FRANCISCO SUÁREZ

A TREATISE ON LAWS AND GOD THE LAWGIVER

BOOK III

ON POSITIVE HUMAN LAW

Of the thirty-four chapters in this Book, only the following are included in these *Selections*: Chapters I–IV (inc.), XXXII, and XXXIII

BOOK III

ON POSITIVE HUMAN LAW AS SUCH, AND AS IT MAY BE VIEWED IN PURE HUMAN NATURE, A PHASE OF LAW WHICH IS ALSO CALLED CIVIL

[INTRODUCTION]

1. In the First Book we divided temporal law into the natural and the positive, and consequently, since the eternal law and natural temporal law have been discussed, the discussion of the positive [temporal] law should follow.

However, in that very passage, [Bk. I, chap. iii, § 14,] we subdivided this phase into the divine and the human. Of these, the divine is in truth the more noble and the worthier, but the human is better known to us, and closer to [human] nature, since it pertains to the same order. Accordingly, as the existence of nature is presupposed for the existence of grace, so human law by its very nature is prior in the order of its generation to divine law, since the latter is supernatural and relates to the order of grace. Therefore, we shall treat of human law before treating of divine law.

And as to positive law in its general aspect, apart from any division into divine and human, this is a matter which we need not discuss. For, aside from its mode of origin, which is explained in the negative statement that the precepts of positive law, whether divine or human, are characterized not by an intrinsic necessity, existing in themselves, but by a necessity resulting from an extrinsic will—aside from this fact, I say, and aside from the statements relating to law in general which were made in the First Book—practically nothing remains to be said, of a general nature, that would be useful as practical doctrine or even possessed of any speculative significance.

Moreover, when both the human and the divine branches of positive law have been explained, all the questions pertaining to their mutual accord or distinction that might call for discussion, will have been explained.

2. However, in the opinion of Justinian (*Institutes*, I. ii. 1), human law (*lex*) may be divided into that which pertains to common law (*ius*) and that which pertains to the particular law (*ius*) [of a single community].

Human law (*lex*) is divided into that which is common law (*ius*) and that which pertains to the particular law (*ius*) [of a single community].

The former relates to the *ius gentium* and is comprehended within that term. We have already discussed that phase of law sufficiently.

At present, therefore, we are dealing with particular human law

[of individual communities] to which the name of positive human law has been applied, and which is said to be peculiar to any given state, commonwealth or similar perfect community.

Accordingly, human law of this kind is in turn divided into civil and canon. For though canon law is of itself capable of being common to the whole world, even as the Catholic Church is universal, nevertheless, in point of fact, it is a law peculiar to the community of the Church of Christ, and not common to all nations, since they are not all a part of the Church. Furthermore, in the manner of its enactment, it is positive human law in the strict sense, and of a very different character from that of the *ius gentium*, while in many respects it bears a likeness to the civil law. For these two branches of law agree in the fact that both in common possess the character of positive human law. One may note, however, that there exists between them a difference, consisting in the fact that civil law pertains entirely to the natural order in so far as regards its origin and authority, for though it is not enacted directly by nature, it is nevertheless enacted through the authority connatural to man. Canon law, on the other hand, is properly speaking, that law which is enacted by man through a supernatural authority.

Human law is divided into civil and canon.

Therefore, following the order of doctrine, and beginning with those points which are easier to comprehend, we deem it advisable to speak of civil law before speaking of canon law. We shall, however, dis- 197
cuss the common basis of positive human law, in connexion with civil law. For the doctrine will thus be grasped more readily and will easily be adapted to the canon law by the addition of those elements which befit the latter because of its supernatural authority, a matter which we shall take up in the following Book.[1]

From the foregoing, it also follows that, within the civil law itself, two states may be distinguished: one, the civil law in itself, simply as it existed among the Gentiles and exists now among unbelievers; the other, civil law as it exists when joined with faith and as it may be practised among believers in the Christian Church. These two states differ only in non-essentials, and therefore, we shall speak of civil law in a general sense. However, when any special point arises, calling for explanation, we shall not pass it by, but shall adapt the general doctrine to the present state of the Church.

CHAPTER I

DOES MAN POSSESS THE POWER TO MAKE LAWS?

1. We are speaking (as I have said) of man's nature and of his legislative power viewed in itself; for we are not considering, at present,

[1] [Not included in these *Selections*.—Tr.]

the question of whether anything has been added to or taken from that power through divine law, a matter which will be taken up later.

The question under consideration, then, is as follows: is it possible —speaking solely with reference to the nature of the case[1]—for men to command other men, binding the latter by [man's] own laws?

A reason for doubting that they can do so, may lie in the fact that man is by his nature free and subject to no one, save only to the Creator, so that human sovereignty is contrary to the order of nature and involves tyranny.

This doubt is confirmed by history; for [such sovereignty] was in point of fact thus introduced, and it is written (*Genesis*, Chap. x [, vv. 8, 10]) of Nemrod: 'he began to be mighty on the earth. [. . .] And the beginning of his kingdom was Babylon'—that is to say, his kingdom began through force and might. Similarly, Lucan [*The Civil War*, Bk. X, line 21] said of Alexander that he was, 'A fortunate freebooter'. This was the meaning of Augustine, also, in his work *On the City of God* (Bk. IV, chap. iv). Thus it is that we read in *Osee* (Chap. viii [, v. 4]): 'They have reigned, but not by me: they have been princes, and I knew not [. . .].' *Augustine.* *Osee.*

Secondly, the same doubt is confirmed by the words of Augustine, who discusses (*On the City of God*, Bk. XIX, chap. xv) the fact that God said (*Genesis*, Chap. i [, v. 26]): 'Let us make man', &c., 'and let him have dominion over the fishes of the sea, and the fowls of the air, and the beasts [and the whole] earth'[2]; whereas He did not say: 'Let him have dominion over men', a distinction which indicates that such domination is not natural to man. 'Therefore,' says [Augustine, *ibid.*], 'the first just men were not kings, but shepherds of flocks, and they were so called.' Thus Gregory the Great, too, indicates (*Moralia*, Bk. XXI, chap. x, or xi [*Libri sive Expositio in Lib. B. Job*, Bk. XXI, chap. xv] and in the *Regulae Pastoralis*, Pt. II, chap. vi) that authority of this kind was introduced through sin and acquired through usurpation. *Genesis.*

Thirdly, the doubt may be confirmed by the testimony of a number of passages which show that God alone is the king, the lawgiver and the lord of men.[3] 'For the Lord is our judge, the Lord is our king, the Lord is our lawgiver' (*Isaias*, Chap. xxxiii, v. 22). And again, 'There is one lawgiver, and judge', &c. (*James*, Chap. iv [, v. 12]). *Isaias.* *James.*

Finally, we have this confirmation, namely: there is no true law save that which is binding in conscience; but one man cannot bind another in conscience, since this power would seem to be exclusively a property of God, Who alone can save and destroy; therefore, . . .

[1] [With reference to a power inherent in human nature.—Tr.]

[2] [Suárez has simply *bestiis terrae* (the beasts of the earth) in the place of the Vulgate reading, *bestiis, universaeque terrae*.—Tr.]

[3] [Reading *dominum* for *dominium*.—Tr.]

2. At this point, mention might be made of various errors among the heretics; but it will be better to touch upon those errors later.

Accordingly, leaving them aside, we shall make first the following statement: a civil magistracy accompanied by temporal power for human government is just and in complete harmony with human nature. This conclusion is certainly true, and a matter of faith. It may be sufficiently proved by the example set by God Himself, when He established a government of this kind over the Jewish people, first by means of judges, and later by means of kings, endowed doubtless with the princely office and temporal power, and held in such veneration that they were even called gods, according to the passage in *Psalms* (lxxxi [, v. 1]): 'God hath stood in the congregation of gods: and being in the midst of them he judgeth gods.' Nor is there any validity in the objection which may be made that those judges and kings had their power from God Himself; for that power nevertheless did not in itself exceed the limits set by nature, even though the mode through which it was held was extraordinary and the result of a special providence; and therefore, this [divine derivation of the power in question] does not render it impossible for the power to be held justly in some other way. Furthermore, from that same contention there follows this argument, namely, that power of that kind is in harmony with nature itself, in so far as it is necessary to the proper government of a human community.

The affirmative conclusion, which is a matter of faith.

Again, this contention derives a fuller confirmation from human custom, since kings existed long before the times of which we were speaking, even kings who were holy and praised in the Scriptures, as was Melchisedech (*Genesis*, Chap. xiv and *Hebrews*, Chap. vii). Abraham, too, is thought to have been a king or sovereign prince. Moreover, a like example is to be found in *Job*, &c.

Genesis. *Hebrews.*

And finally, we read in *Proverbs* (Chap. viii [, v. 15]) the general statement: 'By me kings reign.'

Proverbs.

The point is clearly set forth in the writings of the Holy Fathers, to whom I shall refer in the course of our discussion.

Aristotle.

3. The basic reason for this assertion is to be sought in Aristotle's *Politics* (Bk. I [, chap. v = p. 1254 B]). This reason is expounded by St. Thomas (*Opuscula*, XX: *De Regimine Principum*, Bk. I, chap. i), and also, very neatly, by St. Chrysostom (*On First Corinthians*, Homily XXXIV [, no. 5]). It is founded, moreover, upon two principles.

The basic reason for the assertion.

Chrysostom.

198

The first principle is as follows: man is a social animal, and cherishes a natural and right desire to live in a community. In this connexion, we should recollect the principle already laid down, that human society is twofold: imperfect, or domestic; and perfect, or political. Of these divisions, the former is in the highest degree natural and (so to speak)

fundamental, because it arises from the fellowship of man and wife, without which the human race could not be propagated nor preserved; wherefore it has been written, 'It is not good for man to be alone'. From this union there follows as a direct consequence the fellowship of children and parents; for the earlier form of union is ordained for the rearing of the children, and they require union and fellowship with their parents (in early life, at least, and throughout a long period of time) since otherwise they could not live, nor be fittingly reared, nor receive the proper instruction. Furthermore, to these forms of domestic society there is presently added a connexion based on slavery or servitude and lordship, since, practically speaking, men require the aid and service of other men.

Now, from these three forms of connexion there arises the first human community, which is said to be imperfect from a political standpoint. The family is perfect in itself, however, for purposes of domestic or economic government.

But this community—as I have already indicated, above—is not self-sufficing; and therefore, from the very nature of the case, there is a further necessity among human beings for a political community, consisting at least of a city state (*ciuitas*), and formed by the coalition of a number of families. For no family can contain within itself all the offices and arts necessary for human life, and much less can it suffice for attaining knowledge of all things needing [to be known].

Furthermore, if the individual families were divided one from another, peace could scarcely be preserved among men, nor could wrongs be duly averted or avenged; so that Cicero has said (*De Amicitia*)[1]: 'Nothing in human affairs is more pleasing to God our Sovereign, than that men should have among themselves an ordered and perfect society, which (continues Cicero) is called a city state (*ciuitas*).' Moreover, this community may be still further augmented, becoming a kingdom or principality by means of the association of many city states; a form of community which is also very appropriate for mankind—appropriate, at least, for its greater welfare—owing to the above-stated reasons, applied in due proportion, although the element of necessity is not entirely equal in the two cases.

