettres ou mandements, voire en forme d'édits, ou par dérogation spéciale on particulière, de n'y avoir aucun égard et de n'y point obéir."

<sup>2</sup> 'Recueil des Pièces,' &c., vol. iv. (v.) p. 55. Cf. Picot, 'Histoire des États Généraux,' ed. 1872, vol. iii., pp. 100 ff: "Je me veux lier, par serment solennel . . . d'observer toutes les choses que j'y aurai arrêtées comme loix sacrées, sans me réserver à moi-même la licence de m'en départir à l'avenir pour quelque cause, prétexte, ou occasion que ce soit, selon que l'aurai arrêté pour chaque point. . . ."

Que s'il semble qu'en ce faisant, je me soumette trop volontairement aux

It is no doubt true that Henry III. was at this time in the power of the Catholic League, and it is probably to the engagements of the "Edict of Union" that these words primarily refer; but they suggest the temper of the Estates. We may put beside these some statements made by the Third Estate and the clergy, urging upon the nobles to join with them in persuading the king himself to swear, and to compel the Princes and the Three Estates to swear, to the Catholic Union. This, they said, could only be made irrevocable if it were sanctioned by the States General. The Edicts of the king had no other foundation than his will, and could be revoked by him at his pleasure, only Edicts approved and sanctioned by the States General were firm and inviolable. The kings were not bound by the civil laws (whatever this may mean), but they were bound by the Laws of God and the Natural Laws, and by those to which they had sworn when they were consecrated and anointed.<sup>1</sup>

In the "Cahier" of the Third Estate it was demanded that the "Parlements" should not publish and register any Edict until this had been communicated to the "Procureurs-Syndics" of the Estates of the provinces.<sup>2</sup>

loix dont je suis auteur, et qui d'elles-mêmes me dispensent de leur empire, et que par ce moyen je rende la dignité royale aucunement plus bornée et limitée que mes prédécesseurs, c'est en quoi la générosité du bon prince se connoit, que de dresser ses pensées et ses actes selon la bonne loi, et se bander du tout à ne la laisser corrompre." (He cites the story of the king who said that if the power which he bequeathed to his successors was less than it had been, it was more durable.)

<sup>1</sup> Id. id., vol. iv., p. 123: "Laquelle ne pouvoit autrement être, ni mieux établie irrévocable, qu'étant lue, approuvée et arrêtée en l'assemblée générale des états. D'autant même que tous les édits des rois n'ont d'autre fondement que leur volonté et plaisir, qu'iceux sont révocables par eux-mêmes d'un consentement contraire,

ou quelque occurrence nouvelle, ou considération. . . ."

"Que les rois n'étoient tenus aux lois civiles; mais aussi qu'ils n'étoient exempts de suivre les lois établies de Dieu, soit les naturelles . . ., ni les autres sous conditions desquelles, la couronne leur étoient déferée, lesquelles ils étoient nécessités de suivre, entretenir et maintenir comme jurées à leur sacre et onction royale."

<sup>2</sup> 'Recueil des Anciennes Loix,' &c., vol. 14 (p. 632): "Extrait des Cahiers du Tiers État présentés au Roi aux États de Blois," 1588: "Sur le point de la justice . . . que les Cours de Parlement ne pussent à l'advenir publier et enregistrer les édits, avant qu'ils eussent été communiqués aux procureurs-syndics des états dans les provinces."

It was also demanded by the Third Estate that the decisions of the Estates should not go to the king's council, but should be published at once, as in some other countries; but this was opposed by the nobles and clergy.<sup>1</sup> And again, Henry III., in commanding the Estates to take the oath to the "Edict of Union," added that they should swear to observe the other fundamental laws of France about the authority of the king and the obedience due to him. The Three Estates were apparently greatly troubled about this, and to reassure them the king, as it is reported, declared "quil n'entendoit faire lois fondamentales en son royaume que par l'avis de ses Etats."<sup>2</sup>

These meetings of the Estates did not contribute much to the restoration of peace, and it was the political genius of Henry IV., supported by the "Politiques," which saved the country. At the same time it must be observed that the conception of the determination of great national problems by a constitutional representation of the whole nation had become so important that for some years Henry IV. continued to profess his intention of calling together the States General. In the Declaration which Henry IV. issued after the assassination of Henry III., in August 1589, he promised to maintain the regulations about religion which had been agreed upon by him and Henry III. in April, until the conclusion of a general peace, or the determination of the States General, which he proposed to call within six months.<sup>3</sup> A summons was actually issued in November 1589 for a meeting of the States General at Tours in March 1590,<sup>4</sup>

<sup>1</sup> Picot, *op. cit.*, vol. iii. p. 111.

<sup>2</sup> 'Recueil des Pièces,' &c., vol. iv. (v.) pp. 131-160.

<sup>3</sup> 'Recueil des Anciennes Lois,' vol. 15, No. 2 (p. 3): "Cependant, quil ne se fera aucune exercise d'autre religion qui de ladite Catholique, Apostolique et Romaine, qu'ès villes et lieux de nostre royaume ou elle se fait à présent, suivant les articles accordés au mois d'Avril dernier, contre

le feu roy Henri III. . . . et nous, jusques à ce que autrement il en ait esté advisé et arrêté par une paix générale en nostro royaume ou par les états généraux d'icelui, qui seront, pareillement, par nous convoqués et assemblés dans le dit temps de six mois."

<sup>4</sup> 'Recueil des Anciennes Lois,' &c., vol. 15, No. 14.

but the meeting did not take place; and indeed it was scarcely possible that it should, for it was in March 1590 that the battle of Ivry was fought, and the war with the Catholic League continued till 1594, and with Spain till the peace of Vervins in 1598.

The importance of the States General as representing the public mind is also attested by the fact that the leaders of the Catholic League called them together in 1593,<sup>1</sup> while in 1596 Henry IV. called together, not the Estates, but an assembly of notables. D'Aubigné in his History gives an account of the deliberations of Henry IV., whether he should summon the States General, and tells us that he decided not to do so, as the condition of the country was too unsettled, but that he endeavoured to make the assembly in some measure representative both of the various provinces and of the various orders of society, and he tells us that in his letters of summons Henry directed those whom he called "de s'informer exactement de l'estat de la ville ou de la province," and "de prendre l'avis de ses subjects de ce a quoy il est bon d'y pourveoir pour y establir un bon et assuré repos, et aussy de ce dont nous pouvons estre secourus."<sup>2</sup> And perhaps more important are the terms of his opening speech, in which Henry assured the notables that he had called them together, not as his predecessor had done, to make them assent to his wishes, but to receive their counsels and to follow them.<sup>3</sup> No doubt we must not take these diplomatic and tactful phrases too seriously, but they serve at any rate to illustrate what Henry and his advisers recognised to be the tendency of public opinion.

It is quite true again that when Henry IV. issued the Edict of Nantes in 1598, he did not call together the Estates

<sup>1</sup> Cf. Picot, *op. cit.*, vol. iii. p. 216 ff.

<sup>2</sup> Picot, *op. cit.*, vol. iii. p. 258.

<sup>3</sup> 'Recueil,' vol. 15, No. 105 (p. 118): "Je ne vous ai point appelés, comme faisoient mes predecesseurs, pour vous faire approuver leurs volontés. Je vous ai assemblés pour recevoir vos conseils, pour les croire, pour les

suivre, bref pour me mettre en tutelle entre ves mains; envie qui ne prend guère aux rois, aux barbes grises et aux victorieux; mais le violent amour que je porte à mes sujets, et l'extreme envie que j'ai d'ajouter ces deux beaux titres a celui de roi, me font trouver tout aisé et honorable."

or even the notables, but published it with the advice of the Princes of the Blood, other princes and officers of the crown, and other great and notable persons of his Council of State; but he was careful to say that he did this after he had examined the "Cahiers des plaintes" of his Catholic subjects, and after he had permitted his subjects of the Reformed religion to assemble and prepare their statements; and that it was only when these had been carefully considered that the Edict was issued.<sup>1</sup>

We must turn to the financial authority of the Estates Provincial and General in the sixteenth century. We must bear in mind that the position of the Provincial Estates was of great importance, and that even though the States General only met occasionally, it must not be assumed that it was admitted that the French crown had the right to impose taxation at its own discretion. We give a few examples of the recognition of the place of the Provincial Estates in this matter.

On the occasion of the marriage of Louis XII. to Anne the Duchess of Brittany in 1499, it was specially provided in the Letters Patent confirming the liberties of the Duchy, that when subsidies were to be levied, the Estates were to be called together in the accustomed manner,<sup>2</sup> and we find that in 1501 the Royal Commissioners, who were sent to hold a

<sup>1</sup> 'Recueil,' vol. 15, No. 124 (p. 171): "Pour ceste occasion ayant recogneu cette affaire de très grande importance et digne de très bonne considération, après avoir repris les cahiers des plaintes de nos subjects catholiques, ayant aussi permis à nosdits subjects de la religion prétendue reformée, de s'assembler par députations pour dresser les leurs et mettre ensemble toutes lesdites remontrances, et sur ce fait conféré avec eux par diverses fois et reveu les arrêts précédents; nous avons jugé nécessaire de donner maintenant sur le tout à tous nosdits subjects une loi générale, claire, nette et absolue, par laquelle ils soient réglés sur tous les differends qui sont cy-devant sur ce survenus entre eux, et y pourront encores survenir cy-après. . . . Pour ces

causes, ayant avec l'avis des princes de nostre sang, autres princes et officiers de la couronne, et autres grands et notables personnages de nostre conseil d'estat près de nous, bien et diligemment poisé et considéré tout ceste affaire, avons par cest édict perpetuel et irrévocable dit, déclaré et ordonné, disons, déclarons et ordonnons etc."

<sup>2</sup> 'Ordonnances,' vol. 21, 1499 (p. 150) (4): "Item que en tant que touche és impositions de fouaiges et autres subsides livrez ou cueillis audit pays de Bretagne, les gens des estats dudit pays soyent convoquez et appelez en la form accoustumée."

Cf. 'Ordonnance of 1498' (vol. 21 p. 76) on the question of raising the price of salt in Burgundy.

meeting of the Estates of Brittany, were instructed to report to them the great expenses of the war in Italy, and to ask them to grant special taxation to meet these.<sup>1</sup> In 1551 Henry II. forbade the "Parlement" of Grenoble to interfere in the levy of taxes which the Estates of Dauphiné imposed at their annual meeting.<sup>2</sup> In 1571 it would appear that Charles IX. asked the Estates of Brittany to grant a subsidy of 300,000 livres, but they would only give 120,000.<sup>3</sup> In 1578 the Estates of Normandy demanded the reduction of taxation to the level of the time of Louis XII., and granted the *taille* for one year only.<sup>4</sup>

When we turn to the national authority we find that there are some important references, even in the first part of the sixteenth century. Louis XII. in 1508 speaks of the grants of money in the form of aids, *tailles*, and *gabelles*, as having been imposed by his ancestors after great deliberations with the princes, prelates, nobles, burgesses, and other inhabitants of the country, to resist the invasions of its enemies.<sup>5</sup> It is true that the words do not refer directly to the States General, but they seem to imply the national consent to taxation. Francis I., in giving his mother charge of the kingdom in 1515 and 1523 during his absence at the wars in Italy, specifically mentions that he has given her authority to call together the Estates of the kingdom, or of particular provinces, to report to them the condition of his affairs, and to ask them for aids.<sup>6</sup> In 1549 Henry II. issued an Ordinance raising the wages of the "Gendarmerie," and substituting this for the contributions in kind which the inhabitants of the places where they were quartered had been obliged to make to them; but he adds that he had first caused the matter to be laid before the people of the various provinces, and had received their approval.<sup>7</sup> In 1555 Henry repeated the Ordinance, and again added that he had imposed the necessary taxation with the consent of his subjects.<sup>8</sup>

<sup>1</sup> 'Recueil,' vol. 61, No. 48 (p. 432).

<sup>5</sup> 'Ordonnances,' vol. 21 (p. 385).

<sup>2</sup> Id., vol. 13, No. 204.

<sup>6</sup> 'Recueil,' vol. 12 (p. 42).

<sup>3</sup> Picot, 'Histoire des États Generaux,' vol. iii. p. 3, note 1.

<sup>7</sup> 'Recueil,' vol. 13, No. 102.

<sup>4</sup> Id. id., vol. ii. p. 389.

<sup>8</sup> Id., vol. 13, No. 265.

We have already dealt with the important constitutional conceptions of the history and nature of the States General which the Chancellor, Michel L'Hôpital, set out in the speech with which he opened the States General at Orleans in December 1560.<sup>1</sup> For our present purpose it is important to consider the speech he made to them on 31st January 1561.