4. The second principle is as follows: in a perfect community, there must necessarily exist a power to which the government of that community pertains. This principle, indeed, would seem by its very terms to be a self-evident truth. For as the Wise Man says (*Proverbs*,

In a perfect community, there must necessarily exist a power governing that community.

Proverbs, xi.

[1] [This passage is not found in *De Amicitia*. A very similar passage is found in Cicero's *De Republica*, Bk. VI, chap. xiii, which reads: *nihil est enim illi principi deo, qui omnem hunc mundum regit, quod quidem in terris fiat, acceptius quam concilia coetusque hominum iure sociati, quae ciuitates appellantur* (For nothing of all that is done on earth is more pleasing to that supreme God who rules all this world than the assemblies and gatherings of men associated in justice, which are called States).—TR.

Chap. xi [, v. 14]): 'Where there is no governor, the people shall fall'; but nature is never wanting in essentials; and therefore, just as a perfect community is agreeable to reason and natural law, so also is the power to govern such a community, without which power there would be the greatest confusion therein.

This argument is confirmed by analogy with every other form of human society. For the union of man and woman, since it is natural, consequently involves a head, the man, according to this passage from *Genesis* (Chap. iii [, v. 16]): '[. . .] thou shalt be under thy husband's power.' Thus it is that Paul says (*Titus*, Chap. ii [, v. 5]): 'Let women be subject to their husbands.'[1] To this, Jerome [on *Titus*, Chap. ii, v. 5] adds the words: 'in accordance with the common law of nature.' Similarly, in that second relationship of parents and children, the father has over his child a power derived from nature. And in the third, the relationship of servants and master, it is also clear that a governing power resides in the master, as Paul teaches [*ibid.*, v. 9], also in *Ephesians*, Chap. vi [, v. 5] and *To the Colossians*, Chap. iii [, v. 22]), saying that servants ought to be obedient to their lords, as to God. For though the relationship of servitude is one derived not entirely from nature, but rather through human volition, nevertheless, given the existence of this relationship, subordination and subjection are obligatory by natural law, on the ground of justice. Filial subjection, too, is supported by this same natural bond and basis, that is to say, natural origin, from which it derives a higher degree of perfection by the title of [filial] piety. This point, moreover, is emphatically brought out in the Fourth Commandment of the Decalogue.

Genesis. *Titus.* Jerome.

Ephesians. *Colossians.*

Finally, it follows from all this, that in a domestic community, or family, there exists by the very nature of the case, a suitable power for the government of that community, a power residing principally in the head of the family. Furthermore, the same situation is necessarily found to exist in the case of any community whatsoever that consists of one sole household, even though that community be founded, not upon the bond of matrimony, but upon some other kind of human society; and therefore, it is likewise necessary, in the case of a perfect society, that there shall exist some governing power suitable thereto.

St. Thomas.

5. There is, in fine, an *a priori* reason in support of this view, a reason touched upon by St. Thomas in the *Opuscula* [XX: *De Regimine Principum*, Bk. I, chap. i] above cited, namely: that no body can be preserved unless there exists some principle whose function it is to provide for and seek after the common

The reason *a priori*.

[1] [Suárez probably had reference to *Ephesians*, Chap. V, v. 22, of which this passage is a direct quotation. The passage in the *Epistle to Titus* reads: *Ut . . . doceant adolescentulas . . . subditas viris suis* (That they may teach the young women . . . to be obedient to their husbands).—Tr.]

good thereof, such a principle as clearly exists in the natural body, and
199 likewise (so experience teaches) in the political. The reason for this fact, in turn is also clear. For each individual member has a care for its individual advantages, and these are often opposed to the common good, while furthermore, it occasionally happens that many things are needful to the common good, which are not thus pertinent in the case of individuals and which, even though they may at times be pertinent, are provided for, not as common, but as private needs; and therefore, in a perfect community, there necessarily exists some public power whose official duty it is to seek after and provide for the common good.

The righteousness of and necessity for civil magistracy are clearly to be deduced from the foregoing, since the term 'civil magistracy' signifies nothing more nor less than a man or number of men in whom resides the above-mentioned power of governing a perfect community. For it is manifest that such power must dwell in men, inasmuch as they are not naturally governed in a polity by the angels, nor directly by God Himself, Who acts, by the ordinary law, through appropriate secondary causes; so that, consequently, it is necessary and natural that they should be governed by men.

6. I hold, secondly, that a human magistracy, if it is supreme in its own order, has the power to make laws proper to its sphere; that is to say, civil or human laws which, by the force of natural law, it may validly and justly establish, provided that the other conditions essential to law be observed.

The second conclusion.

This conclusion is certainly true; and it has, moreover, been laid down by the philosophers—by Aristotle (*Politics*, Bk. I throughout and *Ethics*, Bk. X, last chapter), by Plato (*Laws* [Bk. III, p. 684 c] and *The Republic* [Bk. I, chap. xii = p. 339]) and by Cicero (*On Invention*, Bk. I [, chap. i] and *Laws* [Bk. I, chap. vi]). The theologians, too, and other Doctors whom I have cited above (Bk. I, chap. viii)[1] agree with the conclusion in question. A great deal of support may also be drawn from Covarruvias (*Practicae Quaestiones*, Chap. i; and on *Sext*, rule *peccatum*, Pt. II, § 9, no. 6).

Aristotle. Plato. Cicero. Covarruvias.

Moreover, the reason [on which the said conclusion is based,] is as follows: a civil magistracy is a necessity in the state for its government and regulation, a fact which has already been pointed out; but one of the most necessary acts is the establishment of law, as is evident from what we have said above (Book One); therefore, this legislative power does exist in a political magistracy. For he who is invested with a given office, is invested with all the power necessary for the fitting exercise of that office. This is a self-evident principle of law.

The proof of the [second] conclusion.

[1] [Not included in these *Selections*.—Tr.]

[7.] Whence it follows that such power to make human laws is identified with the human magistracy endowed with supreme jurisdiction in the state.

A corollary.

This fact is evident from what has already been said (in Bk. I, chap. viii),[1] where we showed that the power in question pertains to a perfect jurisdiction. That entire discussion should be applied here. Moreover, it holds true in a universal sense. For solely in the prince, or [supreme] magistrate, does that public power reside which is ordained for public action, concerns the community as a whole, and includes an efficacious binding and compelling force; yet this twofold force is essential to law, according to Aristotle (*Ethics*, Bk. X, last chapter), the *Digest* (I. iii. 7), and, also, the proof adduced above; and therefore, only that magistrate who has supreme power in the commonwealth, has also the power to make human, or civil law. Finally, this supreme power is a certain form of dominion, but a form of dominion that calls, not for strict servitude to a despot, but rather for civil obedience; therefore, it is the dominion of jurisdiction, of the sort that resides in the prince, or king.

Aristotle.

8. Certain jurists, however, qualify these statements, declaring that it is true of the precepts of the law which is commonly applicable or relative to a [whole] kingdom, but that it is not true of municipal precepts, or statutes relating to particular communities;[2] a qualification which may be encountered in referring to Felinus and to the authorities whom he cites in his commentary (on *Decretals*, Bk. I, title II, chap. vi, nos. 9 and 10). These jurists base their opinion upon the contention that many communities not possessing jurisdiction do possess the power to make statutes. Their argument may be confirmed by the fact that the civil laws often distinguish jurisdiction from sovereignty, that is to say, from the power of sovereign command, as one may gather from the *Digest* (L. i. 26 and II. i. 3); but law, properly speaking, is related to the power of sovereign command, as may easily be seen from what we have already said regarding the essence of law; and therefore, the power which is *per se* necessary to law, is not the power of jurisdiction.

Felinus.

Objections to the corollary.

9. Nevertheless, the reply is that this qualification is unnecessary, unless, perchance, there is some ambiguity in the use of terms. For the arguments above set forth furnish universal and unqualified proof. St. Thomas makes this clear in the passage (II.-II, qu. 67, art. 1) where he proves that jurisdiction is necessary in order to pass a sentence for the reason that jurisdiction is necessary to law, because a sentence is a particular law and also has coercive force; and thus, *a fortiori*, any law

St. Thomas.

[1] [Not included in these *Selections*.—Tr.]

[2] [*statutis particularium populorum*. The translation, 'communities', would seem to be justified here by the necessity for a contrast with *regni* (kingdom), above, as well as by the appearance of *Communitates* (communities) in the next sentence.—Tr.]

howsoever particular its character may seem, requires jurisdiction; for no [other] law is ever so particular in character as a sentence, and the latter always has or always should have annexed to it some means of coercion—as is evident from the *Ethics* of Aristotle (as cited above) and from the laws already mentioned—since directive without coercive force is of no value. Indeed, no one has ever doubted that jurisdiction is required for the passing of a sentence. And thus our contention is confirmed; for if jurisdiction is necessary for the declaration of law, it is much more necessary for the making of law.

Aristotle.

10. As to the fundamental position of the authors in question, the [basic] assumption which they make may be denied. For statutes are either not true laws or else not made without jurisdiction; points which will be accorded more attention in later pages.

The objections to the corollary are answered.

As for the confirmation, in so far as concerns the laws cited in that [confirmatory argument], I shall point out that the term 'jurisdiction', in the full and proper sense, refers to political—that is, governmental—power of dominion, the sense in which we are here using the word. And jurisdiction, thus interpreted, is included as intrinsically a part of political sovereignty, in order to differentiate the latter from tyranny. Such is the argument set forth in the *Decretum* (Pt. II, causa XXIII, qu. i, can. iv), in the passage where supreme governmental power over the state is called 'legitimate sovereignty' (*legitimum imperium*); and the degree and mode of sovereignty will be in accordance with the degree and mode of jurisdiction. Sometimes, to be sure, 'jurisdiction' is understood strictly according to the etymology of the term, as signifying the simple power of passing judgment. For law is properly declared, or interpreted, by means of a sentence; and, if one is speaking in this sense, it is not incongruous that the power to judge should reside in a given person apart from the legislative, although such a person is never without some coercive power, such as would seem at times to be denoted by the word 'sovereignty', when the latter, also, is strictly interpreted. Thus it is that, on the other hand, the power given to the magistrate for the punishment of crimes and extending even to the death penalty, is ordinarily spoken of in the civil law simply as sovereignty, and is apparently so treated in the laws above mentioned, as well as in another law of the *Digest* (L. xvi. 215). In such cases, moreover, it is customary to give this power the name of 'unmixed sovereignty' (*merum imperium*), as may be seen by consulting the *Digest* (II. iv. 2) and the Gloss (thereon;[1] and on similar passages); although, in point of fact, it is impossible that such sovereignty should exist apart from the power of jurisdiction, just as, conversely, it is impossible for jurisdiction to exist apart from every element of sovereignty. This

[1] [The words of the Gloss are: *Imperium, s. merum quod est gladii potestas.*—Reviser.]

point is brought out in that passage of the *Digest* (I. xxi. 5)[1] which declares that when jurisdiction has been given, a certain element of sovereignty is also given, 'For there is no jurisdiction without a measure of coercive power.'

Relatively speaking, then, these two attributes are separated, not in actual fact, but only in a certain usage of the terms; so that the legislative power, being—as it is—a power of sovereign command, is accordingly one of jurisdiction.

The objections to the first conclusion are answered.

11. So it is that, in so far as concerns the reason for doubt,[2] the deduction [involved in that reason] is denied. For though man was not created or born subject to the power of a human prince, he has been born potentially subject (as it were) to such power; and therefore, it is not in opposition to preceptive natural law that one should be thus subjected in fact, even though this subjection is not derived directly from nature. On the contrary, it is consonant with natural reason that a human commonwealth should be subjected to some one, although (as we shall see) natural law has not in and of itself, and without the intervention of human will, created political subjection.

It is [merely] an accidental quality of human principates that empires have been established tyrannically.

With regard to the first confirmation of the doubt, we admit that empires and kingdoms have often been established or usurped through tyranny and force; but we deny that this fact is due to the essential character, or nature, of such principates, tracing it rather to the abuse of man. Consequently, we furthermore deny that kingdoms were established in this fashion from the very beginning, a denial which has already been supported by means of examples. Moreover, the words of Osee, quoted above,[3] referred specifically to the kings of Israel, who were set up without the sanction of God's Will, as Ribera explains at length, when expounding this passage [in his *Commentarii in 12 Prophetas Minores*]. These words may, however, be applied to all tyrants, or to all persons who rule unjustly even though they be true kings, or to those who are ambitious to govern though they are unworthy and unfitted to do so. Such persons, indeed, are frequently spoken of as reigning not by God, and not because they are false kings but because they rule in a way that fails to accord with God's will, or else for the reason that God permits rather than ordains their elevation to such office, a point which is made by Origen (*Homilies*, IV, *On Judges*).

[1] [The title of this Chapter in the *Digest* reads: *De officio eius, cui mandata est iurisdictio*, not *De eo, cui mandat. est iurisd.*, as it is given in the text of Suárez.—Tr.]

[2] [i.e. the reason (set forth in the third paragraph of Section 1 of this Chapter) for doubting the general proposition that man possesses the power to make laws.—Tr.]

[3] [In Section 1 of this Chapter. The passage quoted is from *Osee*, Chap. viii, v. 4: 'They have reigned, but not by me: they have been princes, and I knew not: [. . .]'.—Tr.]

Human principates did not originate with nature, but neither are they contrary to nature.

12. As to the second confirmation, that drawn from Augustine [*supra*, Section 1 of this Chapter], I reply that the passage cited indicates simply that human principates did not originate with nature, but does not indicate that they are contrary to nature. To be sure, Augustine here gives expression to the opinion that the dominion of one man over another is derived from the occasion created by sin, rather than from the primary design of nature; but he is speaking of that form of dominion whose concomitants are slavery and a condition of servitude. And Gregory the Great[1] expresses himself more clearly with regard to the governing power; but he should be interpreted as referring to coercive power and the exercise thereof; since, in so far as directive power is concerned, it would seem probable that this existed among
201 men even in the state of innocence. For a hierarchy and a principate exist among the angels, too, as is evident from the language of the Scriptures, from the words of Dionysius [the Areopagite] (*Concerning Ecclesiastical Hierarchy*, Chap. ix), and from those of Gregory (*Homilies*, XXXIV, *In Evangelia*). Moreover, our own preceding arguments may be considered as applicable to the state of innocence, since they are based, not upon sin nor upon any defection from order, but upon the natural disposition of man, the disposition to be a social animal and to demand by nature a mode of living in which he dwells in a community, the latter necessarily requiring to be ruled by means of public power. Coercion, on the other hand, presupposes the existence of a certain amount of defection from order, and therefore, with reference to coercion, it may be said that this power was introduced in consequence of sin. Similarly, a wife's subjection to her husband is also natural, and such subjection would exist in the state of innocence; yet it was after the commission of sin that these words were spoken to Eve: 'Thou shalt be under thy husband's power' (*Genesis*, Chap. iii [, v. 16]), the reference being to a proportionate coercive force, as Augustine has indicated (*De Genesi ad Litteram*, Bk. XI, chap. xxxvii).

Dionysius. Gregory. St. Augustine.

13. Turning to the third confirmation [*supra*, Section 1, at end], based upon certain Scriptural passages, we reply that, in these passages, that is attributed to God which is His, but that is not denied to men which may be shared by them. Accordingly, Isaias[2] [*Isaias*, Chap. xxxiii, v. 22] exhorts his people to trust in God and in His protection, because he holds that God is the true lord, king and lawgiver, that is to say, lord, king and lawgiver in a superlative and unique sense; but, [in making such an exhortation,] he does not exclude that people's right to have its own human king, a king who in his own proper degree might

Isaias.

[1] [Gregory the Great (*Moralium Libri* and *Liber Regulæ Pastoralis*) was also cited in connexion with the second confirmation. *Vide* Section 1 of this Chapter.—Tr.]

[2] [*Isaias* and *Saint James* are quoted in Section 1 of this Chapter, in the course of the third confirmation of the doubt.—Tr.]

James. also have been lord, &c. Again, it is possible to give a similar interpretation to the passage in *James* [Chap. iv, v. 12], concerning the supreme lawgiver and judge, as is indicated by the words, '[There is one lawgiver, and judge,] that is able to destroy and to deliver'. For these attributes would seem to be proper to God. A satisfactory exposition of this passage may, indeed, be supplied by interpreting the word 'one' as denoting identity rather than singularity, so that the sense would be: he who is lawgiver is also judge; nor should the function of judgment be usurped by one who is not the lawgiver and has not the lawgiver's power. Thus it is that Saint James adds [*ibid.* v. 13]: 'But who art thou that judgest thy brother?'[1] He does not deny, then, that men can be legislators and can pass judgment, but he does reprove those who judge rashly and thus usurp the office of judges and legislators.

To the fourth confirmation [*supra*, this Chapter, Section 1], we shall reply later, in treating of the obligation imposed by human law.

CHAPTER II

IN WHAT MEN DOES THIS POWER TO MAKE HUMAN LAWS RESIDE DIRECTLY, BY THE VERY NATURE OF THINGS?

1. The reason for doubt on this point is the fact that the power in question dwells either in individual men; or in all men, that is to say, in the whole body of mankind collectively regarded.

Reasons for doubt.

The first alternative cannot be upheld. For it is not true that every individual man is the superior of the rest;[2] nor do certain persons, [simply] by the nature of things, possess the said power in a greater degree than other persons [, on some ground apart from general superiority], since there is no reason for thus favouring some persons as compared with others.

The second alternative would also seem[3] to be untenable. For in the first place, if it were correct, all the laws derived from such power would be common to all men. And secondly, [so the argument runs] no source can be found, from which the whole multitude of mankind could have derived this power; since men themselves cannot be that source—inasmuch as they are unable to give that which they do not possess—and since the power cannot be derived from God, because if it

[1] [The Vulgate has 'neighbour'.—Tr.]

[2] [This would seem, in the light of the context, to be the most acceptable interpretation of Suárez's argument at this point, although the Latin text is ambiguous: *quia neque omnes sunt aliorum superiores.*—Tr.]

[3] [Suárez is apparently presenting here the arguments opposed to the very alternative which he nevertheless accepts. (*Vide* the first sentence of Section 3 of this Chapter.) Thus the word *videtur* (would . . . seem) should not be overlooked by the reader.—Tr.]

were so derived, it could not change but would necessarily remain in the whole community in a process of perpetual succession, like the spiritual power which God conferred upon Peter and which for that reason necessarily endures in him or in his successors, and cannot be altered by men.

2. It is customary to refer, in connexion with this question, to the opinion of certain canonists who assert that by the very nature of the case this [legislative] power resides in some supreme prince upon whom it has been divinely conferred, and that it must always, through a process of succession, continue to reside in a specific individual. The Gloss (on *Decretum*, Pt. II, causa VII, qu. i, can. ix) is cited [by way of confirmation]; but the passage cited contains simply the statement that the son of a king is lawfully king, which is a very different matter, nor does it assert that this mode of succession was perpetual among men. Another Gloss (on *Decretum*, Pt. I, dist. x, can. viii) is also cited, because it declares that the Emperor receives his power from God alone. But that Gloss, in its use of the exclusive word 'alone', is intended to indicate simply that the Emperor does not receive his power from the Pope; it is not intended to deny that he receives it from men. For, in this very passage, it is said that the Emperor is set up by the army in accordance with the ancient custom mentioned in the *Decretum* (Pt. I, dist. XCIII, can. xxiv). The said opinion, then, is supported neither by authority nor by a [rational] basis, as will become more evident from what follows.

The first opinion. Gloss.

3. Therefore, we must say that this power, viewed solely according to the nature of things, resides not in any individual man but rather in the whole body of mankind. This conclusion is commonly accepted and certainly true. It is to be deduced from the words of St. Thomas ([I.-II,] qu. 90, art. 3, ad 2 and qu. 97, art. 3, ad 3) in so far as he holds that the prince has the power to make laws, and that this power was transferred to him by the community. The civil laws (*Digest*, I. iv. 1 and I. ii. 2, § 11) set forth and accept the same conclusion. And it is upheld at length by Castro (*De Potestate Legis Poenalis*, Bk. I, chap. i, § *Postquam*), as well as by Soto (*De Iustitia et Iure*, Bk. I, qu. i, art. 3). One may also consult Soto (*ibid.*, Bk. IV, qu. ii, arts. 1 and 2), Ledesma ([*Theologiae Moralis*,] II, Pt. IV, qu. xviii, art. 3, doubt 10), Covarruvias (*Practicae Quaestiones*, Chap. i, [no. 2,] first concl.), and Navarrus (on *Decretals*, Bk. II, tit. 1, chap. xiii, notab. 3, no. 119).

The opinion of the author. 202 St. Thomas. Castro. Soto. Ledesma. Covarruvias. Navarrus.

The basic reason in support of the first part of the conclusion is evident, and was touched upon at the beginning of our discussion, namely, the fact that in the nature of things all men are born free; so that, consequently, no person has political jurisdiction over another person, even as no person has dominion over another; nor is there any

reason why such power should, [simply] in the nature of things, be attributed to certain persons over certain other persons, rather than *vice versa*. One might make this assertion only: that at the beginning of creation Adam possessed, in the very nature of things, a primacy and consequently a sovereignty over all men, so that [the power in question] might have been derived from him, whether through the natural origin of primogeniture, or in accordance with the will of Adam himself. For it is so that Chrysostom (on *First Corinthians*, Homily XXXIV [, no. 5]) has declared all men to be formed and procreated from Adam alone, a subordination to one sole prince being thus indicated. However, by virtue of his creation only and his natural origin, one may infer simply that Adam possessed domestic—not political—power. For he had power over his wife, and later he possessed the *patria potestas* over his children until they were emancipated. In the course of time, he may also have had servants and a complete household with full power over the same, the power called 'domestic'. But after families began to multiply, and the individual heads of individual families began to separate, those heads possessed the same power over their respective households. Political power, however, did not make its appearance until many families began to congregate into one perfect community. Accordingly, since this community had its beginning, not in the creation of Adam nor solely by his will, but rather by the will of all who were assembled therein, we are unable to make any well-founded statement to the effect that Adam, in the [very] nature of things, held a political primacy in the said community. For such an inference cannot be drawn from natural principles, since it is not the progenitor's due, by the sole force of natural law, that he shall also be king over his posterity.