He first put before them the lamentable financial position of the king, whose debts now amounted to 43 million livres. He proposed that the clergy should undertake to redeem the royal domain and the aids and "gabelles" which had been alienated, and he proposed to the Third Estate that the "gabelle" in salt, the "tailles," and the tax on wine should be greatly increased; but he also assured them the king asked this only for a period of six years, after which all the taxes should be restored to the level at which they stood in the time of Louis XII. It is important also to observe that L'Hôpital added, that as the members of the Estates said that they had not received authority to make any grant, they should return to their provinces, and consult them, and return in May.<sup>2</sup>

When the States General met at Blois in 1576, several of the deputies of the Third Estate represented that the crown was

<sup>1</sup> Cf. p. 473.

M. L'Hôpital, 'Œuvres Complètes,' vol. ii. (p. 161). The king had reduced his expenditure, but there was a heavy debt of 43 million livres, and he therefore begged the estates "à subvenir à son prince et lui ayder à son urgent nécessité" (p. 164). The king begged the clergy "de rachapter son domaine, ses aydes et gabelles alieznéz, et s'ils ne le pouvoit faire présentement, qu'ils le fist, dans six années prochaines. . . . Tontes fois avait été advisé ung expedient, qu'aux lieux et endroits ou le roy prenait son droit de gabelles, on léveroit sur chascung muyd de sel quinze livres tournois et aux lieux où il n'y a gabelles, on prendrast ung quart au autres redevances. . . .

(p. 165) Et au regard du tiers-

estat, quilz consentissent à l'augmentation des tailles; et où l'on ne perceoit que les droicts de huitiesme ou douzieme du vin, que le roy en prendroit le quart ou autre raisonnable impost . . . et que le roy ne demandoist lesdits imposts, aydes et subventions, que pour six ans au plus, et si plutost il se trouvoit acquitté de ses debtes, il remettrait le tout à son ancienne forme, et en tel estat qu'il estoit du règne de Louis XII. . . .

(p. 166) Et parce que lesdits estats avirent remonstré, qu'ils n'avoient charges de coul qui les avoient commiz d'aucune chose accorder, dict qu'ilz se retirassent en leurs pays, et assemblassent par gouvernemens, que dedans le premier jour de Mai ilz comparussent à Melun."

levying money by various new impositions, contrary to the ancient constitution, and it was agreed to request the king to cause inquiries to be made about this in each province.<sup>1</sup> The nobles joined in this request,<sup>2</sup> and again, when the Third Estate was asked to grant an aid of two million "livres," it replied that they had received no power from their constituencies to make such a grant.<sup>3</sup>

At the Estates of Blois in 1588, one of the Burgundian deputies complained that they had been compelled to pay extraordinary impositions "contre la liberté et le privilège du pays,"<sup>4</sup> and the Third Estate joined in the demand that the taille should be reduced to the level of 1576.<sup>5</sup>

As we have already pointed out, no States General met during the reign of Henry IV., but it must be noticed that it was with the advice and consent of the Assembly of Notables which he called together in 1596 that the new tax of the "pancarte" was imposed in 1597; and it was provided that while one-half of the proceeds of the tax was to be under the direct control of the king, the other half was to be administered by a commission appointed by the notables. This arrangement did not, however, continue long. After a few months the commission transferred their part to the king, and in 1602 Henry IV. abolished the tax, on the ground that it had been found peculiarly onerous, and substituted other forms of taxation for it.<sup>6</sup>

It would thus appear that in the sixteenth century, as before, apart from the ordinary revenues of the crown, which now included the taille at a more or less definite amount, it was generally held that it was proper, if not absolutely necessary, that the crown should obtain the consent of the com-

<sup>1</sup> 'Recueil des Pièces concernement la Tenu des États Généraux, 1560-1614,' vol. iii. p. 233: "Que pendant l'assemblée de ces presents États, on fait lever par les provinces plusieurs deniers sur ledit Tiers-État, tant par formes d'emprunts, nouvelles impositions, que autres nouvelletés, et érections de nouveaux États et Officiers, contre l'Etat ancien, et à la foule du

Peuple."

<sup>2</sup> Id. id., p. 236.

<sup>3</sup> Id. id., p. 260.

<sup>4</sup> Id. id., vol. iv., 'Procès-Verbal,' p. 231.

<sup>5</sup> Id. id. id., 'Pièces Justificatives,' p. 131.

<sup>6</sup> 'Recueil,' vol. 15, No. 110 and No. 162.

munity, either formally or informally, through the Provincial Estates, the States General, or some less formal assembly, before it could impose taxation. It is no doubt probably true that in the sixteenth century, as in the fourteenth and fifteenth centuries, the crown from time to time raised money without any constitutional formality, but it seems clear that this was irregular.

## CHAPTER V.

### THE THEORY OF REPRESENTATIVE INSTITUTIONS IN THE POLITICAL LITERATURE OF THE SIXTEENTH CENTURY.

WE have so far considered the importance of the representative institutions as we find them illustrated in the actual proceedings of the Cortes and the Estates, Provincial and General, of Spain and France, but we must now take account of the discussion of the subject in the political treatises and pamphlets of the sixteenth century. We have said enough to show that these representative institutions continued in the sixteenth century to have some real importance in the structure of political society.

This, however, is not a sufficient account of the significance of the conception of the organised representation of the community. We think that it is clear that the importance of this was almost universally recognised in theory, and was accepted even by those who insisted most strongly upon the authority of the monarchy.

We may begin by reminding ourselves of the terms in which Commynes, in the last years of the fifteenth century (or the first years of the sixteenth century), refers to the States General. Commynes' own opinion was that the royal power was greatly increased when the king acted with the advice or counsel of his subjects, that is of the Estates; he speaks with disdainful contempt of those who opposed their meetings as tending to diminish the royal authority; and he is equally dogmatic in maintaining that the king had no authority to

impose taxation on his subjects without their consent.<sup>1</sup> It is quite clear that to Commynes the meetings of the Estates were a normal, useful, and even, for financial purposes, a necessary part of any intelligent system of government; and this is the more important because he was a great servant and officer of the French crown.

It is, again, true that while de Seyssel's principle of the limitation of the authority of the French monarchy rested primarily upon a legal foundation, and that he was little interested in representative institutions, he was clear in maintaining that when there were great matters to consider, such as war or legislation, the king should call together, not his Ordinary Council, but a great council of princes, prelates, nobles, jurists, and (though he seems to admit it grudgingly) some citizens of the great towns.<sup>2</sup> De Seyssel had been, like Commynes, for many years in the service of the French crown.

Again, as we have seen in the last chapter, Michel L'Hôpital as Chancellor of France, at the opening of the States General of Blois in 1559, spoke of the ancient Kings of France as having held meetings of the Estates frequently, and said that they had consulted them on matters of grave importance for the country. He says indeed that the king was not bound to take counsel with his people, but it was good and useful that he should do so.<sup>3</sup> It is clear that in L'Hôpital's opinion the States General, as representing the French people, were a normal and valuable part of the political organisation of the country.

It is also very important to observe that even Bodin, with all his insistence upon the "Maiestas" (sovereignty) of the King of France, maintains the great importance of the meetings of the representative assemblies, and indeed states this as a general principle which applied not only to France, but to the other important countries of Western Europe. He urges the great advantages of such assemblies for dealing with the evils which might arise in the commonwealth, for making laws, or for raising money. He praises the Spanish and

<sup>1</sup> Cf. pp. 214 and 201.

<sup>2</sup> Cf. p. 223.

<sup>3</sup> Cf. p. 473.

English rule that their "Curiae" or "Parlamenta" met every three years, and while he admits that the King of France did not call together the "Comitia" (the States General) so frequently, he points out that six of the French provinces had their particular assemblies. He mentions with approval Commynes' vigorous criticism of those who had opposed the meeting of the States General, on the accession of Charles VIII. (Tours, 1484); and finally he describes with admiration the system of representative assemblies, local and general, which were highly developed in Switzerland and Germany.<sup>1</sup>

<sup>1</sup> Bodin, 'De Republica,' III. 7 (p. 346): "Regia tamen potestas optimis legibus ac institutis moderata, nihil corporibus et collegiis firmiter aut stabiliter habere potest. Nam si opibus, si pecuniis, exercitu, regi opus est, id omnium optime a collegiis et corporibus fieri solet. Quinetiam illi ipsi qui conventus, quae Hispani curiae, Angli parlamenta vocant aboleri cupiunt, urgentibus periculis ad conventus, velut ad sacram anchoram confugiunt, ut seipsos Rempublicam ab hostibus tueantur. Ubi enim melius de curandis Reipublicae morbis, de sanandis populis, de iubendis legibus, de statu conformando, quam apud principem in Senatu, coram populo agi potest? . . . Quamobrem sapienter ab Anglis et Hispanis institutum est, si quidem illud teneremus, populi conventus tertio quoque anno haberi, et ut princeps libentius id faceret, nullum imperari tributum poterat, nisi populi conventus haberentur: id quod etiamnum factum memini, quum ab Andium Duce Francisco in Angliam iussus legationis causa trajeci. Nostri reges non ita saepe ut Angli comitia cogunt, sed cum sexdecim provinciae in hoc imperio numerentur, sex habent sua quaedam singularia comitia, quae ut omnino tollerentur modis omnibus tentatum est ab iis qui sua scelera et peculatus pervulgari metuunt. Ut

etiam Carolo VIII Rege Imperium ineunte, cum universae provinciae conventus haberi oportere una voce conclamarentur, non defuerunt qui maiestatis crimen ingererent iis, qui in senatu cum populo idem sentirent; quibus acerrime restitit Philippus Comminius rerum gerendarum usu clarissimus senator. Sed quam sint necessaria totius populi concilia, ex eo perspicitur, quod quibus populis sua concilia cogere licet, cum iis optime agitur: coeteri populi tributis ac servitute urgentur, nam singulorum voces minus exaudiuntur: totius vere provinciae clarissima vox est, rogatio efficax, quam ne princeps quidem ipso, si velit, repudiare possit. Quamquam innumerabiles sunt conciliorum utilitates. Nam si conscribendi exercitus, imperanda tributa, cogenda pecunia sit, tum ad hostes repellendos, tum ad latrocinia perditorum hominum coercenda, tum ad portus, aeres, moenia sartatacra sint, vias et coetera id genus sarcienda, quae nulla ratione possunt a singulis, omnium optime ab universis conficiuntur; ut enim omitam coetera. . . . Sed quae de conciliis provinciarum discimus quam sint Rebus publicis utilia, quam provinciis salutaria, quam civitatibus singulis necessaria, omnium optime Helvetii ac Germani sentiunt, eoque melius, quo fructus longe quam nos uberius.

Bodin returns to the subject in a later book of the 'De Republica,' and deals specially with the principle that no taxation could be imposed without the consent of the Estates. He says that in an assembly held by Philip of Valois in 1338 it was declared that no taxation could be imposed without the consent of the Estates; and that though Louis XI. imposed a tax (without their consent) in the last years of his reign, this was abolished by the States General of Tours on the accession of Charles VIII. He adds that Commines maintained that princes could only impose taxes with the consent of their subjects, as was still the rule in Spain, Britain, and Germany.<sup>1</sup>

We have already referred to the very interesting and important statements of James Almain and John Major, in the early years of the century, that the community is superior to the king, and can depose him; and John Major says that in difficult matters the Three Estates of the kingdom are to direct him.<sup>2</sup> In another place we have pointed out that Calvin, with all his emphatic condemnation of the disobedience of private persons to the divine authority of the ruler, was also clear that if the king should abuse his authority and misgovern his subjects, the magistrates of the people, or

De Helvetiis notum est, et libris accurate praescriptum: de Germanis obscurius, habent tamen non modo singulae civitates sua collegia, corpora, iura universitatis: verum etiam decem Imperii provinciae, circulos ipsi appellant, sua singulis annis comitia cogunt, quorum rogationes ac decreta ad universos totius Imperii conventus referuntur: quibus Imperium illud stare videmus, et quibus sublatis ruere necesse est."

<sup>1</sup> Bodin, 'De Republica,' VI. 2 (p. 656): "Itaque Philippo Valesio conventus Gallicos habente anno mcccxxxviii, populi rogatione decretum est, ne ullum tributum aut vectigalis genus nisi consentientibus ordinibus imperaretur. Ac tametsi Ludovicum XI. regem gravissima difficillimaque bella eo impulissent, ut praeter vectigal

praediorum publicorum ac dominiis fere octingentis H. S. Tributi nomine extremo imperii suo anno exigeret: nihilominus tamen Carolo VIII. regnum ineunte, coactis apud Turones comitiis, annua illa, quae ordinaria evaserunt, tributa sublata sunt: sed eandem oblationem quam Carolo VII. dono dederant, in aerarium ac septuagies H. S. donationis nomine inferri, quam summam semel tantum ab universis ordinibus exigi placuit: ne imposterum imperaretur. Et quidem Philippus Comminius, qui tunc publici consilii particeps erat, negavit principibus tributa imperare licere: sed ea tantum capere posse quae consentientibus subditis dono darentur: eoque iure Hispanos, Britannos, Germanos etiam-num uti videmus."