Chrysostom.

The power held by Adam over[t] his descendants.

But, granted that this inference does not follow upon natural principles, neither have we sufficient foundation for the assertion that God has bestowed such power upon that [progenitor], through a special donation or act of providence, since we have had no revelation to this effect, nor does Holy Scripture so testify to us. To this argument may be added the point made by Augustine and noted in our preceding Chapter [Chap. i, sect. 1], namely, that God did not say: 'Let us make man that he may have dominion over men', but rather did He say: [Let us make man that he may have dominion] over other living creatures.[2]

Therefore, the power of political dominion or rule over men has not been granted, directly by God, to any particular human individual.

[1] [The marginal subheading, *Quam potestatem habuit Adamus posteros*, should read: *Quam potestatem habuit Adamus in posteros*, the reading found in the editions of Mayence, 1619 and Paris, 1856.—Tr.]
[2] [Suárez merely paraphrases Augustine's statement in these two passages.—Tr.]

4. From the foregoing, it is easy to deduce the second part of the assertion [at beginning of Section 3], namely, that the power in question resides, by the sole force of natural law, in the whole body of mankind [collectively regarded].

Two standpoints from which the whole multitude of mankind may be regarded.

The proof is as follows: this power does exist in men, and it does not exist in each individual, nor in any specific individual, as has also been shown; therefore, it exists in mankind viewed collectively, for our foregoing division [into the two alternatives] sufficiently covers the case.

However, in order that our argument may be better understood, it must be noted that the multitude of mankind is regarded in two different ways.

First, it may be regarded simply as a kind of aggregation, without any order, or any physical or moral union. So viewed, [men] do not constitute a unified whole, whether physical or moral, so that they are not strictly speaking one political body, and therefore do not need one prince, or head. Consequently, if one regards them from this standpoint, one does not as yet conceive of the power in question as existing properly and formally; on the contrary, it is understood to dwell in them at most as a fundamental potentiality,[1] so to speak.

The multitude of mankind should, then, be viewed from another standpoint, that is, with regard to the special volition, or common consent, by which they are gathered together into one political body through one bond of fellowship and for the purpose of aiding one another in the attainment of a single political end. Thus viewed, they form a single mystical body which, morally speaking, may be termed essentially a unity; and that body accordingly needs a single head. Therefore, in a community of this kind, viewed as such, there exists in the very nature of things the power of which we are speaking, so that men may not, when forming such a group, set up obstacles to that power; and consequently, if we conceive of men as desiring both alternatives—that is to say, as desirous of so congregating, but on the condition (as it were) that they shall not be subject to the said power—the situation would be self-contradictory, and such men would accordingly fail to achieve any [valid end]. For it is impossible to conceive of a unified political body without political government or disposition thereto; since, in the first place, this unity arises, in a large measure, from subjection to one and the same rule and to some common superior power; while furthermore, if there were no such government, this body could not be directed towards one [common] end and the general welfare. It is, then, repugnant to natural reason to assume the existence of a group of human beings united in the form of a single political body,

203

[1] [The Latin has simply *radicaliter*.—Tr.]

without postulating the existence of some common power which the individual members of the community are bound to obey; and therefore, if this power does not reside in any specific individual, it must necessarily exist in the community as a whole.

5. To what has been said above, we should add the statement that the power in question does not reside in the multitude of mankind by the very nature of things in such wise that it is necessarily one sole power with respect to the entire species, or entire aggregate, of men existing throughout the whole world; inasmuch as it is not necessary to the preservation or welfare of nature, that all men should thus congregate in a single political community. On the contrary, that would hardly be possible, and much less would it be expedient. For Aristotle (*Politics*, Bk. VII, chap. iv [, § 7]) has rightly said that it is difficult to govern aright a city whose inhabitants are too numerous; accordingly, this difficulty would be still greater in the case of a kingdom excessively large, and therefore, it would be greater by far (we are referring to civil government) if the whole world were concerned.

Aristotle.

Consequently, it seems to me probable that the power of which we speak never existed in this fashion in the whole assemblage of mankind, or that it so existed for an exceedingly brief period; and that, on the contrary, soon after the creation of the world, mankind began to be divided into various states in each one of which this power existed in a distinct form. Thus it is that Augustine (*On the City of God*, Bk. XV, chap. viii) concludes from the Fourth Chapter of *Genesis*, that Cain, before the Flood, was the first to establish an individual kingdom and commonwealth. Moreover, in another passage of the same work (Bk. XVI, chap. iv), Augustine adds that, according to the Tenth Chapter of *Genesis*, after the Flood, Nemrod was [the first to do so]. For Cain first brought about a division of the perfect community, separating himself from his father's family; and Nemrod did likewise, at a later period, with respect to Noe.

Augustine.

Genesis.

Augustine.

6. Finally, it may be concluded from the foregoing that this power to make human laws of an individual and special nature, laws which we call civil, as if to indicate that they are ordained for one perfect community—it may be concluded, I say—that this power never existed in one and the same form throughout the whole world of men, being rather divided among various communities, according to the establishment and division of these communities themselves. Thus we also conclude that—before the coming of Christ, at least—this civil power did not reside in any one specific man with respect to the whole world. For at no time did all men agree to confer that power upon a particular ruler of the entire world, neither have we any knowledge of its bestowal upon some particular individual by God; inasmuch as such an idea might most easily be entertained with regard to Adam, and we

have already shown it to be inapplicable to him [*supra*, Section 3 of this Chapter]. Finally, as is evident in the light of history, no one has ever acquired such power through war or any other similar means.

As to what should be said, however, with respect to the situation after the advent of Christ, that is a matter which I shall take up in the following Book.[1]

But these statements are not incompatible with what we have already said regarding the *ius gentium*. On the contrary, they serve to confirm those earlier assertions. For even though the whole of mankind may not have been gathered into a single political body, but may rather have been divided into various communities, nevertheless, in order that these communities might be able to aid one another and to remain in a state of mutual justice and peace (which is essential to the universal welfare), it was fitting that they should observe certain common laws, as if in accordance with a common pact and mutual agreement. These are the laws called *iura gentium*; and they were introduced by tradition and custom, as we have remarked, rather than by any written constitution. Moreover, they comprise that twofold body of law—special and common[2]—which Gaius distinguished in the *Digest* (I. i. 9).

The manner in which the precepts of the *ius gentium* were introduced.

CHAPTER III

HAS THE POWER OF MAKING HUMAN LAWS BEEN GIVEN TO MEN IMMEDIATELY BY GOD AS THE AUTHOR OF NATURE?

1. A reason for doubt on this question may lie in the fact that it apparently follows upon what has been said above that this power over an entire community of men assembled together is derived from them as individuals, and through their own consent. For such power springs from the same source as does the very community in which it resides; and that community is welded together by means of the consent and volition of its individual members; therefore, the power in question also flows from those same wills.

A reason for doubt.

204 The major premiss is manifestly true, because, once the community is assumed to exist, it follows that this power likewise exists; for he who gives the form, gives, too, those things which are consequent upon the form; and therefore, whoever is the proximate author of the said community, would seem also to be the author and bestower of its power. But, on the other hand, it may be contended that before men congregate into one political body this power does not reside in the individuals, whether wholly or in part, and that, furthermore, it

[1] [Not included in these *Selections*.—Tr.]

[2] [That is to say, the law of each state and the law common to all men.—Tr.]

does not exist even in the rough mass (so to speak), or aggregate, of mankind, a point which was made in the preceding Chapter; and therefore, the power can never flow immediately from men.

The common and true opinion.

2. On this question, the common opinion appears to be that the said power is given immediately by God, as the Author of nature, in such a way that men in a sense dispose the matter involved and render the recipient capable of wielding the power, yet the form is imparted, as it were, by God, Who is the Giver of the power. Such is the view suggested by Cajetan (*Opuscula*, Vol. I, tract. ii: *De Potestate Papae*, Pt. II, chap. x, reply to 2d confirmation [chap. ix, *ad id vero*]), by Covarruvias (*Practicae Quaestiones*, Chap. i [, no. 6]), by Victoria, more at length, in the *Relectio* that treats of this power [*De Potestate Civili*], and by Soto (*De Iustitia et Iure*, Bk. IV, qu. ii, art. 1).

Cajetan.

Covarruvias.

Victoria.

Soto.

Moreover, one might adduce as an argument the fact that, as I remarked above,[1] if we assume that men have willed to gather together into one political community, it is not in their power to set up obstacles to this jurisdiction; and this is an indication that the jurisdiction does not flow proximately from their wills as from a true efficient cause. Thus, in regard to matrimony, we rightly infer that the husband is the head of the wife by grant of the Author of nature Himself, and not by the will of the wife; for though they may contract the marriage by their own will, nevertheless, if they do contract it, they cannot prevent the establishment of this superiority.

To the Romans, xiii.

This view is confirmed by Saint Paul, who says (*To the Romans*, Chap. iii [Chap. xiii, vv. 1, 2]): '[. . .] there is no power but from God [. . .] and therefore he that resisteth the power, resisteth the ordinance of God'; therefore, the power in question is also of God; and consequently, it is derived immediately from Him, since it has no other prior, or more immediate, source.

The acts of legislative power.

3. Secondly, it is held that this power embraces several acts which appear to transcend human authority as it exists in individual men; and this is an indication that such power is not from them, but from God. The first of these acts is the punishment of malefactors, extending even to the death penalty. For, since God alone is the Lord of life, it would seem that He alone could have granted the power [to impose this penalty]. Thus it is that Augustine has said (*De Natura Boni, Contra Manichaeos*, Chap. xxxii): 'There is no power to hurt unless it comes from God.' The second act is the establishment, in a certain matter, of the mean of virtue necessary to its rectitude.[2] Thirdly, to this [righteous] state has been added the

Augustine.

[1] [*Supra*, p. 364, § 3, chapter i, of this Book.—Tr.]

[2] [For example, the legislator may order certain acts to be performed as acts of the virtues of temperance, justice, and so on.—Reviser.]

effect of binding the conscience, as we shall see below, and this effect would seem to pertain most especially to divine power. The fourth act is the infliction of punishment for injuries done to individuals; for it has moreover been written (*Romans*, Chap. xii [, v. 19]): '*Revenge* is mine; I will repay, saith the Lord.'[1] This, then, is an indication that the power in question is divine; for otherwise, men would have been able to seize for themselves some other means for the avenging of injuries, and that would be opposed to natural justice.

Romans, xii.

4. One part of this opinion[2] is clear and beyond dispute; but another requires explanation.

The first part is the contention that the power under discussion comes from God as its primary and principal Author. For this appears to correspond with the clearly expressed opinion of Paul and to be sufficiently well proved by the arguments already set forth. Moreover, since this power is a part of the nature of things, and since—whether it be physical or moral—it is in an absolute sense a good thing, extremely valuable and necessary for the good estate of human nature, it therefore must flow from the Author of that nature. Finally, since the persons who wield this power within a human community are the ministers of God, they accordingly administer a power received from God; and therefore, God is not only the chief Author of this power but its exclusive Author.

The other part of this opinion, however, calls for an explanation, as to how God may be said to confer the power in question immediately.

In what way the afore-mentioned power is given by God.

5. With respect to this point, I shall say briefly that, in the first place, this power is given by God as a characteristic property resulting from nature, just as the bestowal of the form involves the bestowal of that which is consequent upon the form.

The first proof of this assertion is the fact that God does not give this power by a special act or grant distinct from creation; for if He did so, that grant would necessarily be made manifest through revelation, and this is clearly not the case, since if it were, such power would not be natural. Therefore, the power is given as a characteristic property resulting from nature, that is to say, resulting through a dictate of natural reason, since the latter shows that God has sufficiently provided for mankind, and has therefore given it the power necessary to its
205 preservation and proper government.

When the afore-mentioned power manifests itself.

6. In the second place, I declare that this power does not manifest itself in human nature until men gather together into one perfect community and are politically united. My assertion is proved as follows: the said power

[1] [The words *dicit Dominus* (saith the Lord) are not a part of the quotation in the Latin text.—Tr.]

[2] [i.e. the opinion in Sect. 2, *supra*, p. 378.—Tr.]

resides not in individual men separately considered, nor in the mass or multitude of them collected, as it were, confusedly, in a disorderly manner, and without union of the members into one body; therefore, such a political body must be constituted, before power of this sort is to be found in men, since—in the order of nature,[1] at least—the agent of the power must exist prior to the existence of the power itself. Once this body has been constituted, however, the power in question exists in it, without delay and by the force of natural reason; and consequently, it is correctly supposed that it exists as a characteristic property resulting from such a mystical body, already constituted with just the mode of being [that it has] and not otherwise. Wherefore, even as man—by virtue of the very fact that he is created[2] and has the use of reason—possesses power over himself and over his faculties and members for their use, and is for that reason naturally free (that is to say, he is not the slave but the master of his own actions), just so the political body of mankind, by virtue of the very fact that it is created in its own fashion, possesses power over itself and the faculty of self-government, in consequence whereof it also possesses power and a peculiar dominion over its own members. Moreover, by a similar process of reasoning, just as freedom [of will] has been given to every man by the Author of nature, yet not without the intervention of a proximate cause—that is to say, the parent by whom [each man] is procreated—even so the power of which we are treating, is given to the community of mankind by the Author of nature, but not without the intervention of will and consent on the part of the human beings who have assembled into this perfect community.

Nevertheless, just as, in the former case, the will of the parent with respect to generation only is necessary, but no act of will endowing the child with freedom, or with the other natural faculties which are not essentially dependent upon a special act of will on the part of the parent, being on the contrary a natural consequence; even so, with respect to the matter under discussion, human will is necessary in order that men may unite in a single perfect community, but no special act of volition on their part is required to the end that this community shall possess the said power, which arises rather from the very nature of things, and from the providence of the Author of nature, so that in this sense it is rightly said to have been conferred immediately by Him.

7. I shall add that, thirdly, although this power is (so to speak) a natural attribute of a perfect human community, viewed as such, nevertheless, it does not reside immutably therein, but may be taken from that com-

The afore-mentioned power is not immutable.

[1] [The order of nature, that is, the order of reality, as distinguished from the order of thought.—Reviser.]
[2] [Reading *creatur*, with the Paris edition of 1856; not *creditur*, the reading of our own Latin text.—Tr.]

munity—by its own consent or through some other just means—and transferred to another [seat of authority].

This fact is sufficiently evidenced by usage, and it will, moreover, be explained more fully by the inferences to be drawn below. First, its truth may be demonstrated by means of the example already adduced, that is to say, by applying this example in due proportion. For freedom from servitude is a natural property of man, and is therefore wont to be described as an effect of natural law; yet man can by his own volition deprive himself of this property, or can even for a just cause be deprived thereof and reduced to slavery; and therefore, in like manner, a perfect human community, though by nature it may be free and may possess within itself the power to which we refer, nevertheless can be deprived of that power in one or another of the ways already mentioned. Thus it may be considered that, even though the physical properties emanating from nature are wont to be immutable from the standpoint of nature, nevertheless, these quasi-moral properties—which are like titles of ownership, or rights—can be changed by means of a contrary will, in spite of their derivation from nature; just as [, to be sure,] even those physical properties which have the contrary quality, or are derived from some contrary disposition, are sometimes liable to change, as is evident.

8. A second proof of the same contention is based upon a certain similarity and, from another point of view, upon a dissimilarity, between the power in question, and that which is derived from a special divine disposition—such a power, for example, as that of the Pope.

For though this power has been bestowed by Christ upon a specific individual duly chosen, it may be renounced by the Pope himself, who may deprive himself thereof, if he so wishes; at least, he may do so if the Church accepts the resignation, as I here assume. In this respect, then, there exists a certain similarity, since the human community, too, though it has received this power from God, may, if it wishes, deprive itself thereof.

A dissimilarity exists, however, as to mode. For in the first place, the Pope, once he has been elected, cannot for any cause whatsoever be deprived of his power or dignity, by the whole body of mankind, if he himself is unwilling. By Christ alone, Who gave that power, can he be so deprived. The commonwealth, on the other hand, can on some occasions, and for just cause, be divested of its liberty through some coercive measure, such as a just war. Again, a dissimilarity exists because the papal power cannot be so changed as to be transferred by one person to a community, since it is not within the power of man to alter the monarchical government of the Church; whereas
206 the human community, on the other hand, may transfer its own

jurisdiction to a single individual or to some other community, as will be made clear. Thus the power under discussion is not only mutable, but even more mutable [than that derived from a divine disposition], and more dependent upon human will.

In the third place, a reason for this difference may be found in the fact that those things which are the result of a special disposition are dependent upon the will of him who orders the disposition, a will which cannot be changed by his inferiors; whereas the power in question results, not from such a disposition, but from nature, and is therefore bestowed in such form as befits the rational nature and accords with right reason and prudence. And natural reason declares that it is not necessary to rational nature—nor even conformable to it—that the said power should reside in an immutable form within the community as a whole, since the latter, so viewed, and without the addition of any specific qualification or the making of any change, would scarcely be able to put this power to use; and therefore, the power is so given by nature and by the Author of nature, as to be capable of undergoing such change as may be expedient for the common good.

CHAPTER IV

COROLLARIES FROM THE DOCTRINE SET FORTH ABOVE

1. From our discussion in the preceding Chapter, we may draw certain inferences which will throw a great deal of light on all that we have to say.

The first inference is this: although the power in question is in an absolute sense an effect of the natural law, its specific application as a certain form of power and government is dependent upon human choice. This inference may be explained as follows: political government, according to the doctrine set forth by Plato in the Dialogue on *The Statesman*, or *On Kingship*[1] [Chap. xxxi = p. 291 D], and in the *Republic* [Bk. I, chap. xii; Bk. IV, *passim*, especially at end = p. 445 D E], as well as by Aristotle in the *Politics* (Bk. III, chap. v), and in the *Ethics* (Bk. VIII, chap. x), takes three simple forms. These forms are: monarchy, or government by one head; aristocracy, or government by the few and the best; and democracy, or government by the many and the common people. From these, it is possible to make up various mixed forms of government, that is to say, forms compounded of these simple ones by drawing either from all three or from two of them. Bellarmine (*De Potestate Summi Pontificis*, Bk. I, from the beginning and through several Chapters) may be consulted, for he has treated

Plato.

Aristotle.

Bellarmine.

[1] [This is the usual English translation of the Greek title for this Dialogue, referred to in our Latin text as *Dialogo Civili, seu de Regno*.—TR.]

of the matter at length and very satisfactorily. Thus men are not obliged, [simply] from the standpoint of natural law, to choose any given one of these forms of government.

We grant, indeed, that monarchy is the best among the three; as Aristotle demonstrates very fully and as one may infer from the government and providential plan of the universe in its entirety, the government and plan which ought to be the most excellent, so that Aristotle concludes (*Metaphysics*, Bk. XII, at end [= p. 1076 A]): 'Therefore, let there be one prince.' This conclusion is also supported by the example of Christ the Lord in the institution and government of His Church. And, finally, the prevailing usage among all nations is an argument in favour of the same view. Although—as I was saying—we grant this to be true, nevertheless, other forms of government are not [necessarily] evil, but may, on the contrary, be good and useful; so that, consequently, men are not compelled by the sheer force of the natural law to place this power either in one individual, or in several, or in the entire number of mankind; and therefore, this determination [as to the seat of the power] must of necessity be made by human choice.

Monarchy is the best form of government.

Aristotle.

Moreover, experience similarly reveals a great deal of variety in connexion with this [most excellent type of government]. For monarchies may be found in this place or in that, and rarely in their simple form; since—given the frailty, ignorance and wickedness of mankind—it is as a rule expedient to add some element of common government which is executed by a number of persons, this common element being greater or smaller according to the varying customs and judgment of men. Accordingly, this whole matter turns upon human counsel and human choice.

We infer, then, that by the nature of things, men as individuals possess to a partial extent (so to speak) the faculty for establishing, or creating, a perfect community; and, by virtue of the very fact that they establish it, the power in question does come to exist in this community as a whole. Nevertheless, natural law does not require either that the power should be exercised directly by the agency of the whole community, or that it should always continue to reside therein. On the contrary, it would be most difficult, from a practical point of view, to satisfy such requirements, for infinite confusion and trouble would result if laws were established by the vote of every person; and therefore, men straightway determine the said power by vesting it in one of the above-mentioned forms of government, since no other form can be conceived, as is easily evident to one who gives the matter consideration.

2. The second inference [to be drawn from the preceding Chapter] is as follows: civil power, whenever it resides—in the right

and ordinary course of law—in the person of one individual, or prince, has flowed from the people as a community, either directly or indirectly; nor could it otherwise be justly held.

When the civil power flows from the community.

This is the common opinion of the jurists, as indicated by their comments on certain laws of the *Digest* (I. iv. 1 and I. ii. 2). Moreover, the same conclusion is upheld in these laws themselves; by Panormitanus and other canonists (on *Decretals*, Bk. IV, tit. xvii, chap. xiii); by St. Thomas (I.–II, qu. 90, art. 3 and qu. 97 [, art. 3]); by Cajetan (in the above-cited work, *De Potestate Papae*, Pt. II, chaps. ii and x [chap. ix]); by Victoria (in his *Relectio* on this very subject [*De Potestate Civili*]); and by other authorities to whom reference has been made.

Panormitanus. St. Thomas. Cajetan. Victoria.

207

A reason for this view, supplied by what we have said above, is the fact that such power, in the nature of things, resides immediately in the community; and therefore, in order that it may justly come to reside in a given individual, as in a sovereign prince, it must necessarily be bestowed upon him by the consent of the community.

[This] power, in the very nature of things, is lodged immediately in the community.