<sup>2</sup> Cf. pp. 245 and 248.

perhaps the Three Estates, should restrain him.<sup>1</sup> We have also, in an earlier chapter, dealt with the conception of the nature and source of law in St Germans (1539), and especially his treatment of English law as being primarily founded upon custom; and we are here only concerned to observe that when this was not adequate, the laws which he calls statutes could be made by the king, the lords spiritual and temporal, and the community of the whole kingdom in Parliament.<sup>2</sup>

We have also referred to that important work of Sir Thomas Smith, 'De Republica Anglorum,' which sharply contrasts the prince who governs with the consent of the people and according to the laws of the commonwealth, with the tyrant who makes and breaks the law at his pleasure.<sup>3</sup> We must now consider his treatment of the nature and power of Parliament. He defines a republica or commonwealth as being a multitude of free men united into one, and holding together by mutual wills and contracts, for their protection in peace and war.<sup>4</sup> The fundamental character of the government of the commonwealth of England he describes in sweeping and emphatic words. It belongs to three kinds of men; the king or queen by whose will and authority all things are ruled, the greater and lesser nobles, and the yeomanry, and each of these classes has its part in judgments, in election of officers, in imposing taxation, and in making laws.<sup>5</sup> The meaning of this far-reaching statement is explained when, in a later chapter, he goes on to describe the Parliament and its powers. It is in the Parliament that the whole absolute power resides, for there are present the king, the nobles, the commons, and the clergy are represented by the bishops. It is they who take counsel for the well-being of the kingdom and commonwealth, and when, after long deliberation, a Bill is read three times, discussed in both Houses, approved, and confirmed by the assent of the king, no question can be raised as to what has been

<sup>1</sup> Cf. p. 266.

<sup>2</sup> Cf. pp. 234 236.

<sup>3</sup> Cf. p. 326.

<sup>4</sup> Sir Thos. Smith, 'De Republica Anglorum,' I. 10 (ed. 1583).

<sup>5</sup> Id., I. 24.

decided, for it has the force of law.<sup>1</sup> There was indeed little or nothing that was new in this, but it is interesting to compare the statement of the "absolute" authority which resides in Parliament with the conception of Bodin.

Sir Thomas Smith goes on to enumerate the powers of Parliament, and in a later chapter, those of the king. Parliament among other things makes laws, declares the rights and properties of private persons, establishes the forms of religion, determines the succession to the kingdom, imposes taxation.<sup>2</sup>

The king, on the other hand, has the right of making war and peace, of appointing the Council, he has absolute power, not restricted by any laws, in time of war; he has control over the currency, the right of moderating the severity of law, when mercy and equity require it; he appoints the chief officers of the kingdom, and no jurisdiction great or little belongs to anyone except the king.<sup>3</sup>

We have set out these statements of political writers, mostly of the earlier part of the century, because, as it seems to us, it is only when we have made clear to ourselves what was the normal judgment of the time that we can properly understand and appreciate the significance of the often highly controversial literature of the later part of the century.

We have already cited George Buchanan's emphatic statement that the legislative authority belonged to the whole people of a commonwealth, but that as in Scotland this

<sup>1</sup> *Id. id.*, II. 1: "The most high and absolute power of the realm of England consisteth in the Parliament. For as in warre where the king himself in person, the nobilitie, the rest of the gentilitie, and the yeomanrie are, is the force and power of England: so in peace and consultation when the Prince is to give . . . the last and highest commandement, the Baronie for the nobilitie and higher, the knights esquires, gentlemen and commons for the lower part of the commonwealth, the bishoppes for the clergie, bee present to avertise, consult and shew what is

good and necessarie for the commonwealth, and to consult together; and upon mature deliberation everie bill or lawe being thrise reade and disputed uppon in either house, the other two partes first each apart, and after the Prince himself in presence of both the parties doeth consent unto and alloweth. That is the Prince's and whole realmes' deede: whereupon justlie no man can complaine, but must accomodate himselfe to finde it good and obey it."

<sup>2</sup> *Id. id.*, II. 1.

<sup>3</sup> *Id. id.*, II. 4.

power should be entrusted to persons chosen from all the orders (Estates) who should deliberate with the king, and that only after this should the final judgment be given by the people.<sup>1</sup>

In the Huguenot pamphlets the demand for the recognition of a regular representative authority was founded in the first place upon historical contentions, which may have been in some respects overstated and even fantastic, but that does not mean they had no value. Hotman in the 'Franco Gallia' (1573) maintained that the supreme government in the Merovingian period belonged to the assembly of the representatives of the whole people, which met every year, and was composed of the king, the nobles, and the deputies of the provinces, and he held that this continued in the Carolingian period, and under the house of Capet.<sup>2</sup> He was on firmer ground when he came to the later Middle Ages, and put together a number of examples of the importance and actions of the States General in France, from the time of the first great meeting, to deal with the conflict between Philip the Fair and Boniface VIII. in 1302, down to the States General of Tours in 1484.<sup>3</sup> He cites that important passage in Commines' 'Memoires,' to which we have already referred, and concludes that it was only the flatterers of the king who resisted the freedom of the Estates.<sup>4</sup>

Much of this may seem a little fanciful, but it is not so fantastic as the notion that in the Middle Ages the government of the Empire or the French kingdom had been that of an absolute monarch. We are, however, not here concerned with the accuracy of Hotman's appeal to history, but with the importance of its appearance at this time. For it recurs in the other important political tracts of the time.

The 'Remonstrance' demanded the restoration of the ancient laws and the assembling of the Estates, as had been the custom till the French kings desired to rule absolutely

<sup>1</sup> Cf. p. 333.

<sup>2</sup> Hotman, 'Franco Gallia,' X., pp. 647; XV., XVII.

<sup>3</sup> *Id. id.*, XVII.-XIX.

<sup>4</sup> *Id. id.*, XIX. (p. 708).

(souverainement) and uncontrolled.<sup>1</sup> The writer cites various examples of such meetings in Merovingian and Carolingian times, and contends that it was by these means that the proper relations between the king, the nobles, and the people had been maintained, and should now be restored.<sup>2</sup> He urges the excellent results of the meeting of the States General at Tours in 1484, and the good work begun by the Estates which met at Orleans in 1560, which had been unhappily frustrated by evil machinations.<sup>3</sup> What is better, he exclaims, than that the Ordinance of God should be graved on the heart of the king, and that the king should govern with the goodwill and consent of his people; and what is more detestable than that he should lord it over them by constraint; how can the State be now maintained but by the ancient and sacred rule of calling together the Estates, by means of which some remedy might be found for the corruption of religion and justice.<sup>4</sup>

The 'Droit des Magistrats' points out the excellent results of the recognition of the authority of Parliament in England,<sup>5</sup> and asserts that the French people had from the first so ordered the monarchy that the kings did not reign by hereditary succession alone, but were elected by the Estates of the

<sup>1</sup> 'Remonstrance aux Seigneurs,' p. 76: "Procurez que les lois anciennes obtiennent et recouvrent leurs vigueurs en ce Royaume, et quo par la convocation legitime des Estats (ou comme en un Royaume libre, les langues doivent aussi estre libres), on pourvoye à une ruine prochaine dont la Franco est menassee. Qui est un moyen legitime des la premiere institution de ceste Monarchie, pratiqué et continué iusques à ce que nos Roys aient voulu regner souverainement sans estre contrerollez, lequel il est expedient et necessaire de revoquer en usage. En ces assemblees, qui au commencement se nommoient parlemens, le Roy communiquait avec ses sujets, prenoit leurs advis, oyoit leurs plaintes et y pourvoyait. Et de ceste police dependent la grandeur de la France."

<sup>2</sup> Id., p. 77.

<sup>3</sup> Id., p. 78.

<sup>4</sup> Id., p. 78: "Qu'y a il plus recommandable, que quand l'ordonnance de Dieu qui est authour et conservateur de tout bon ordre, est ongraeue au cœurs des Roy, et le Roy regne avec la benevolence et consentement de son peuple. Comme aussi il n'y a rien de plus detestable que quand le prince veut dominer par contrainte, et pervertit la fin pour laquelle il est ordonné de Dieu. Et comment est il aujourd'hui possible de maintenir cest estat . . . si ce n'est par ceste ancienne et sainte observance, d'assembler les Estats, par lesquels on pourra remedier à la corruption qui a tant gagnée sur la Religion et la justice."

<sup>5</sup> 'Droit des Magistrats,' p. 760.

kingdom, who had also exercised the right of deposition.<sup>1</sup> The ancient and authentic histories showed that the same Estates had possessed the authority to appoint and remove the principal officers of the crown, or at least to observe what the kings did in this matter, and to control taxation and the other more important affairs of the kingdom in war and peace. The writer recognised indeed that this was no longer the case in France, but he maintains that this was contrary to the methods of the "Anciens" and "directement repugnant aux loix posees avec le fondement de la Monarchie Française," and he appeals to all good jurists to say whether any prescription was valid against these.<sup>2</sup>

The 'Vindiciae Contra Tyrannos' sets out the same conception in emphatic terms. In ancient times the assembly of the Three Estates met every year, in later periods from time to time, to determine matters concerning the commonwealth, and the authority of this assembly was such that its decisions were held as sacred. It was in its power to determine such matters as war and peace, as the imposition of taxation, and when the corruption or tyranny of the king required, it could even change the succession. Hereditary succession had been accepted to avoid the inconveniences of election, but when it caused greater evils and the kingdom became a tyranny, the lawful assembly of the people retained authority to depose the tyrant and to appoint a good king in his place.<sup>3</sup>

<sup>1</sup> Id., p. 766.

<sup>2</sup> Id., p. 767.

<sup>3</sup> 'Vindiciae Contra Tyrannos,' Q. 3, p. 98: "At praeter haec, quotannis olim, post vero aliquando, quotiescunque saltem necessitas postulabat, habebatur trium ordinum conventus, quo regiones urbesque omnes alicuius nominis suos legatos mittebant, et quidem Plebei, Nobiles, Ecclesiastici in unaqueque sigillatim, ubi de his quae ad Rempubicam pertinebant publice statuebatur. Eius vero conventus, ea fuit perpetua auctoritas, ut non modo, quae ibi statuta forent sacra

sanctaque haberentur, seu pax facienda, seu bellum gerendum, sive Regni Procuratio cuiquam deferenda, sive vectigal imperandum esset: verum etiam regis luxus, desidia, tyrannidis causa in coenobia detruderentur, eoque authore, universae adeo stirpes regni successionem privarentur, non secus ac primum, Populo auctore, ad regnum vocatae fuerant. Nempe quas consensus extulerat, dissensus exturbabat. . . . Ex quo sane liquet, successionem tolleratum quidem ad vitandum ambitum, secessionem, interregnum, et alia electionis incommoda. At sane ubi

Like the 'Droit des Magistrats,' the 'Vindiciae' cites the example of the regular meetings of the Parliament in England and Scotland,<sup>1</sup> and in another place maintains that in the empire, as well as in Poland, Hungary, Denmark, and England, taxes could only be imposed by the authority of the public assembly, and asserts that this had been the rule also in France, and refers to the law of Philip of Valois.<sup>2</sup>

We turn to Spain and the Jesuit Mariana. In an early chapter he declares that the decision about the law of succession must be made "ordinum consensu";<sup>3</sup> but his position is more completely developed in a later chapter in which he discusses the question whether the authority of the community or the king is the greater. (We have already cited some passages from this chapter.)<sup>4</sup> He begins by referring to the constitutional order of Aragon, but, feeling apparently that this was somewhat unusual, he turns to other countries where the authority of the people was less. Almost all recognise the king as ruler and head of the commonwealth, and that his authority is greater than that of any one of the citizens, but they deny that his authority is equal to that of the whole commonwealth or to that of the representatives and principal men elected from all the orders (Estates) in their assembly; as we see in Spain, where the king cannot impose taxes against the will of the people. It is the same with laws, they are set up when they are promulgated, but are established by the custom of those who live by them. The commonwealth has the right to depose and even to slay the

graviora damna consequerentur, ubi regnum Tyrannis, ubi regis solium Tyrannus invaderet, Populi legitime conventum, et Tyranni regisve ignavi expellendi, adve agnates deducendi, et boni regis in eius locum adsciscendi, auctoritatem sibi perpetuo retinuisse."

<sup>1</sup> Id., Q. 3, p. 100.

<sup>2</sup> Id., Q. 3 (p. 142): "Ne vero pecuniae in alium usum extorqueantur, iurat Imperator, se nulla, nisi conventus publici auctoritate vectigalia

impositurum, tributave indicturum. Idem reges Poloniae, Hungariae, Daniae, Angliae consimiliter, ex lege Eduardi primi. Francorum reges olim in trium Ordinum conventu vectigalia imperabant. Unde enim est lex Philippi Valesii, ne collectae indicantur, nisi summa necessitate urgente, deque Trium Ordinum consensu."

<sup>3</sup> Mariana, 'De Rege,' I. 3 (p. 36).

<sup>4</sup> Cf. p. 376-77.

king who becomes a tyrant, for it has retained in its own hands an authority greater than that which it has delegated.<sup>1</sup>

Mariana recognised indeed that there were some learned men who denied this, and maintained that the king was greater than the whole body of the citizens. He answered that this was true only in nations where there was no public assembly, where the people or the chief men never met to deliberate on the affairs of the commonwealth, where men were compelled to obey, whether the rule of the king was just or unjust. He adds contemptuously that this was surely an excessive authority, and very near a tyranny, and as Aristotle had said might be found among barbarous peoples. We are, however, he says, not concerned with barbarians but with that form of government which exists among ourselves (in Spain), and with the best and most wholesome form of government.<sup>2</sup>

<sup>1</sup> Id. id., I. 8 (p. 70): "In aliis provinciis ubi minor populi auctoritas est, Regum maior: an idem iudicium sit, et an rebus communibus id expediat considerandum est. Plerique omnes Regem rectorem reipublicae et caput esse concedunt, rebus gerendis supremam et maximam auctoritatem habere, sive bellum hostilibus indicandum sit, sive iura subditis in pace danda. Neque dubitant maiorem unius quam singulorum tum civium tum populorum imperandi potestatem esse.

Idem tamen, si respublica universa, aut qui eius partes gerunt, sive primarii ex omnibus ordinibus electi, in unum locum sententiamque conveniant, negant pari iubendi auctoritate Regem fore. Quod experimento comprobatur in Hispania, vectigalia imperare Regem non posse populo dissentiente. Utetur quidem illo arte, praemia civibus ostentabit, nonnunquam terrores, pertrahendis caeteris in suam sententiam: sollicitabit verbis, spe, promissis (quod an recte fiat non disputamus); sed si restitorit tamen, eorum potius iudicio quam Regis voluntati stabitur. Idem

de legum sanctione iudicium esto, quae, auctore Augustino, d. quarta, c. in istis (Gratian, Decretum, D. 4, 3), tunc instituuntur cum promulgantur, firmantur, cum moribus utentium approbantur. . . .

Praeterea Regem pravis moribus rempublicam vexantem, atque in apertam tyrannidem degenerantem comprimere eadem respublica qui posset, principatu et vita, si opus sit, spoliare, nisi maiore potestate penes se retenta, cum Regi suas partes delegavit."

<sup>2</sup> Id. id., I. 8 (p. 71): "Video tamen non deesse viros eruditionis opinione praestantes, qui secus statuunt. Regem non singulis modo civibus, sed etiam universis maiorem esse. . . .

(p. 72) Est autem perspicuum, id institutum in quibusdam gentibus vigere, ubi nullus est publicus conventus, numquam populus aut proceres de republica deliberaturi conveniunt: obtemperandi tantum necessitas urget, sive aequum sive iniquum Regis imperium sit. Potestas nimia proculdubio, proximeque ad tyrannidem vergens, qualem inter gentes barbaras vigere Aristoteles affirmatum reliquit.

Mariana's conception is clear, but it is further developed in a very important passage dealing directly with the Cortes. In order to restrain the king within due bounds, our ancestors, he says, had provided that nothing of greater importance should be done without the will of the chief men and the people, and to this end it was the custom to call to the assembly of the kingdom men chosen from all the orders (Estates), the Bishops, the "Proceres" and the Procurators of the cities. This still continued in Aragon and other provinces of Spain, but in Castile (in nostra gente) it had for some time come about that the "Proceres" and the Bishops had been excluded from the assembly, and he suggests that this had been done in order that public affairs should be controlled by the capricious will of the king and the desires of a few. The people complained that the Procurators of the cities who alone continued to attend were frequently corrupted by bribes and promises, especially as they were appointed by lot and not by deliberate choice.<sup>1</sup>

These observations of Mariana on the composition of the Cortes of Castile are very important and interesting, and in the remainder of the chapter he develops his view of the importance of the aristocratic element in the Spanish consti-

*Nec mirum cum robore corporis sine consilio, sine prudentia ad servitatem nati sunt quidam: Principum imperium, quamvis graue, volentes nolentes ferunt. Nos hoc loco non de barbaris, sed de principatu qui in nostra gente viget et vigere aequum est, deque optima et saluberrima imperandi forma disputamus."*

<sup>1</sup> *Id. id.*, I. 8 (p. 75): "Hoc maiores nostri, providentes viri prudentes periculum, ut Reges continerent intra modestiae et mediocritatis fines, ne se nimia potestate efferent, unde publica perniciēs existeret, multa sapienter sanxerunt atque praeclare. In his quam prudenter, quod nihil maioris rei sine voluntate procerum et populi sanctum esse voluerunt; eoque consilio, delectos ex omnibus ordinibus ad

conventus regni, Pontifices tota ditione, proceres, et procuratores civitatum euocare moris erat. Quod hoc tempore in Aragonia aliisque prouinciis retentum, vellem nostri Principes reponerent. Cur enim maiori ex parte antiquatum in nostra gente est, exclusis proceribus et Episcopis, nisi ut sublato communi consensu, quo salus publica continetur, Regis ad arbitrium, et ad paucorum libidinem res publicae et privatae vertantur. Homines priuatos, quales procuratores urbium sunt, qui soli hac tempestate supersunt, donis speque corrumpere conqueritur populus passim: praesertim non iudicio delectos, sed sortis temeritate designatos, quae nova corruptela est, argumentum reipublicae perturbatae, quod prudentiores dolent, mutire nemo audet."

tution. We are, however, not writing a history of constitutions, and cannot therefore deal with this question as it deserves.

We turn to Hooker, and it is highly important to observe how emphatically so careful and restrained a political thinker sets out the importance of the authority of the community as represented in Parliament. In the first book of the 'Ecclesiastical Polity' he was dealing with the general principles of law, and the source of the positive law in the authority of the community; he was not concerned, except incidentally, with the question of the representation of the community. Such reference, however, as he made, was clear and unequivocal. "Laws," he says, "they are not therefore which public approbation hath not made so. But approbation not only they give who personally declare their assent by voice, sign, or act, but also when others do it in their names by right originally at least derived from them. As in parliaments, councils, and the like assemblies, although we be not personally ourselves present, notwithstanding our assent is by reason of others, agents there in our behalf."<sup>1</sup> It is Parliament which expresses that public approbation without which there is no law.

It is, however, in the eighth book that Hooker's treatment of representative authority is fully developed. He does this in his careful discussion of the relation of the ecclesiastical authority to that of the State, and it is in this connection that he sets out with great precision his conception of the nature of Parliament, and of its relation to the king and the whole community. "The Parliament of England, together with the convocation annexed thereunto, is that whereupon the very essence of all government within this realm doth depend; it is even the body of the whole realm; it consisteth of the king and of all that within the land are subject unto him; for they are all there present, either in person or by such as they voluntarily have derived their very personal right

<sup>1</sup> Hooker, 'Ecclesiastical Polity,' I. 10, 8.

unto.”<sup>1</sup> Such is Hooker’s conception of the nature of Parliament, and lest there should be any confusion as to the source of its authority, he adds at the end of this section : “ Which laws being made amongst us, are not by any of us to be so taken or interpreted as if they did receive their force from power which the prince doth communicate unto the Parliament, or to any other court under him, but from power which the whole body of the realm being naturally possessed with, hath by free and deliberate assent derived unto him that ruleth over them, so far forth as hath been already declared.”<sup>1</sup>

The authority of the laws is derived, not from the king, but from the whole community, as indeed is the authority of the king himself, as we have seen in an earlier chapter.<sup>2</sup> The authority of the king in regard to the making of laws had been described a little earlier in the same section as mainly negative. “ The supremacy of power which our kings have in the case of making laws, it resteth principally in the strength of a negative voice ; which not to give them, were to deny them that without which they were but kings by mere title, and not in exercise of dominion.”<sup>1</sup>

It is clear that Hooker, like St Germans and Sir Thomas Smith, had no doubt that in England the supreme power, that is the legislative, resided not in the king alone, or in any smaller body of persons, but in that assembly which contained all, and represented all the community, the king, the peers, and the whole body of the people.

Finally, we turn once again to Althusius, who is specially important to us as expressing the continuity of that representative theory in Germany which we have seen in Leopold of Babenberg and in Nicolas of Cusa.<sup>3</sup>

Althusius describes the nature and functions of the councils of the commonwealth, no doubt primarily with the constitutional system of the German Empire in his mind, but also as the embodiment of a general principle of political society.

<sup>1</sup> Id. id., VIII. 6, 11.

<sup>2</sup> Cf. p. 370.

<sup>3</sup> Cf. pp. 39 and 215.

They are composed of the “ members ” of the political society, and consider and determine upon all the difficult and weighty matters which concern the whole “ imperium,” such as the fundamental laws, the “ iura Maiestatis,” the taxes, and other matters which require the deliberation and consent of the whole “ polity.” All the “ members ” have the right of deliberation, but the decision is made by the votes of the majority.<sup>1</sup>

This is clear and important, but of equal importance is Althusius’ statement of the principles (rationes) on which this representative system rests. First, that which concerns all should be done by all ; second, it is better that these matters should be considered by many, for many know more and are less easily mistaken than a few ; third, there are some affairs which cannot be dealt with except by the people in such councils ; fourth, those who have great power are restrained and corrected by the fear of such councils, in which the demands of all are freely heard. Finally, it is in this manner that the liberty of the people is preserved, and the public officers are compelled to give account of their administration, and to acknowledge that the people or universal society, by which they have been created, is their lord.<sup>2</sup>

<sup>1</sup> Althusius, ‘Politica,’ XVII. 56 : “ Concilia illa occumenica generalia regni, seu corporis consociati, sunt membrorum illius convocatorum conventus, in quo de Republica eiusque utilitate et commodis . . . deliberatur, et consiliorum communicatione pro salute communi aliquid concluditur et decernitur.

In his itaque conciliis et comitiis generaliter totius consociationis universalis, regni seu Reipublicae negotia illius ardua, difficilia et gravia tractantur, examinantur et concluduntur, uti sunt negotia et causae totum Imperium politiamve, vel membra illius concernentes, de legibus fundamentalibus politiae, de iuribus Maiestatis, de contributionibus et collectis indicandis . . . et de aliis, quae communem delibera-

tionem et consensum totius politiae postulant.

57. Concilia igitur et comitia haec, politiae vel regni sunt epitome, ad quam omnia publica regni negotia referuntur, et a membris regni discussa et examinata deciduntur.

58. Ius deliberandi, consultandi, et examinandi singula, regni et Reipublicae membra habent. Ius decidenti vero est penes suffragia et sententias plurimorum membrorum.”

Cf. id. id., XVII. 43, 44.

<sup>2</sup> Id. id., XVII. 60 : “ Rationes horum Comitiorum sunt. Primo, quod omnes tangit, ab omnibus peragi aequum est. . . . Deinde, melius causa a pluribus examinari . . . cum plures plura sciunt, et minus falli possunt. Tertio, quia quaedam sunt

These are drastic and emphatic statements of the principle that the supreme authority in a political society is not only derived from, but remains with the whole community or people, and the assembly which represents it. There is indeed nothing here to surprise us, for, as we have already seen, the supreme authority or "Maiestas" always remains and must remain, in the judgment of Althusius, with the whole community;<sup>1</sup> but it makes it plain that in his mind this was no merely abstract judgment, but that this supreme authority had a concrete embodiment in the representative assembly.

The reference to the representative assembly as protecting the liberty of the people is interesting, and he returns to this in a later chapter. It is, he says, a part of liberty that those at whose risk, and by whose blood and treasure, things are done, should administer them by their own counsel and authority.<sup>2</sup>

It is also clear that in the judgment of Althusius these representative councils of the community were to be found in all the countries of Central and Western Europe, not only in the Empire but in France, in England (he refers to Sir Thomas Smith), in the Netherlands, Poland, Castile, Aragon, Portugal, Denmark, Norway, Sweden, and Scotland;<sup>3</sup> and it should be observed that he describes the constitutions of the various territories in the German Empire as having the same character.<sup>4</sup>

Althusius was indeed no enemy of monarchy, but he maintained, in direct opposition no doubt especially to Bodin,

negotia, quae non possunt nisi a populo in talibus comitibus tractari. Quarto, qui sunt in magna potentia, horum comitiorum metu, in quo libere omnium postulata audiuntur, in officio contineri et corrigi possunt. Denique hoc modo libertas quaedam populo superest, atque administratores publici, rationes suae administrationis reddere, et populum, seu universalem consociationem, dominum suum, a quo sunt constituti agnoscere coguntur."

<sup>1</sup> Cf. pp. 360, 378.

<sup>2</sup> Id. id., XXXIII. 30: "Deinde libertatis pars est, quorum periculo, facultatibus, auxilio, bonis atque sanguine res geritur, illa eorum quoque consilio et auctoritate administratur. . . . Unde libertatis imago in hoc comitiorum habendorum iure retinetur, et potentiorum, adulatorum, inustorum et avarorum conatibus remedium ponitur"

<sup>3</sup> Id. id., XXXIII.