Again, the same view may be explained by means of a comprehensive enumeration of the various aspects of the matter.[1]

For [in the first place,] the power in question may be considered as having been bestowed upon kings immediately by God Himself. Yet such a bestowal, although it has sometimes occurred—as it did in the case of Saul and in that of David—has nevertheless been extraordinary and supernatural in so far as concerned the mode [of imparting power]. In the common and ordinary course of providence, however, such cases do not come to pass, since—in the natural order—men are governed in civil affairs not by revelations, but by natural reason. Neither may a valid objection be based upon the assertions in certain Scriptural passages, as in the Fourth Chapter of *Daniel*, that God gives kingdoms and changes them at His will; or as in the Forty-fifth Chapter of *Isaias*, which declares that God made Cyrus a king; wherefore Christ said [to Pilate] (*John*, Chap. xix [, v. 11]): 'Thou shouldst not have any power against me, unless it were given thee from above.' For the meaning of these passages is simply that all of the events mentioned come to pass only through the special providence of God, Who either ordains or permits them, as Augustine has said (*On the Gospel of John*, Tract. VI [, chap. i, § 25] and *Against Faustus*, Bk. XXII, chap. lxxiv); but this fact does not prevent such [bestowals and transferences of power] from being executed by human agency; just as all

The first title of royal power is derived immediately from God.

Daniel, iv. *Isaias*, xlv. *John*, xix. Augustine.

[1] [i.e., the various titles to monarchical power. This enumeration extends throughout the remainder of Section 2, and through the whole of Sections 3 and 4.—Tr.]

the other effects wrought through secondary causes are attributed primarily to the providence of God.

3. A second possibility is that this power may reside in a king through hereditary succession. Some jurists, indeed, are of the opinion that such was the case from the very beginning; but others rightly point out that succession necessarily presupposes the existence of dominion or power in the person succeeded, so that we must of necessity trace it to some one who was not the successor of another, since the succession cannot reach back *ad infinitum*. Therefore, with respect to that first[1] possessor, we ask whence he has derived the kingdom and power, since he does not possess it inherently and by natural law. Title by succession, then, cannot be the primary source of this power as it resides in the sovereign. Therefore, the first possessor must have derived the supreme power directly from the commonwealth, while his successors must derive it from that same source indirectly, [yet] fundamentally. Moreover, since any possession passes into the hands of a successor with its accompanying obligations, the conditions attaching to the kingly power when it was transmitted by the commonwealth to the first king, pass to his successors, so that they possess that power together with the original obligations.

A second title of royal power: hereditary succession.

4. A third title of royal power is wont to arise on the basis of war, which must be just war in order to confer a valid title and dominion. Consequently, many persons believe that kingdoms were originally introduced through tyranny rather than true power. This belief is attested by Alvaro Paez (*De Planctu Ecclesiae*, Bk. I, chap. xli), by Driedo (*De Libertate Christiana*, Bk. I, chap. xv), and by Petrus Bertrandi (in his treatise *De Origine et Usu Iurisdictionis*, Qu. 1). Accordingly, when the kingly power is held solely through unjust force, there is no true legislative power vested in the king; yet it is possible that, in the course of time, the people may give their consent to and acquiesce in such sovereignty, in which case the power in question is [once more] traced back to an act of transmission and donation on the part of the people, It may sometimes happen, however, that a state not previously subject to a king is subjected through a just war. But such an event is always an incidental circumstance (as it were) of the punishment of some wrongdoing; so that the state in question is bound to obedience and to acquiescence in such subjection; and therefore, this mode [of acquiring kingly power] also includes, in a sense, the consent—whether expressed or [implicitly] due—of the state.

A third title of royal power: a just war.

Alvaro Paez. Driedo. Petrus Bertrandi.

However, we are now treating of this power chiefly in so far as it

[1] [Reading *primo* (the unaccented adjective) in accordance with the 1619 and 1856 editions, instead of *primò* (the accented adverb).—Tr.]

is inherently capable of being introduced and bestowed upon one man. And finally, if we give the matter sufficient consideration, we shall find that when such subjection to one king is imposed by means of a just war, it is presupposed that he possesses the royal power by virtue of which he is able to declare that war; and this power is simply a just extension (so to speak) of the power of his kingdom; so that such kingly power is always to be traced back to some individual who attained it, not through war, but through just election or the consent of the people.

We rightly conclude, then, after this comprehensive enumeration [of the various titles to royal power], that the said power has been derived [in every case] by the prince from the state.

5. It may, indeed, be objected that from our conclusion it follows that this royal power pertains exclusively to human law, a deduction which would seem to be contrary to the language of the Scriptures: 'By me, kings reign [. . .]' (*Proverbs*, Chap. viii[, v. 15]); and again, 'For he is God's minister,' &c. (*Romans*, Chap. xiii [, v. 4]).

Proverbs, viii.

Romans, xiii.

The royal power viewed formally as such pertains to human law.

Another deduction from the same conclusion is that the kingdom must be superior to the king, since it has given the king his power; whence a further inference is drawn, namely, that the kingdom may, if it shall so choose, depose or change its king, a deduction which is altogether false.

Consequently, Victoria (above cited [*De Potestate Civili*]) held that the royal power should be described absolutely as derived from divine law and as having been given by God, with the intervention of human choice. On the other hand, Bertrandi, Driedo (above cited) and Castro (*De Potestate Legis Poenalis* [Bk. I, chap. i]) uphold the opposite doctrine, which is doubtless the true doctrine, if one is speaking in a formal sense of the royal power as such and in so far as it exists in one man. For this governing power, regarded from a political viewpoint and in its essence, is undoubtedly derived from God, as I have said; yet the fact that it resides in a particular individual results—as has been demonstrated—from a grant on the part of the state itself; and therefore, in this sense, the said power pertains to human law. Moreover, the monarchical nature of the government of such a state or province is brought about by human disposition, as has already been shown; therefore, the principate itself is derived from men. Another proof of this derivation is the fact that the power of the king is greater or less, according to the pact or agreement between him and the kingdom; therefore, absolutely speaking, that power is drawn from men.

Bertrandi. Driedo. Castro.

208

6. The passages cited from Holy Scripture, however, are to be interpreted as having two meanings. One is as follows: the power in question, viewed in itself, is derived from God; and it is just and in conformity with the divine will. The other meaning is this: assuming

that the said power has been transferred to the king, he is now the vicar of God, and natural law makes it obligatory that he be obeyed. The case is similar to that of a private individual who surrenders himself by sale to be the slave of another; so that the resulting power of *dominium* has, in an absolute sense, a human derivation, yet the slave is [also] bound by divine and natural law—once we assume that the contract has been made—to render obedience to his master.

Thus the reply to the confirmation [of the opposing view] consists clearly in a general denial of the [second] deduction [and its corollary].[1] For, once the power has been transferred to the king, he is through that power rendered superior even to the kingdom which bestowed it; since by this bestowal the kingdom has subjected itself and has deprived itself of its former liberty, just as is, in due proportion, clearly true in the case of the slave, which we have mentioned by way of illustration. Moreover, in accordance with the same reasoning, the king cannot be deprived of this power, since he has acquired a true ownership of it; unless perchance he lapses into tyranny, on which ground the kingdom may wage a just war against him, a point which we consider elsewhere.[2]

7. A third inference to be drawn from our preceding Chapter[3] is as follows: in view of the nature of things—that is to say, according to the natural and ordinary course of human events—there are no civil laws established universally for the whole world and binding upon all men.

There are no laws established universally for the whole world, which are binding upon all.

This fact is evident, indeed, from the term itself, since we are speaking of human laws as strictly distinguished from the *ius gentium*, and therefore called civil, for the reason that they are peculiar to one city state or one nation, as the *Digest* (I. i. 9) declares. We are furthermore speaking of laws which can be established by natural power, omitting for the present the consideration of supernatural power. Accordingly, such laws demand, as by an intrinsic condition, that they should not be of a universal nature.

The reason [in support of our third inference] is the fact that *a priori* there is in existence no legislative power with jurisdiction over the whole world, that is, over all mankind; and therefore, no civil law can be thus universal. The consequent is clearly true, since no law extends its force beyond the limits of the legislator's jurisdiction. 'For we know', says Paulus [*Digest*, II. i. 20], 'that every law is addressed to those who are under the jurisdiction of that law'; since 'he who

[1] [i.e. the deduction 'that the kingdom must be superior to the king', and the consequent inference 'that the kingdom may, if it shall so choose, depose or change its kings'. *Vide* the second paragraph of Section 5 of this Chapter, p. 386.—Tr.]

[2] [*Defensio Fidei Catholicae*, Bk. VI, chap. iv, *infra*, p. 705, and in Disp. XIII of *De Bello*, Sec. viii, *infra*, pp. 854–5.—Tr.]

[3] [*Vide* the first sentence of this Chapter, *supra*, p. 382.—Tr.]

pronounces judgment outside the territory [of his jurisdiction] may be disobeyed with impunity,' as the laws declare; and therefore, much less are we bound to obey, outside his own territory, the person who decrees law, or legal precepts [for that territory]. The antecedent, moreover, is manifestly true in the light of what has already been said. For the power in question does not reside in the whole community of mankind, since the whole of mankind does not constitute one single commonwealth or kingdom. Nor does that power reside in any one individual, since such an individual would have to receive it from the hands of men, and this is inconceivable, inasmuch as men have never agreed to confer it [thus], nor to establish one sole head over themselves. Furthermore, not even by title of war, whether justly or unjustly, has there at any time been a prince who made himself temporal sovereign over the whole world. This assertion is clearly borne out by history. And therefore, the ordinary course of human nature points to the conclusion that a human legislative power of universal character and world-wide extent does not exist and has never existed, nor is it morally possible that it should have done so.

However, an objection with respect to the emperor would straightway present itself [to those who support the view above set forth]. I shall deal with this objection in the following Book.[1]

Thus the whole world—even though it be governed and bound by civil laws, as is morally certain in the case of all nations enjoying any form of civil government and not entirely barbarous—is nevertheless not ruled throughout by the same laws; on the contrary, each commonwealth or kingdom is governed, in accordance with an appropriate distribution, by means of its own particular laws.

And as to how the power in question finds a place within the Church of Christ, or whether it has been specifically instituted therein, these are questions which we shall discuss later.

8. By way of a fourth inference, we may briefly deduce from the discussion [in the preceding Chapter], the ways in which this power to make human laws may be imparted.

In what ways this power of making [human] laws may be imparted.

For it should be pointed out that, originally, the said power can be received directly from God; since there is no other possible origin for it—as we have shown in that previous Chapter—and since God, as the Author of all good things, is therefore the Author of all powers and especially of this power. For the latter most particularly rests upon divine providence, being necessary to good moral conduct, and to the proper preservation and government of mankind. Consequently, the said power must have been transferred to some possessor immediately 209

[1] [Bk. IV, chap. iii, which is not included in these *Selections*.—Tr.]

by God; for if it resides mediately in any being, it necessarily resides immediately in some other being, since it cannot be traced back *ad infinitum*.

There are two ways, however, in which this power may be derived from God; that is to say, it may be derived naturally, as from the Author of nature, or supernaturally, as from the Author of grace. We shall treat of the latter mode in Book Five,[1] but the first has been sufficiently expounded in our previous discussion.

Accordingly, it is furthermore clear that the power in question may [also] be received immediately from men, and mediately from God. Indeed, such is usually the case with regard to natural power. For though it resides immediately in the community, it is conferred through the latter upon kings or princes or senators, since it is rarely or never retained in the community as a whole in such a way as to be administered immediately thereby. Nevertheless, after that power has been transferred to a given individual, and even though it may pass as the result of various successions and elections into the possession of a number of individuals, the community is always regarded as its immediate possessor, because, by virtue of the original act of investiture, it is the community that transfers the power to the other possessors. The case is similar to that of the papal power which, in spite of the fact that it is transferred to various persons in turn, as the result of various elections, comes always to every one of these persons from God, its immediate source.

9. But we must distinguish at this point between two customary modes in which any power may be held; that is to say, it may be held as ordinary, or as delegated power.

For what we have said above holds true with respect to ordinary power; since such power is indeed derived immediately from God, in the case of the community, and transferred by the community to the prince in exactly the same way, so that he wields this power as its proper owner and as one entitled to it by virtue of his peculiar office.

With respect to the second mode, however, a question may be raised as to whether such power can be delegated. That question is suggested by Bartolus (on *Digest*, I. i. 9, qu. 2 at beginning, subques. 5, no. 20) and by Panormitanus (on *Decretals*, Bk. V, tit. xxxix, chap. liii). Moreover, this doubt may have reference to all human legislative power, both supernatural and natural and with respect to every status. Such would indeed seem to be the scope of the question as it is raised by the authors above-mentioned. These authorities lay down without qualification the doctrine that the said power is capable of being delegated; a conclusion drawn by Panormitanus from the following phrase in the afore-cited Chapter of the *Decretals* [*ibid.*]: 'Certain

Bartolus.

Panormitanus.

Panormitanus.

[1] [Not included in these *Selections*.—Tr.]

citizens of Pisa, deputed by popular power to promulgate the statutes of the city', &c. The same inference is customarily derived also from the first law of the *Code* [I. i. 8, § 33].

10. But we must note that there are two ways in which this commission or delegation may take place.

First, there may be a delegation of power to frame a law, decreeing whether or not it is just, useful or necessary, and in what terms it shall be incorporated; but the power of the delegate does not extend to the ability to endow the law with binding force nor, consequently, to the ability to promulgate it as law. In this sense, it is manifest that the power in question can be delegated; although, in point of fact, this constitutes a delegation, not of jurisdiction, but simply of a form of ministry that requires knowledge and skill. This kind of delegation, then, would seem to be effected by way of consultation, as it were. And speaking from this standpoint, the said delegation takes place daily. Indeed, it would hardly be possible, otherwise, for laws to be made by princes, since the latter could not accomplish unaided all that is necessary to the process of legislation. Moreover, the laws cited above, if duly examined, prove this point and no more.

What power is capable of being delegated.

From the other standpoint, then, we have true delegation when the promulgation of a law is entrusted to any person in such a way that he is able to give it authority and validity, by his own will and independently of the confirmation or approval of the delegating party. This mode of delegation is neither so frequently nor so easily employed [as the first mode]. Accordingly, Bartolus (in the passage cited above) makes a distinction between the community and the prince, saying that the community may delegate this power when holding it in its ordinary phase and when able to wield it in accordance with the community's own choice and will; whereas the princes and judges to whom this jurisdiction has been entrusted—continues Bartolus—may not delegate it; because, in the first place, their [personal] activities are required when this charge is committed to them, so that they may not transfer the said charge to another (as is argued in *Digest*, I. xxi. 1), and furthermore because the power in question would seem to exist in those [princes and judges] solely in a delegated form and therefore may not be subdelegated by them.

Bartolus.

11. However, passing over the first member [of Bartolus's distinction], which is clearly valid, we find that the second requires explanation.

For if it is understood as referring to the emperor, to kings, and to other princes, into whose hands this power of the state has been absolutely transferred, a false doctrine is involved; since in the case of such princes the power in question is not delegated but ordinary, inasmuch as it is perpetual and pertains to them by virtue of their

office. Moreover, these princes may grant that power in its ordinary form to certain inferior states or rulers; why, then, may they not transfer also the function of delegating the same power? For in truth, there is no obstacle, in so far as concerns the power itself, which renders it incapable of being delegated. Bartolus himself upholds this supposition; and its truth is rendered still more clear by the fact that any power of a purely jurisdictional nature—such as the power under discussion—is capable of being delegated. Accordingly, the transfer of the said power from the state to the prince is not a delegation but a transfer (as it were), that is to say, an unlimited bestowal of the whole power which [formerly] resided in the community; and therefore, just as it was possible for the community to delegate that power, so also is it possible for the prince to make a similar delegation. Neither is the said power committed to him in such a way as to require his [personal] activities any more truly than this requirement is made in the case of the community. On the contrary, the power is granted to him absolutely, to be used by him personally or through agents, in that way which seems most expedient to him. Moreover, in the light of this same reasoning, the Pope, too—and not only the Pope but bishops, also—may delegate their legislative power whenever they are legislators with ordinary power; so that the arguments adduced above are [likewise] valid with respect to them.

12. Thus the opinion set forth by Bartolus applies solely in the case of those magistrates and judges to whom the power in question has been delegated by the supreme sources of power. For the arguments advanced by Bartolus are valid only in those cases. To be sure, since he refers particularly to communities, a verification of his opinion may be found in those commonwealths which are free in fact and which retain in themselves the supreme power, though they commit the task of legislation to a senate, or to a leader, [and in the latter case,] either to the leader alone or to him in association with the senate. For such legislators are perhaps simple delegates; and they will consequently be unable to delegate [, in turn,] their own power, unless this very ability is expressly provided for in the delegation [of power to themselves], or unless it is rendered clear by the light of custom that the power in question has been committed to them with that provision, a supposition which relates to fact rather than to law, so that we cannot make a more definite assertion as to this point. Furthermore, we are for the same reason unable to make any statement with regard to the actual delegation of this power, that is to say, any statement as to the persons in whom such delegated power may reside; for this is a matter which depends upon the free exercise of the will, and concerning which nothing is decreed by the common law.

What power is incapable of being delegated.

CHAPTERS V–XXXI

Omitted from these *Selections*

334

CHAPTER XXXII

ARE THE MUNICIPAL LAWS OF ANY KINGDOM OR DOMAIN BINDING ON THE MEN OF THAT DOMAIN, WHEN THEY ARE DWELLING OUTSIDE ITS TERRITORIAL LIMITS?

1. There are four ways in which any person may be related to a given domain or diocese: first, as a permanent inhabitant[1] thereof, actually living and residing therein; secondly, at the opposite extreme, as one who has neither of these relations with the domain in question; thirdly, as a permanent inhabitant of this domain, having his domicile therein, but dwelling abroad at the time; fourthly, as being present in the said domain, but having neither domicile nor origin therein.

There is no occasion for dispute with regard to the first and second situations. For, as to the first, what was said in the preceding Chapter[2] has special application, since all the elements necessary for the actual status of a subject and consequently for the binding obligation of law are present in this first case. In the second situation, on the other hand, it is clear that there is no possibility of legal obligation, because there is no title existing under which the status of a subject may be imposed. But in connexion with the third and fourth, there are two doubtful questions which must be discussed.

2. The first question is stated in the title of this Chapter. There is indeed cause for the doubt indicated therein, since the subject, although he is actually living or travelling outside the boundaries of his own state, always remains a subject, as long as he does not change his domicile, and since we have already said[3] that the law binds all subjects and all parts of the community, wherefore the law is binding, even in the case in question. The confirmation of this view is drawn, first, from an argument based on [the absurdity of] the converse supposition: for an inhabitant of another kingdom, while dwelling in this one, is not bound to observe the laws of the latter kingdom, a fact which seems to be expressly defined in the *Decretals* (Bk. V, tit. xxxix, chap. xxi); and therefore, he must be under the obligation of observing the laws of his own domain, since if he were not so bound he would be freed, solely on account of his absence, from the obligation of obeying the laws of either country, an assumption which is evidently absurd.

The reason for the doubt.

Decretals.

The second confirmation of the same view is that if a bishop makes a rule for the diocese in question, ordering for example that all persons subject to him, who enjoy a benefice within that diocese, must reside therein during a given period of time under pain of a given

[1] [*incola*.—Tr.]
[2] [Not included in these *Selections*.—Tr.]
[3] [Bk. III, chap. xxxi of *De Legibus*, which is not included in these *Selections*.—Tr.]

punishment or censure, then he so binds the holders of such benefices, wherever they may be, that if they do not return to the diocese within the prescribed time, they incur the said penalty or censure, as a general rule, apart from ignorance of the order on their part, or inability to comply therewith. Hence, a provincial statute is binding upon those belonging to a diocese, even while they are travelling elsewhere; and therefore, the same is true of any similar law.

3. Nevertheless, it must be stated, that no law is binding outside the limits of the territory of the superior or prince by whom it is decreed; so that the inhabitants of that country, generally speaking, do not sin if they violate the law in question while they are outside this territory. Such is the common opinion of the Doctors on the *Sext* (Bk. I, tit. II, chap. ii) and on the *Decretals* (Bk.V, tit. XXXIX, chap. xxi); of Sylvester (on word *excommunicatio*, Pt. II, no. 7); as also of Angelus de Clavasio and the other summists (on word *lex*); and of Covarruvias (on *Sext*, Pt. I, § 10, no. 3). This conclusion is derived from the passage in the *Sext* already cited (Bk. I, tit. II, chap. ii), in which it is stated that one who is living outside a particular diocese and disobeys a law made by the bishop thereof, does not therefore incur the sentence imposed by that law. However, the reply may be made that in the passage under discussion, the reference is not to the binding authority of the law, but rather to the censure, and that in the latter case the principle involved is different; for the imposition of a censure pertains not to the directive, but to the coercive power of the law, and therefore is not a practice to be extended outside of the territorial limits, since the superior or judge may not punish outside of the territory, although he may issue orders and impose obligations. This would appear to be the meaning of the Pope when he adds, in explanation of the above-mentioned passage (*Sext*, *ibid.*), these words: 'since he who pronounces judgment outside the territory [of his jurisdiction] may be disobeyed with impunity'; for pronouncing judgment is the same as passing a sentence. Nevertheless, the intention of the Pope was doubtless to assert that the statute involved was not [actually] violated by the subject in such a situation; that it is for this reason that the subject does not incur a censure; and that, therefore, even the directive force [of the law] would not be binding in the said situation. Moreover, the person who does not obey the statute, under the circumstances supposed, is not contumaciously disobedient to the Church; and this in turn is an indication that the person in question is not bound by that statute, even with respect to its directive force. The truth of the antecedent is evident, since if the said subject were contumacious he might accordingly be excommunicated, and consequently would incur a legal censure. For excommunication, to follow the more

The negative conclusion: this is the opinion commonly held.