<sup>4</sup> Id. id., VIII.

that in a good polity the various elements must be combined; the democratic in the assemblies of the people, the aristocratic in the senate and councillors, the monarchical in the executive action of the supreme magistrate, the king.<sup>1</sup> Or, as he put it in another place, every form of commonwealth was "tempered" and mixed, and he refused to recognise that there could be any simple and unmixed form of political association, the infirmity of human nature would prevent its continuance, nor could it be adjusted to a good and social life.<sup>2</sup>

We think that it is clear that in theory as well as in fact the political representation of the community was important in the sixteenth as well as in the fourteenth and fifteenth centuries, and it is obvious that it was thought of as existing in almost all European countries, and not only in Spain or England or the Empire.

<sup>1</sup> Id. id., XXVII. 44: "Unde in bona politia temperamentum quoddam conspicitur. Nam in populi comitibus, Democratiae imago apparet; in senatu et consiliariis Aristocratiae, in executione summi Magistratus, Regiae potestatis et Monarchiae species."

<sup>2</sup> Id. id., XXXIX. 15: "Quod cum ita sit recte dicimus temperatam et mixtam esse quamvis Reipublicae speciem, uti hominis complexio ex quatuor quos dixi humoribus esse

temperata. . . .

Id. id., XXXIX. 23: "Constat enim ex praecedentibus et tota doctrina politica, me nullam speciem Magistratus ab illa mixtione immunem statuere."

Simplicem et purum statum in politica hac consociatione non agnosco, neque ob naturae humanae imbecillitatem esse potest dururnum, aut bonum, et sociali vitae accomodatum."

## PART V.



### CONCLUSION.

WE have endeavoured, in the six volumes of this History, to give some account of the most important elements in the development of the political principles of Western Europe during sixteen centuries, a large and, as some may think, an over-ambitious enterprise. We can only say that we found ourselves compelled to make the attempt. When we began this work some forty years ago our intention was much more restricted; we proposed little more than a careful study of the political theory of the thirteenth century, and we therefore began with a detailed consideration of the political theory of St Thomas Aquinas.<sup>1</sup> We soon, however, found that in order to understand the real significance of that great political thinker, we were compelled to go back to the Roman Jurists of the "Corpus Juris Civilis," to the New Testament, the Christian Fathers, and the literature of the earlier Middle Ages, and even to make some study of the post-Aristotelian political theory. Some friendly critics observed, naturally enough, that the treatises of an eclectic literary man like Cicero, and a somewhat rhetorical literary philosopher like Seneca, were inadequate representatives of this, and we were, and are, very conscious of this. We can only hope that some scholar more competent than ourselves will some time take in hand the task of reconstructing from the fragments of the

<sup>1</sup> Cf. "The Political Theory of St Thomas Aquinas," by R. W. Carlyle, in the 'Scottish Review,' January 1896.

post-Aristotelian philosophers an adequate and critical account of their political theory. We are still convinced that, while the debt which we owe to the great political thinkers like Plato and Aristotle is unmeasurable, it is also true that it was during the centuries between Alexander the Great and the Christian era that some of the most distinctive and important principles of the mediæval and modern world took shape. It was during this period that the Hellenistic world learned to conceive of mankind as being homogeneous and rational, or, to put it into the terms of Cicero and other Roman writers, all men are alike, for they are rational and capable of virtue. And it was during the same period that the older conception of the solidarity of the group began to be transformed by the recognition of the inalienable liberty of the human spirit.

We are also very conscious of the fact that, in the attempt to deal with the vast and complex political literature of sixteen centuries, we have had to treat of many matters for the study of which we had little technical qualification. And especially is this true of the political jurisprudence of the Roman and Canonical and Feudal lawyers, and we recognise with gratitude the forbearance and friendly treatment of our work by the Jurists. We cannot indeed regret that we ventured to do this, for we feel that without this it is really impossible to deal adequately with the political ideas of a period like the mediæval, which was dominated by the conception of the supremacy of law.

We have at last completed the task which we had set before ourselves, and must now again make the attempt to set out what seem to us the most important elements in the political ideas and theories of the Middle Ages; but now, with special reference to this volume, we must consider how far during the centuries from the fourteenth to the sixteenth the principles of the political civilisation of the thirteenth century were modified, and how far these were continuous.<sup>1</sup>

<sup>1</sup> An attempt to sum up the principal elements in the political theory of the Middle Ages to the end of the thirteenth century will be found in Part III. of Volume V.

The formal aspect of Mediæval Political Theory is to be found in that conception which is implied in the post-Aristotelian philosophy, in the Christian Fathers, and in the Digest and Institutes of Justinian, that the political and social order of society is conventional rather than natural, and represents the consequences of the fall of man from his primitive innocence. It is true that St Thomas Aquinas, under the influence of the Aristotelian "Politics," endeavoured to correct this, but it is also true that the post-Aristotelian tradition was too firmly rooted to be shaken even by St Thomas' great authority, and that the contrast between the conventional and natural conditions continued to furnish the formal terms of political thought to the end of the sixteenth century. We can see this in so great a political thinker as Hooker, though he was evidently a disciple of St Thomas Aquinas. Indeed, we can recognise the continuance of this tradition in Locke in the seventeenth century and in the earlier essays of Rousseau in the eighteenth. It was not till Rousseau in his later work, and especially in the 'Contrat Social,' restated the Aristotelian conception that man is only man in the coercive society of the State, and urged that apart from this he would be nothing but a "stupid and limited animal," that the Aristotelian principle once again became the foundation of all rational political thinking.<sup>1</sup>

This formal mediæval conception then is interesting, but it is doubtful how far it had any great importance. It is very different with that great principle which dominated the political thought of the Middle Ages, that the first and most fundamental quality of political society was the maintenance of justice. St Augustine, in the 'De Civitate Dei,' handed down to the Middle Ages, not only Cicero's definition of the nature of the commonwealth, but also his emphatic assertion that where there is no justice there is no commonwealth.<sup>2</sup> Here indeed we are dealing not with a conception which was peculiar to the post-Aristotelian philosophers, but rather with one which they carried on from Aristotle and Plato; but it is not

<sup>1</sup> Cf. Rousseau, 'Contrat Social,' I, 8.

<sup>2</sup> Cf. vol. i. pp. 4-6.

the less important to make clear to ourselves that this was the normal principle of the Middle Ages.

It was set out by the Roman Jurists of the Digest and Institutes,<sup>1</sup> by the Christian Fathers,<sup>2</sup> in the political treatises of the ninth century,<sup>3</sup> by the political theorists of the Middle Ages,<sup>4</sup> and by the mediæval Civilians and Canonists.<sup>5</sup> It is true that in one place St Augustine had suggested that the conception of justice might be omitted from the definition of the commonwealth,<sup>6</sup> but it is clear that this exercised no influence in the Middle Ages.

This conception of justice as the rationale of political society may indeed seem to some persons, not well acquainted with political problems, as too obvious to require statement; or, on the other hand, it may appear to some, and especially to those who are unfamiliar with history, as too indefinite to be of much profit. It must indeed be admitted that there never has been, perhaps there cannot be, any adequate definition of justice, but to those who are better acquainted with the history of political civilisation it will be clear that it is exactly the pursuit of justice which distinguishes a rational and moral society from a stupid anarchy.

It would in any case be a very great mistake if we were not to recognise that the conception of justice found in the Middle Ages a great and effective form in the law, and its authority in the commonwealth. The numerous political treatises of the ninth century are largely composed of exhortations to the king to maintain justice, and, if we ask what they meant by justice, it is clear that they meant primarily the law—the law as distinguished from the merely arbitrary and capricious will of the ruler.<sup>7</sup> It is this which was meant when the “Assizes of the Court of Burgesses,” in the kingdom of Jerusalem, declared that “*La Dame ne le Sire n'en est seignor se non dou dreit . . . mais bien sachiés*

<sup>1</sup> Cf. vol. i. p. 56 ff.

<sup>2</sup> Cf. vol. i. p. 161 ff.

<sup>3</sup> Cf. vol. i. p. 220 ff.

<sup>4</sup> Cf. vol. iii. part i. chap. 2; part i. chaps. 3 and 5; vol. v. part i. chaps.

2 and 7.

<sup>5</sup> Cf. vol. ii. part i. chaps. 1 and 2; part ii. chap. 7.

<sup>6</sup> Cf. vol. i. pp. 165-168

<sup>7</sup> Cf. vol. i. chaps. 18, 19.

qu'il n'est mie seignor de faire tort,"<sup>1</sup> or when John of Salisbury said that the difference between the king and the tyrant was, that the king obeys the law while the tyrant flouts it,<sup>2</sup> or when Bracton in memorable words lays down the principle that, while the king is under no man, he is under god and the law, and that there is no king when mere will rules and not the law.<sup>3</sup> Nicolas of Cusa in the fifteenth century reinforced this judgment with the authority of Aristotle, whom he cites as saying that when the laws are not supreme there is no polity.<sup>4</sup> This is what was meant when so wise and prudent a political thinker as St Thomas Aquinas did not hesitate to say that, while sedition is a mortal sin, revolt against a tyrant is not to be called sedition; for his rule is not just.<sup>5</sup> We think that we are justified in maintaining that the first principle of mediæval political society was the supremacy, not of the prince but of the law, for the law was the embodiment of justice.

If, however, we are to understand the mediæval political principles, we must now consider the nature of law, not merely in its relation to justice, but also with regard to its source.

To the people of the Middle Ages the positive law was primarily and fundamentally the custom of the community—that is, the expression of the habit of life of the community; it was not properly something deliberately or consciously made. The earlier mediæval codes, as everyone knows, are not acts of legislation, but records of custom, revised, no doubt, and modified from time to time by the ruler and his wise men, but not, properly speaking, made by them. The feudal laws in the same way were records of custom. The picturesque account of the origin of the laws of the kingdom of Jerusalem, given by Jean d'Ibelin and Philip of Novara,<sup>6</sup> is no doubt literally unhistorical, but it represents admirably the mediæval temper. Bracton asserts that English law was custom; and while he seems to think that other countries used written

<sup>1</sup> Cf. vol. iii. pp. 32, 33.

<sup>2</sup> Cf. vol. iii. pp. 137, 138.

<sup>3</sup> Cf. vol. iii. pp. 38, 67.

<sup>4</sup> Cf. vol. vi. p. 136.

<sup>5</sup> Cf. vol. v. p. 92.

<sup>6</sup> Cf. vol. iii. pp. 43, 44.

laws, his great contemporary, Beaumanoir, asserts in equally broad terms that "all pleas are determined by custom," and that the King of France is bound to maintain them.<sup>1</sup>

When, therefore, we find that the first systematic Canonist, Gratian, begins his 'Decretum' with the great generalisation that mankind is governed by two great systems of law, Natural Law and Custom, and in another place sets out the principle that, even when the law is made by some person or persons, it must be confirmed by the custom of those who live under it,<sup>2</sup> we recognise that he is not expressing a merely individual opinion, but is putting into formal phrases the general judgment of the Middle Ages. Law was not to them primarily the expression of the will of the ruler, but of the habit of life of the community. It is important to observe that even in the sixteenth century an English Jurist like St Germans looks upon custom as the normal source of English law, and that Statutes of Parliament are only added when the customs were not sufficient.<sup>3</sup> The truth is that to think of the mediæval king as making laws by his own personal authority is an absurdity.

It is, however, true that at least from the ninth century we can see that the conception of definite and deliberate legislation begins to appear, and, while there was little development of this in the tenth and eleventh centuries, we can trace its gradual progress, and can see that while the conception of law as custom continued to be of great importance, the conception of law as being the expression of the rational and moral will of the supreme power in the community became more and more important. We say the rational and moral will, for there is no trace of any conception that the merely arbitrary or capricious will had any real place in law. This is the real meaning of the principle that the supreme authority in the community is always limited by the Divine and Natural laws.

Law came, that is, to be thought of as the expression of

<sup>1</sup> Cf. vol. iii. p. 42.

<sup>1</sup> Cf. vol. vi. pp. 234-36.

<sup>2</sup> Cf. vol. ii. pp. 98 and 155.

the will of the legislator. Who, then, was the legislator? The answer is that it was the whole community, and this was the necessary consequence of the fact that law was custom before it was command. From the ninth century at least there can be no doubt about the normal conception of the Middle Ages. There are some words of Hincmar of Rheims, the most important ecclesiastical statesman of the ninth century, which express this very clearly. Kings, he says, have laws by which they must rule; they have the capitularies of their ancestors, which were promulgated with the consent of their faithful men; and this corresponds with the normal forms of legislation as we find them in the Carolingian Capitularies.<sup>1</sup>

This is again the conception of the source of law as we find it in the twelfth and thirteenth centuries. Glanvill says that those are properly laws which are made by the king with the consent of the chief men (proceres). The Norman "Summa de Legibus" says that laws are made by the prince and maintained by the people. Bracton lays it down that that has the force of law which has been determined by the counsel and consent of the great men, the approval of the whole commonwealth and the authority of the king; and again, when the laws have been approved by the custom of those concerned and by the oath of the king they cannot be changed or annulled without the common consent of all those by whose counsel and consent they had been promulgated.<sup>2</sup> The meaning of this is illustrated by the formulas of legislation as we find them in the Empire, in France, in Castile, and in England in the thirteenth century.<sup>3</sup>

In this volume we have seen that these conceptions continued to be normally accepted in the fourteenth, fifteenth, and sixteenth centuries. Law was still primarily custom, but when it was made it was thought of as deriving its authority from the community. This is continually illustrated in the proceedings of the Cortes of Castile, and is expressed in theory, not only by an English Jurist like Fortescue, but by one of

<sup>1</sup> Cf. vol. i. pp. 233-39.

<sup>3</sup> Cf. vol. v. pp. 51-63.

<sup>2</sup> Cf. vol. iii. pp. 46-48, and p. 69.

the greatest thinkers of the fifteenth century, Nicolas of Cusa. He thinks that the wiser men should be elected to prepare the laws, but their wisdom gives them no authority to impose these by coercion on other men ; this coercive power can only be given by the agreement and consent of the community.<sup>1</sup> Marsilius of Padua, no doubt, expresses this principle in sharper and more precise terms than we generally find in northern writers, as was indeed natural in one who was thinking primarily in the terms of the Italian City Republics, but his principles were not substantially different from theirs. It would be difficult to find a better expression of the general principles of these centuries than in the words of Sir Thomas Smith, a man of great public experience and a minister of the Crown under Elizabeth : " When one person beareth the rule, they defines that to be the estate of a king, who by succession or election commeth with the good will of the people to the government, and doth administer the common wealth by the lawes of the same, and by equitie. . . . A tyrant they name him who by force commeth to the monarchy against the will of the people, breaketh lawes already made at his pleasure, maketh others without the advice and consent of the people." <sup>2</sup>

It is no doubt true that in the later part of the sixteenth century these principles were often discussed in controversial terms by men like George Buchanan in Scotland and the writers of the Huguenot pamphlets, but in Hooker and Althusius and Mariana we find the same confidence and clearness expressed in large and profound terms. Hooker makes the same distinction as Nicolas of Cusa between the wise men who should " devise " laws and the authority of the community which alone can give them their " constraining force " ; and of England he says, " Which laws, being made amongst us, are not by any of us so taken or interpreted, as if they did receive their force from the power which the Prince doth communicate unto the Parliament, or to any other Court under him, but from power which the whole body of the Realm, being naturally possessed with, hath by

<sup>1</sup> Cf. vol. vi. p. 170.

<sup>2</sup> Cf. vol. vi. pp. 326-27.

free and deliberate assent derived unto him that ruleth over them, so far forth as hath been declared." <sup>1</sup>

There is really no doubt that the normal political judgment, whether practical or theoretical, of the Middle Ages and down to the end of the sixteenth century, was that the Positive Law was the expression of the will or consent of the whole community, including the king, and that the conception of writers like Bodin and Barclay that the king was the legislator, represented an intrusive and alien principle. Indeed it should be carefully observed that Bodin and Barclay themselves recognised, and quite frankly, that while they thought that the King of France possessed an absolute power in legislation, it was difficult to find any other country of Central and Western Europe of which this could be said.<sup>2</sup>

We have so far dealt with the source of Law, but in order to appreciate correctly the meaning of the mediæval conception of the supremacy of Law, we must take account of the normal principle of the Middle Ages, that the Law was supreme over every member of the community, including the king.

We have dealt with this in relation to Feudalism in the third volume of this work, and in more general terms in the fifth volume.<sup>3</sup> Professor Ganshof of Ghent has indeed brought forward strong reasons to show that the prefeudal king was, at least in civil matters, subject to the judgment of the court, like other men ;<sup>4</sup> and this confirms our judgment that we are dealing with a general principle of mediæval civilisation.

That this continued to be the normal political judgment of Central and Western Europe from the beginning of the fourteenth century till the end of the sixteenth is clear. We must not recapitulate what we have said in this volume, but we may draw attention to some of the clearest examples of this.

<sup>1</sup> Cf. vol. vi. p. 355-57.

<sup>2</sup> Cf. vol. vi. pp. 425-26, pp. 449-50.

<sup>3</sup> Cf. vol. iii. part i. chap. 4 ; part ii. chap. 5 ; vol. v. part i. chap. 7.

<sup>4</sup> Professor F. L. Ganshof, ' Note

sue la Compétence des Cours Féodales en France " (in ' Melanges d'histoire offerts à Henri Pirenne '). Cf. vol. v. p. 111.

Nothing perhaps is more significant than the continual and emphatic protests of the Cortes of Castile and Leon against the attempts of the kings to override the laws by the issue of special briefs containing "non-obstante" clauses, or referring to their "certain knowledge or absolute authority"; nothing could be more significant except the answers of the Kings Juan I. and Juan II., and the replies made by Queen Juana with regard to "Pragmatics" issued without the consent of Cortes, and by the Emperor Charles V., about "cartas de suspencion de pleytos."<sup>1</sup>

Perhaps, however, even more significant of the principle of these centuries is the treatment of the relation of the King of France to the law and the Courts of Law by De Seyssel in the 'Grant Monarchie de France.' De Seyssel had been for many years in the service of the French Crown, and it is therefore the more noteworthy that he should have looked upon it as the best of all monarchies because it was neither completely absolute nor too much restrained: it was restrained by the Law and the "Parlemens." We have pointed out that Machiavelli in his 'Discourses' on Livy expressed the same judgment.<sup>2</sup> And most remarkable is it that Budé, who set out the doctrine of the absolute monarchy in France in the most extravagant terms, should have at the same time felt compelled to draw attention to the fact that the French Kings submitted to the judgment of the Parliament of Paris;<sup>3</sup> and that Bodin should have contended that the judges should be permanent and irremovable, except by process of law, because the kingdom should be governed by laws and not by the mere will of the prince.<sup>4</sup>

The principle of the Middle Ages is indeed admirably summed up by Hooker, after citing the words of Bracton, "Rex non debet esse sub homine, sed sub Deo et lege." "I cannot choose but commend highly their wisdom by whom the foundations of this commonwealth have been laid; wherein, though no manner person or cause be un-subject

<sup>1</sup> Cf. vol. vi. pp. 4, 133-36, 232, 233.

<sup>2</sup> Cf. vol. vi. p. 296.

<sup>4</sup> Cf. vol. vi. pp. 381-83.

<sup>3</sup> Cf. vol. vi. part iii. chap. 1.

to the king's power, yet so is the power of the king over all and in all limited, that unto all its proceedings the law itself is a rule. The axioms of our royal government are these: *Lex facit Regem.*' The king's grant of any favour made contrary to the law is void, '*Rex nihil potest, nisi quod jure potest*'" ('*Eccl. Pol.*' VIII. 2, 13).

It is time, however, that we should consider the political significance of the revived study of the Roman Law in the Middle Ages. We are not indeed dealing with the general influence of this on mediæval civilisation; we are concerned with it only so far as it affected its political conceptions and principles. We have endeavoured in the second and fifth volumes of this work to set out some of the more important conceptions of the nature and source of Law as we find them in the great Bologna Civilians of the twelfth and thirteenth centuries, and we think that it is important to notice that these great Jurists were as clear and emphatic as the feudal lawyers and the political theorists in asserting that positive law was the formal expression of justice. Justice is the will to establish *Aequitas*, and laws flow from justice as a stream from its source.<sup>1</sup> They did not conceive of it as arbitrary, or as expressing the capricious will of the lawgiver. In this respect the Civilians represented the normal conception of the Middle Ages.

It is also most important to observe that the Civilians, following the tradition of the Jurists of the Digest, looked upon the community or people as the sole ultimate source of the positive law of the State. The people might grant this authority to the prince, might constitute him as legislator, but it was only in virtue of their grant that this or any other authority belonged to him. It is sometimes forgotten that when Ulpian said, "*Quod principi placuit, legis habet vigorem,*" he added, "*ut pote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat.*"<sup>2</sup> That which has pleased the prince has the force of law, but only because the people have given him

<sup>1</sup> Cf. vol. ii. part i. chaps. 1 and 2.

<sup>2</sup> '*Digest,*' I. 4, 1.

this authority. What, if any, importance this principle may have had in the ancient empire, we are not competent to discuss, but it must be remembered that this is the only theory of the immediate source of the authority of the emperor which is known to the lawyers of the Digest, and it was recognised in the Code, not only by Theodosius and Valentinian, but also by Justinian himself.<sup>1</sup>

The Civilians down to the end of the sixteenth century not only recognised this, but, as we have seen, in a treatise ascribed by Professor Fitting to Irnerius, in one of the Glosses ascribed by Professor Besta to Irnerius, and in Bulgarus' Commentary on the Digest, it is drawn out into the general principle that it is the "Universitas" or "Populus," or the magistrate "qui obtinet vicem universitatis," which is the source of all law.<sup>2</sup> It seems to us important that this recognition by the Civilians, that all political authority was derived from the community, coincided with the normal judgment of the Middle Ages and confirmed it.

It is, however, very different when we consider some other important elements in the tradition of the Roman Law as interpreted by the mediæval Civilians. The Roman Law, as they knew it, was the law of the Empire, not of the Republic, and while the jurisprudence of the "Corpus Juris Civilis" represented in fact a long development of juridical experience and of legal wisdom, in principle the emperor was the legislator. (We confess that we should have been glad to find some detailed historical criticism of the rescript of Theodosius and Valentinian ('Cod.' I. 14, 8) which deals with the process of legislation; but it is also clear that Justinian looked upon the emperor as the sole legislator and the sole final interpreter of the laws ('Cod.' I. 14, 12).)

The Roman emperor was then to the Bologna Civilians normally the legislator. We have indeed pointed out that there was a real and profound divergence among the Civilians of the twelfth and thirteenth centuries on the question whether the Roman people had transferred their authority to the

<sup>1</sup> 'Code,' I. 14, 4, I. 17, 1, 7. (Cf. vol. i. p. 69.)

<sup>2</sup> Cf. vol. ii. p. 57.

emperor in such a sense that they retained nothing and could reclaim nothing. This seems to have been the judgment of some of the best-known Civilians of the twelfth and thirteenth centuries, of Irnerius, Placentinus, and Roger; but, on the other hand, Azo, Hugolinus, and Odofridus maintained that the Roman people had indeed given their authority to the emperor, but they could reclaim it. Hugolinus indeed describes the emperor as a "procurator at hoc," and they and John Bassianus were agreed that the custom of the Roman people still retained its legislative authority.<sup>1</sup> In the fourteenth century the Civilians were aware of the controversy, and inclined to the view that the custom of the Roman people still retained its authority; this seems doubtful in the fifteenth century, but one Civilian, Christophorus Porcius, stoutly maintained an opinion similar to that of Azo and Hugolinus.<sup>2</sup>

This is indeed interesting and important, but at the same time, even to those Civilians who thought that the custom of the Roman people retained its authority in making and unmaking law, and that it might reclaim its general legislative authority, the emperor was normally the legislator.

This conception was wholly alien to the principles of the Middle Ages, from Hincmar of Rheims in the ninth century to Hooker in the sixteenth.

More important still was the question of the subordination of the prince to the Law. What the real doctrine of the Roman Jurists had been we do not pretend to determine, but Ulpian had in one place said that the prince was "legibus solutus" ('Dig.' I. 3, 31), while Bracton said that the king was under God and the Law.<sup>3</sup> The mediæval Civilians were, it seems to us, often gravely perplexed as to the real meaning of Ulpian's words, for it was difficult to reconcile these with the words of Theodosius and Valentinian, "Digna vox, &c.," and they were apparently contradicted by the rescripts of the same

<sup>1</sup> Cf. vol. ii. pp. 60-66.

<sup>3</sup> Bracton, 'De Legibus,' I. 8, 5.

<sup>2</sup> Cf. vol. vi. part i. chap. 2, part ii. (Cf. vol. iii. p. 67.) chap. 2.

emperor ('Cod.' I. 19, 7) and of Anastasius ('Cod.' I. 22, 6), which commanded the magistrate to ignore any imperial rescript or Pragmatic Sanction which was contrary to the Law and the public service. In the fourteenth century, however, while Bartolus uses such phrases as that it is "aequum et dignum" that the prince should obey the Law, this is of his own free will and not "de necessitate," Baldus speaks of a supreme and absolute authority in the prince which is not under the law, as contrasted with his ordinary authority, which is subject to it; and as Jason de Mayno, writing in the later fifteenth century, reports, Baldus had in another place said that the Pope and the prince can do anything, "supra ius et contra ius et extra ius."<sup>1</sup>

It is true that some of the French Civilians of the sixteenth century, under the influence probably of Alciatus of Milan and Bourges, and especially the great Cujas, felt that this was a dangerous doctrine, and set out in various terms what seemed to them the necessary correction of this interpretation of the words that the prince was "legibus solutus." We have dealt with this in detail, and here we need only recall that Cujas maintained that these words could only refer to those laws upon which Ulpian was in this passage ('Dig.' I. 3, 31) commenting, and that the prince was not free from many others, especially if they had sworn to observe them. What the French Civilians thus contended was also maintained by Zasius of Freiburg<sup>2</sup> and by Althusius.<sup>3</sup>

On the other hand, we can see that this doctrine that the king was above the law was held by some in the sixteenth century. It was stated or implied in the words of the President of the Parliament of Paris in 1527, and of Michel L'Hôpital;<sup>4</sup> it was asserted in somewhat ludicrous terms by Budé in his 'Annotations on the Pandects.'<sup>5</sup> This power seems at times to be attributed by Bodin to the King of France, in whom the *Maiestas* resides, while at other times he seems to express a different view.<sup>6</sup> It is asserted dogmatically by

<sup>1</sup> Cf. vol. vi. pp. 19, 20, 149.

<sup>2</sup> Cf. vol. vi. part iii. chap. 5.

<sup>3</sup> Cf. vol. vi. p. 359.

<sup>4</sup> Cf. vol. vi. pp. 416, 417.

<sup>5</sup> Cf. vol. vi. pp. 293-96.

<sup>6</sup> Cf. vol. vi. p. 427.

Peter Gregory of Toulouse,<sup>1</sup> and Barclay appeals rather recklessly to the most eminent Civilians of the fourteenth and fifteenth centuries as holding that the Pope and the prince, when acting "ex certa scientia," can do anything, "supra ius et contra ius et extra ius."<sup>2</sup>

We do not indeed suggest that the development of the conception that the prince was above the law was due entirely to the influence of the Roman jurisprudence, but we think that it is clear that it was related to it, and we think that such phrases as those which we have just quoted illustrate the growth of this influence, for these men were no longer merely commenting upon and endeavouring to interpret the "Corpus Juris Civilis" as the mediæval Civilians had done, but they were applying principles drawn from this to the actual constitutional and legal conditions of the Western kingdoms.

The truth is that this was an innovation, and a somewhat barbarous innovation, for the supremacy of the law over all persons is perhaps almost the most essential characteristic of a rational social order, and mediæval political theory had always maintained it. We have thus felt compelled to recognise that the influence of Roman Law, great and useful as it was in other aspects of life, was in some respects mischievous and retrograde. The feudal system had its grave defects: it tended always towards the anarchy of the noble class, that anarchy which Machiavelli spoke of in a passage to which we have referred, in which he said that the very existence of a noble class ("gentiluomini," meaning by these a feudal territorial nobility) made a "vivere politico" almost impossible.<sup>3</sup>

It is perfectly true that the absolute monarchies of the seventeenth and eighteenth centuries represented the necessity of controlling this aristocratic anarchy, but that can hardly justify before history the attempt to control it by the anarchical autocracy of an absolute king.

There was indeed another element in the political conceptions

<sup>1</sup> Cf. vol. vi. p. 443.

<sup>2</sup> Cf. vol. vi. p. 250, note 3.

<sup>3</sup> Cf. vol. vi. pp. 417, 448.

of the sixteenth century whose influence was parallel to that of the Roman Law, as we have just been dealing with it; that is, the conception of the king as being the vicar of God in such a sense that he was above all human authority, that resistance even to his unjust and illegal actions and commands was resistance to God Himself. This conception, as has been well pointed out by Professor A. Kern in his admirable work, 'Gottesgnaden und Widerstandsrecht im Mittelalter,' had grown out of various elements in the earlier Middle Ages, but in the political literature with which we have been concerned, it was derived almost wholly from some of the Christian Fathers, and especially from St Gregory the Great, who drew it from certain parts of the Old Testament and the conception of the "Lord's Anointed."

The authority of Gregory the Great was naturally so strong that in the ninth century we find even Hincmar of Rheims sometimes citing his words, and a Church Court threatening those guilty of rebellion with excommunication.<sup>1</sup> In the stormy times of the great conflict between Hildebrand and Henry IV. we find not only Henry IV. but some of the clergy maintaining that the king could be judged by God only, and Wenrich of Trier and the author of the treatise 'De Unitate Ecclesiae Conservanda' (Walther of Naumburg) appealing to the authority of Gregory the Great, and Gregory of Catino maintaining that it was God only who could take away the authority of the king.<sup>2</sup>

Practically, however, the conception of Gregory the Great was overpowered by the principle that political authority was founded upon justice and law, and the distinction between the king and the tyrant. If Manegold and John of Salisbury maintain this in the sharpest terms,<sup>3</sup> it must be remembered that it was St Thomas Aquinas himself, as we have seen, who declared that while sedition was a mortal sin, resistance to the unjust rule of a tyrant was not sedition.<sup>4</sup> These are the principles of the political literature of the fourteenth

<sup>1</sup> Cf. vol. i. pp. 217-18.

<sup>2</sup> Cf. vol. iii. part ii. chap. 4.

<sup>3</sup> Cf. vol. iii. part ii. chaps. 5 and 6.

<sup>4</sup> Cf. vol. v. p. 92.

and fifteenth centuries. Only very rarely, as in Wycliffe, in the proceedings of the Cortes of Olmedo in 1445, and in a treatise of Æneas Sylvius (afterwards Pope Pius II.) do we find this appeal to the authority of God as forbidding all resistance to the king, for he was the vicar of God.<sup>1</sup>

It was not till the sixteenth century that this conception had any real importance in political thought, and we have treated it in some detail in this volume, first in Luther and Tyndale in the earlier part of the century,<sup>2</sup> and again in some later writers, especially Bilson, James I., Peter Gregory of Toulouse, and Barclay.<sup>3</sup> Luther, however, after 1530 abandoned this view, and admitted that it was the law and not the king which was supreme,<sup>4</sup> and the other writers who maintained this conception of the "Divine Right" were unimportant, and their authority cannot be measured against that of Calvin and Hooker among the Protestants, or of the great Jesuits among the Catholics. How a manifestly fantastic conception such as this should have come to have some importance in the seventeenth century, it is not for us to say; perhaps the dreadful experience of the French Civil Wars, and the incompetent absurdities of the Fronde in France, and the dependence of the Anglican Church upon the Crown may serve to explain it in part.

We are clear that, as in the conception of the prince and his absolute authority, which was derived by some Civilians from the Roman Law, we have here a merely intrusive conception, which was wholly alien to the rational and intelligible political tradition of the Middle Ages, that the law was supreme and not the prince.

We turn back to a saner world than that of the absolute prince of some interpreters of the Roman Law, and of those who upheld the "Divine Right," and, curiously enough, we find it in the terms of a conception which has sometimes

<sup>1</sup> Cf. vol. vi. p. 54, and part ii. chap. 4.

<sup>2</sup> Cf. vol. vi. part iv. chap. 3 (pp. 430-50).

<sup>3</sup> Cf. vol. vi. part iii. chap. 4.

<sup>4</sup> Cf. vol. vi. pp. 280-86.

been thought merely antiquarian and even irrational, that is, in the principle of the contractual relation between the ruler and the ruled.

Whatever we may think of it, this was, next to the principle of the supremacy of law, perhaps the most important of all the political conceptions of the Middle Ages. We need hardly again point out that we do not mean that unhistorical and unscientific conception of a contract by which men had formed themselves into political societies. It may be said that this was implied in the Stoic theory of the conventional nature of political institutions, but it had no real place in mediæval thought, though there may be occasional traces of it. It was not till the seventeenth and eighteenth centuries that it became the fashionable, if only hypothetical, starting-point of political theory.

The principle of the contract between the ruler and the ruled was, on the other hand, the general assumption of all mediæval political theory, and it was upon this that there were built up the principles of the nature and limitations of the authority of the prince.

This conception indeed, so far from being merely abstract, was founded upon certain conditions of political authority which found a definite expression in the coronation ceremonies of Western Europe at least from the eighth century—that is, in the mutual oaths of the prince and the people. It is indeed a little strange that some writers should not have observed that in the ninth century these principles of mutual obligation were not only a part of the “recognition” of the prince, but that continual appeal was made to them as determining the nature of the relations of prince and people.<sup>1</sup> For in these mutual oaths the prince swore to maintain not only abstract justice, but the concrete law, and the people swore to obey the prince. This was indeed an intelligible and practical conception of the relations of ruler and ruled; indeed it was only another form of the principle that the law was supreme. The contractual conception then goes back to the earlier Middle Ages, but it continued to find expression

<sup>1</sup> Cf. vol. i. chap. 20.

throughout them in the importance attached to the coronation oaths.

There can, however, be no doubt that this was immensely strengthened by the development of the feudal system. For, as we have endeavoured to make plain in the third volume of this work—while there are elements in the feudal relation, especially as set out in the poetical literature, of a purely personal nature, implying an almost complete and unconditional loyalty of the vassal to his lord—when we examine the juridical literature of feudalism, it is the contractual conception of the mutual obligations of lord and vassal which we find to be dominant. Even that well-known passage in the letters of Fulbert of Chartres which sets out the obligations of the vassal in comprehensive terms, concludes by saying that the lord must also fulfil the same obligations to his vassal. And the structure of feudal society provided the methods by which this should be enforced, for in case of a dispute between the lord and vassal, the determination belonged to the Court which was composed of all the vassals and not to the lord.<sup>1</sup>

The conception of the contractual relation between the prince and the community may be expressed in sharper terms by Manegold than by others, but in substance he represents the normal mode of mediæval political thought, that the prince is bound to the community by his obligation to obey the law, and that the tyrant—that is, as John of Salisbury especially puts it, the prince who ignores or defies the law—has forfeited all claim to authority.<sup>2</sup>

When therefore Marsilius of Padua laid special stress upon the principle that it was the community which was the source of all positive law, that it was from the community that the ruler (*pars principans*) received his authority, and that the community which had given this authority could also withdraw it, if he violated the law, he was implicitly asserting the doctrine of the contract.<sup>3</sup>

There is therefore nothing to surprise us when we find

<sup>1</sup> Cf. vol. iii. part i. chaps. 1, 2, 3, 4. and 6.

<sup>2</sup> Cf. esp. vol. iii. part ii. chaps. 5 <sup>3</sup> Vol. vi. pp. 8 ff., 40 ff.

that in the later sixteenth century the principle of a contract between the prince and the community, as expressing the condition on which authority was granted to him, should be reaffirmed not only by controversialists, but by the most careful and restrained political thinkers.

It is particularly interesting to find that in the 'Apologie' of William of Orange the conception of the contract is stated under the terms of the conditions on which Philip II. held his power in the Netherlands; the oath which he took before they swore obedience to him, and the right of his vassals to enforce these conditions upon him, under the terms of feudal law. George Buchanan asserts roundly against Maitland, who urged that subjects are bound by their oath of obedience to the king, that kings are bound by their promise to administer the law, and that there is therefore a "mutual contract" between the king and the citizens. The 'Droit des Magistrats' maintains that the people had only surrendered their liberty to the king on certain conditions, and that, if these were violated, they had the right to withdraw the authority which they had granted. The 'Vindiciae Contra Tyrannos' sets out the principle of a "foedus" between king and people. It was the people who created the king on the condition that he should rule justly and according to the law, and the people and those who are responsible for their protection have the right to enforce this; and it maintains that a "pactum" of this kind was part of the constitution, not only of the empire and other elective monarchies, but also of the great hereditary monarchies like France, Spain, and England, and was embodied in the coronation oaths. Hooker, with characteristic breadth of judgment, observes that the nature of this "compact" is to be determined not by a search for "the articles only of compact at the first beginning, which for the most part are either clean worn out of knowledge, or else known unto very few, but whatsoever hath been after in free and voluntary manner condescended unto, whether by express consent, whereof positive laws are witnesses, or else by silent allowance famously notified through custom reaching beyond the memory of man."

It is the whole body of the public laws of the community which constitutes the terms of the contract. Althusius, like the author of the 'Vindiciae,' maintains that the contract between the "Chief Magistrate" and the community was a part of the constitutional system in almost all modern kingdoms, whether elective or hereditary, and he relates it to the form of the mutual oaths of kings and subjects; and, in still more general terms, he declares that no kingdom, no commonwealth was ever created without a mutual contract between the prince and his future subjects, which was to be religiously kept by both, and that if this were violated the authority founded upon it would fall to the ground.<sup>1</sup>

Finally, we must also recognise that in the political structure of the Middle Ages there was always implicit, and sometimes expressed, the principle that the best form of government was that in which all the members of the political community had their share. St Thomas Aquinas said that in his judgment, in a good form of government it was in the first place important that all should have some share in authority; this tends to the peace of the community, for all men will love and maintain such an order; and he found this in a monarchy in which one should rule "secundum virtutem," and under him others, also ruling "secundum virtutem," and yet the authority would belong to all, for they may be elected from all, and are elected by all. Such a constitution, he continues, combines the character of a monarchy, an aristocracy, and a democracy. St Thomas claimed to derive this from Aristotle, and he found an example of it in the constitution established by Moses for the people of Israel.<sup>2</sup>

St Thomas then clearly thought that the mixed constitution, in which the authority of the whole community—king, nobles, and people—was represented, would be the best form of government. How far he was conscious that this corresponded

<sup>1</sup> Cf. vol. vi. part iv. chap. 2, Theologica,' 1. 2, 105, 1. (Cf. vol. v. sect. 4. p. 94.)

<sup>2</sup> St Thomas Aquinas, 'Summa

with the development of the representative system which was taking place in his time we cannot say, but he thought of the mixed government as superior to all the simple forms, and he found the essence of this in the elective and representative method.

We have often said that it was the supremacy of justice and law which was the fundamental principle of Mediæval Political Theory, but we must now put beside this the principle that, subject to the final authority of justice and the divine and natural laws, it was the community which was supreme—the community which included the king, the nobles, and the people. This was the principle out of which the representative system grew.

It is a rather curious incompetence of judgment which sees in the words of Edward I.'s summons of the bishops to the Parliament of 1295, "*quod omnes tangit, ab omnibus approbetur,*" nothing but the rhetorical use of an incidental phrase in the "*Corpus Juris Civilis.*" What it meant to those who drafted the summons is quite immaterial; the fact is that it expressed the development of the political self-consciousness of the community. Implicit indeed it had always been in the authority which lay behind the custom and law of the community, but in the later centuries of the Middle Ages it found for itself a new form in the representative system.

The Huguenot pamphlets of the sixteenth century may express this conception of the supremacy of the community in extravagant terms, but they were saying nothing more than Mariana said in Spain and than Hooker said in England: "In kingdoms, therefore, of this quality the highest governor hath indeed universal dominion, but with dependence upon that whole entire body, over the several parts of which he hath dominion; so that it standeth for an axiom in this case. The king is '*maior singulis, universis minor.*'"<sup>1</sup>

It was the supreme power of the community which, in the judgment of the most important political writers of the

<sup>1</sup> Cf. vol. vi. part iv. chap. 2, sect. 2.

sixteenth century, found its embodiment in the Diet of the Empire, in the Cortes of Spain, in the States General of France, and in the Parliament of England.

It is in the Parliament, says Sir Thomas Smith, that the whole absolute power resides, for there are present the king, the nobles, the commons, and the clergy are represented by the bishops. The Huguenot writers demanded the restoration of the Estates to that place which they had held till some of the French kings had desired to rule absolutely and uncontrolled, and Boucher, representing the Catholic League, said that the "*Maiestas*" was embodied in the Estates. Mariana in Spain contemptuously repudiated the contention that the authority of the king was equal to that of the Cortes. Hooker says, "The Parliament of England, together with the convocation annexed thereunto, is that whereupon the very essence of all government within this realm doth depend; it is even the body of the whole realm; it consisteth of the king and of all that within this realm are subject to him; for they are all there present, either in person or by such as they voluntarily have derived their very personal right unto." And Althusius expresses the principle of the authority of these representative assemblies when he says that it is by such Councils that the liberty of the people is preserved, and that the "*public administrators*" are taught that the people—that is, the universal community—is their lord.<sup>1</sup> The representative system was then the form of the principle of the supremacy of the community, of the whole community, including the king, the nobles, and the commons.

We are not here dealing with the developments of the seventeenth and eighteenth centuries, with the conditions or circumstances which brought about the conflicts between the monarchy and the community, whether in England or in the continental countries. We are in this work concerned with the development of the principles of political civilisation in the Middle Ages, and we think that it is true to say that

<sup>1</sup> Cf. vol. vi. p. 368, and part iv. chap. 5.

in these we can see not only principles of profound and permanent value, but also that the moral and political genius of the Western nations was making its way through immense difficulties, and through what often seems an intolerable confusion, to rational and intelligible ends, to some kind of reconciliation of the principles of liberty and authority.

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Demand by Third Estate that Ordinances made by the king on the "remonstrance" of the Three Estates should not be revoked, except in a similar assembly 476.

Estates of Blois, 1588. King swears that he would bind himself to observe the laws he had made, 476.

Clergy and Third Estate declare laws made by the king with the Estates to be inviolable, 477.

Third Estate demanded that no edict should be published, and registered by "Parlements" till it had been communicated to the "Procureurs-Syndics des états dans les provinces," 477.

Third Estate demanded that the decisions of the Estates should be published, without going to the king's council, 478.

King declared that he did not intend to make "fundamental" laws, except with the advice of the Estates, 478.

Henry IV. in 1589 announced his intention to call together the States General within six months. Summons issued for meeting in 1590, but it never met, 478, 479.

Catholic League called together the Estates in 1593, 479.

Henry called together an assembly of notables in 1596, 479.

Those called were instructed to consult the people of their city or province, 479.

Henry assured the meeting that he had called them to hear and follow their advice, 479.

The Estates were not called together by Henry before issuing the "Edict of Nantes," 1598, but he declared that he had examined the "Cahiers" of the Catholics, and had permitted the "Reformed" to meet and prepare their statements, 479, 480.

Examples of taxation by Pro-

vincial Estates, States General, and assembly of notable persons, 1499 to 1597, 480-484.

#### Suarez—

Repudiates conception that political authority normally came immediately from God; this only happens rarely, 344, 345.

Community may transfer its jurisdiction to one man, but the nature and form of this authority is determined by human will, 345.

Legislative power belongs to king, but this depends upon the conditions under which his power was given him by the community, 345, 346.

Prince ought to obey his own laws, but repudiates the conception that the phrase "legibus solutus" applies only to "leges caducarii," 347.

King ought to obey the laws, but is exempt from "vis legum coactiva," 347.

Kingdom can justly make war upon a tyrant, 347, 348.

#### Taxation—

No taxation without Parliament, "Modus Tenendi Parliamentum," 36.

King can impose taxation for public purposes, not private, 'Somnium Viridarii,' 37.

If he uses them for private purposes, he may be deposed, 'Somnium Viridarii,' 38.

King has the right to impose taxation for royal expenses, Bartolus, 77.

Prince has the right to impose "collecta," but only if it is useful to the commonwealth; but there is no "obligatio naturalis" to pay them, if it is made according to the prince's "effrenata voluntas," Baldus, 85, 86.

See under Cortes of Castile, States General of France, and Provincial Estates of France.

It is tyranny to impose taxation without consent of subjects, Commines, 201.

King of France can impose "novum vectigal," Ferrault, 297.

See under L'Hôpital, Bodin, Thos. Smith, 'Droit des Magistrats,' Parliament, 'Vindiciae.'

Tudeschis, Nicolas de: see Panormitanus.

#### Turrecremata—

Laws derive their authority from legislator, but are void unless confirmed by custom, 153.

Custom has force of law, if allowed by legislator, 153.

Prefers mixed government, 167.

Better to be governed by law than by the will of one man, 168.

The tyrant is one who governs for his own profit, 168.

Subjects are not bound to obey the unjust commands of prince, 168, 169.

Tyndale, W.—

Concerned to show that Reformers were not subverters of political order, 287.

Subjects who resist the king are resisting God, 288.

Rulers whether good or evil are ordained by God, 288.

King in secular matters is outside of the law, 288.

Dismisses contemptuously argument that king had sworn to maintain the laws, privileges, &c., of his subjects, 289.

King is the Lord's anointed, cannot be deposed without a special commandment from God; cites the story of David and Saul, 289.

Attributes misfortunes of England in fifteenth century to deposition of Richard II., whom God had set over them, 290.

Restatement of Gregory the Great, but under immediate influence of Luther, 291.

Unity, Political, of Europe—

Dante, 111-123.

Engelbert of Admont, 123.

Bartolus, 123.

Pierre Dubois, 124-126.

Vacarius: people could revoke authority given to prince, and could then make law, 23.

Victoria, Francis—

A Dominican and Professor at Salamanca, 328.

King is bound by the law, 328.

"Potestas" of king is from God, his "Autoritas" from the commonwealth, 365.

Vigelius, Nicolas—

Laws abrogated by subsequent custom, 306.

"Princeps legibus solutus," he does not like this; it is contrary to "Digna Vox" (Cod. i. xiv. 4), 307.

Rescripts of prince contrary to law

are to be rejected by Courts of Law, unless they injure no one, 307.

'Vindiciae contra Tyrannos'—

Laws made by wise men and magistrates to restrain kings, 338, 339.

The many are wiser than the one, 339.

King receives the law from the people, 339.

Only among barbarians is king absolute, 339.

Legislation in Empire, England, Spain, Hungary—by representative bodies—it was formerly the same in France, 340, 494.

Kings the Vicars of God, God "institutes" them, but people "constitute" them, 367.

Even hereditary monarchs are only held to be kings when they have been invested by those who represent the "Maiestas" of the people, 367.

The two "foedera," God, king, and people, and king and people, 388, 389.

God is the avenger of the first, the people of the second, 388, 389.

Such a contract between king and people exists in almost all countries, Empire, France, England, Spain, Brabant, &c., 390.

It is related to mutual oaths at coronation, 390.

There are officers of the kingdom whose function it is to maintain this contract, 410.

The Three Estates (of France) met every year formerly, 493.

Their authority in war and peace, and taxation, they could even change the succession and depose the king if he was a tyrant, 493.

Taxes could formerly only be imposed by the authority of the Three Estates in France. Cites law of Philip of Valois, 494.

Wenceslas, Emperor: deposition by the electors, 182, 183.

Wesselius of Groningen—

Contract between people and ruler, 180.

King not to be obeyed in evil things, and may lawfully "in regno turbari," 181.

Discusses meaning of St Paul in Romans xiii. 1. This refers only to righteous rulers, it is lawful to resist others, 181, 182.

William of Orange—

Statement of the principles of the

contract between prince and people in Netherlands, 383-385.

Conceived of them in terms of feudal law, 384.

If Philip violated these obligations, the Netherlands no longer obliged to render him obedience, 385, 395, 396.

Nobles have the right of the Ephors in Sparta to control evil kings, 385.

Wycliffe, John—

"Civile dominium" created by "Ritus Gentium," and coercive authority was accepted by the custom and consent of the people as approved by reason, 51.

Civil law and political authority instituted by men on account of sin, but derive their authority from God, 51, 53.

Discusses the best form of government, in view of man's sinful nature; monarchy is probably the best, 52, 53.

Christian man should obey the tyrant, "quoad bona fortunæ minus valencia," 52.

Meaning of "dominium," 52, 53, 54, 56-61.

Authority of the ruler founded on the election of the community, in England and in other kingdoms, 53.

King is the Vicar of God, whether just or unjust, cites Rom. xiii. and 1 Pet. ii., 54.

Resistance even to perverse ruler is a great sin, unless his commands are against God, 54.

King who violates the laws sins against God, 55.

But his obedience to law is voluntary, 56.

Zabarella (The Cardinal)—

Discusses authority of custom, commenting on Decretal of Gregory IX. (Decretals i. 4, 11), 151.

Political authority is normally derived from the community, cites Aristotle, but probably this is a reminiscence of Marsilius, 165.

Discussion of the question whether Roman people, when they transferred their authority to the prince, still retained it, 165.

Mentions that he had seen a brazen tablet in Lateran dealing with the powers given by the Senate and the Roman people, 165, 166.

This made it clear that Roman people had retained the power of making laws, 166.

However this might be, all power came to be in the hands of the prince, 166.

Agrees with Lupold of Bebenburg that the electors in electing the emperor acted as a "Collegium" representing the "universitas populi Romani," 166.

Government a Divine institution even among infidels, cites Innocent IV., 166.

The electors can for just cause depose the emperor, at least when he has not yet been crowned by Pope, 167.

This is Zabarella's own judgment, but he submits it to the judgment of more competent persons, 167.

Zasius—

Emperor has "Potestas immensa," he is "legibus solutus," and can make law "sobis," 319.

Prince is bound by his "contracts" even with private persons—relates this to feudal law, 319.

Prince's actions must conform to reason and equity, cites the stories of Trajan and Agesilaus, and the rescript of Anastasius that no heed was to be paid by administrators to rescripts contrary to general law and public utility, 320.

Discusses the meaning of "legibus solutus." This does not mean that the prince could annul a man's legal rights by law, decree, or statute. Reference to case "in Consistorio Principis," 320.

This is probably the case discussed in Zasius' *Consilia*, ii. 10, 321.

Two principles laid down in this. Emperor cannot override the judgment of the Court, and he is bound by his contract, 321.

There had been much discussion of such phrases as "ex plenitudine potestatis" and "ex certa scientia," 321.

Zasius is quite clear that by the use of such phrases the emperor could not annul "Res Judicata," or a man's lawful rights, 321, 322.

Such phrases had become a matter of convention, and they had no great force, 322.

In this case the emperor was bound by his own constitution in the Diet of Worms, 1495. This had received the force of a contract, for the emperor had sworn to observe it, 323.

The authority of the emperor does not extend to injustice, though he is "lege mere positiva solutus," 323, 324.

The "ius" claimed by a man which belongs to the "ius naturale vel gentium" cannot be taken away by the emperor, except perhaps for obvious public utility, 323, 324.

The Court, therefore, should order its original judgment to be carried out, 323, 324.