Sext.
Decretals.
Sylvester.
Angelus.
Covarruvias.

probable opinion, may be inflicted upon an absent subject, even though he be dwelling in foreign territory, provided a sufficient cause for censure is assumed to exist; and contumacy is a sufficient cause, according to the passage (*Matthew*, Chap. xviii [, v. 17]): 'If he will not hear the church, let him be to thee as the heathen and publican'. Therefore, just as [liability to] a censure does not bind an absent person, neither does a law. It clearly follows that, although the statute in question may have been published without any provision as to censure or penalty, but simply with the force of a directive law binding in conscience, nevertheless, it will not be binding upon absent subjects, since its power to lay an obligation upon the conscience is not enlarged by reason of the censure [of the court]. For the imposition of a censure rather assumes the existence of jurisdiction and the power to bind; and when a censure is attached, the jurisdiction [of the law] is not for that reason extended[1] or restricted. Thus, from the text cited, the best argument may be drawn as to any law proceeding from a power limited to a definite territory; and whether this law be ecclesiastical or civil, the same conclusion in due proportion holds true.

4. But all the authorities do not agree as to the rational basis for the assertion in question.[2] For some explain the fact stated, by referring it to the intention of the legislator, on the ground that he intended merely to bind the subjects living within his own territory; wherefore these persons say that the conclusion which we have laid down is true only if the law is couched in general terms, since in that case, no other—that is to say, no more extensive—intent on the part of the lawmaker, is expressed; and, therefore, if the legislator declares in explicit terms that he wishes to bind [all] subjects, wherever they may be, then—according to those [who favour the opinion above set forth]—the law is binding even upon subjects outside the territory. Thus the persons who hold to the said opinion limit the aforementioned statement in the *Sext*, (Bk. I, tit. II, chap. ii). In favour of the view in question, Bartolus (on *Code*, I. i. 1, nos. 44 *et seq.*) is usually cited. However, this stand, as ascribed to Bartolus, is criticized by Panormitanus (on *Decretals*, Bk. V, tit. XXXIX, chap. xxi); Navarrus (*Enchiridion*, Chap. xxvii, no. 272); Sylvester, *ibid.*, [Sect. 3]; Covarruvias, *ibid.*, [Sect. 3] and all the other authorities. And the matter is made entirely clear in that passage of the *Sext*, *ibid.*, where the Pope states the reason for his proposition, as follows: 'since he who pronounces judgment outside the territory [of his jurisdiction] may be disobeyed with impunity.' These words indicate a defect not merely of will, but also of power, a fact which is self-evident and which

Bartolus.
Panormitanus.
Navarrus.
Sylvester.
Covarruvias.

[1] [Reading *extendatur* for *extenuatur*.—TR.]
[2] [i.e. 'no law is binding outside the limits of the country of the lord or prince by whom it is decreed'; &c. Cf. *supra*, § 3, p. 396.—TR.]

is, moreover, corroborated by the *Digest* (II. i. 20), whence the assertion in question has been taken, the commentators being commonly agreed upon this point in connexion with the latter passage, also.

Therefore, the true reason for the statement under discussion is that the jurisdiction of any one state or particular prince does not include the power of making laws which shall be valid outside the state or kingdom; a fact which I have elsewhere expounded more fully, in a passage where I have treated of other phases of this matter (Vol. V, *De Censuris Ecclesiasticis*, Disp. V, sect. IV[1]), which pertain more especially to censures. Neither is this reason entirely alien to the mind of Bartolus; for he touches upon it in the place cited, [on *Code*, I. i. 1, nos. 44 *et seq.*] and draws this very conclusion from the *Digest* (I. i. 9), in which [civil] law (*lex*) is defined as the particular law (*ius*) of any given state.[2] Therefore, just as in philosophy we are accustomed to say that an action does not continue outside its sphere of activity, owing surely to a defect of power and not of will; even so the activity of jurisdiction in the making of any law is limited to a specific territory, and hence that law is not binding outside those territorial limits. Therefore, it is clearly to be inferred that the lawgiver cannot bind a subject outside the existing boundaries of the state, even if he has a decided intention of doing so, and expressly states that intention in the words of his [law].

5. But we must interpret the foregoing as referring to the peculiar directive obligation imposed by law upon the conscience, for this is the proper and immediate effect of law.

When a prince may punish a delinquent subject outside of his own territory.

If, however, one is discussing coercion by means of a penalty, it is the opinion of the jurists that when a subject has committed a crime outside of the state, the prince may inflict upon him the punishment imposed by his own law for his own territory, provided that the penalty is not imposed *ipso iure*, but is still to be imposed, and provided that the crime thus committed outside the realm is later punished within that same realm. Thus Abbas [i.e. Panormitanus] (on *Decretals*, Bk. V, tit. XVII, chap. i, no. 8) teaches; and indeed it will be found that this is all that Bartolus meant in the passage cited, if that passage is carefully read.

The reason for the opinion above set forth is that under the conditions specified the penalty is imposed not outside the territory in question, but within it; for it is assumed that this punishment must be imposed by human agency, and judges do not inflict punishment upon or exercise power over those who are dwelling outside the territory, but do so only when the latter return to the country. This view,

[1] [Not included in these *Selections*.—TR.]

[2] [Suárez wrote: . . . *Lex dicitur ius proprium civitatis.* The *Digest* (*loc. cit.*), has: *Quod quisque populus ipse sibi ius constituit, id ipsius proprium civitatis est vocaturque ius civile, quasi ius proprium ipsius civitatis.* The point of the reference is that the *Digest* recognizes particular law.—REVISER.]

then, is not in conflict with the *Sext* (Bk. I, tit. II, chap. ii): for, in the first place, it has reference [only] to statutes accompanied by a sentence of censure, through which sentence the censure is inflicted *ipso iure*; and, furthermore, that kind of a statute necessarily supposes and requires a peculiar power to lay a binding obligation upon the conscience, rendering the transgressor contumacious and worthy of censure. By the same token, the reason set forth in the *Sext* (*ibid.*) does not conflict with the limitation in question, since a legal precept designating the penalty to be imposed even for a crime committed outside the limits of the state, and the execution of that precept, are not equivalent to 'pronouncing judgment' outside the territory [of the lawmaker].

336 6. Hence, also, we clearly see the rational basis for this difference between a law imposing punishment *ipso facto*, and a law merely declaring a punishment that is to be imposed. For the first kind of law of itself inflicts a penalty and thus necessarily extends its binding character and power of execution outside its own territory; and this it cannot do otherwise than by obliging the guilty person to execute the penalty upon himself, which is impossible, as has been proved. For if the law in question cannot compel one to, or restrain one from an action, much less will it be able to compel one to the execution of the penalty. Whereas a law which imposes a penalty that is to be inflicted by a judge, is by the very nature of the case, a statute binding the judge to act in accordance with it, rather than a statute binding upon the criminal; and the judge dwells within the territorial limits of the state. The objection may be raised that the [guilty] subject is also bound in conscience to submit to the punishment in question. Our reply is that the said subject, strictly speaking, is not bound by this law until after sentence has been passed, when he is assumed to be already within the limits of the state.

Hence Panormitanus has rightly noted that it is necessary not merely that any crime punishable by such a law should be evil because it is forbidden by the law in question, but also that the supposition should exist that the deed is essentially evil, or in some other way sufficiently forbidden. For that law, as has been proved, can not itself prohibit the deed, outside of the limits of the state; and therefore it can not designate any penalty for the same, unless the deed is for some other reason assumed to be evil or sufficiently prohibited.

7. As to the reason for the doubt which was mentioned at the beginning [of this Chapter][1] we may reply, in accordance with what has been said above, that a subject living outside the territorial limits of the state, although he does not lose his status as a subject in the essential sense

A reply to the arguments to the contrary.

[1] [*Vide* Section 2, p. 395.—TR.]

—or basically, so to speak—does nevertheless lose that status, in a temporary sense; that is to say, he ceases to exercise it in relation to the laws of his country, since he is living beyond the range of their [normal] operation.

However, in the first confirmation of [the view set forth in Section 2 of this Chapter], it is pointed out that a certain difficulty exists in connexion with the interpretation of a statement in the aforesaid Chapter xxi [*Decretals*, Bk. V, tit. xxxix, chap. xxi], which pertains rather to the following point. Briefly, then, I answer that the statement in question refers, not to a statute or law, but to a general sentence, or a personal and temporary precept. As to the difference arising from this fact, and the reason therefore, I shall speak presently of these points.

Exposition of *Decretals*, V. xxxix. xxi.

8. In regard to the second confirmation [of the above-mentioned view], the Doctors add certain limitations to the proposition stated [in connexion with the said confirmation]. This may be deduced from Sylvester, [on word *excommunicatio*, Pt. II, no. 7] and from Angelus de Clavasio (on word *excommunicatio*, Pt. I, no. 10), who reduce the limitations to this principle: that, outside of the territory in question, no one is bound when the agent, and the object of the operation, and the action itself, are entirely without the limits of the state. Whence it is to be inferred that if the agent is outside, while the object with respect to which he offends is inside, then the obligatory force of the law may be applicable. Covarruvias, however, explains this limitation in different words, although their ultimate significance may be the same; for he says that a law is not binding outside the limits of the state, unless the subject-matter of the law has in view the welfare of that same state, that is to say, the avoidance of injury or harm to it, or some similar purpose.

Sylvester.[1]

Covarruvias.

In my opinion, this is the true doctrine. I have explained it more fully in a passage already cited [Vol. V, *De Censuris*, Disp. V, sec. iv][2]; and from the statements made there, I infer that, strictly speaking, the proposition in question is not limited by the said doctrine, since offences contrary to a law of the sort under discussion should be considered as having been committed, not without, but within the territory [of the lawmaker]. For if the law is, for example, affirmative, directing that some act be performed within the state, the failure to observe this law is considered to have occurred where the prescribed act should have been performed, since one would seem to perpetrate an offence in that place in which he fails to do what he ought, just as, on the other hand, he would seem to sin wherever he does what he should not have done. This analogy is borne out by a statement in the

[1] [This marginal reference to Sylvester incorrectly appears after Covarruvias in the Latin text.—Tr.]
[2] [Not included in these *Selections*.—Tr.]

Digest (L. xvii. 121). But if the law be negative, and if its transgression shall result in an injury to the state, then the offence is clearly consummated in that state: even as a person corporally outside the limits of the state or kingdom would, if he shot an arrow and thus killed a man within those boundaries, be clearly held to have sinned in the territory of the said state, thus transgressing the law and incurring, in consequence, a liability to the censure, if the latter should be provided for by the law in question: all of which I have said in the passage cited above. These remarks, then, are applicable to the second confirmation, and constitute a sufficient comment upon it.

9. There may be some doubt as to whether the same assertion may be made with respect to exempt localities when they are otherwise enclosed within a state. But this doubt occurs more frequently in connexion with the canon, than with the civil laws; and, besides, I have treated of the question sufficiently in the place above-mentioned [*De Censuris*, Disp. V, sect. iv].[1] Therefore, I shall simply state that the same assertion does indeed hold true with respect to localities of this kind; a reply which is, as I have said in the aforesaid passage, the common solution of the question. This opinion is held also by de la Palu (on the *Sentences*, Bk. IV, dist. xviii, 2d part of quest. 2, art. 2) and by Gabriel thereon (on the *Sentences*, *ibid.*, concl. 6), by Antoninus (*Summa*, Pt. III, tit. xxiv, chap. lxxv, § 1) and is supported by the *Summa Rosella*[2] (word *excommunicatio*, Pt. VII, 337 § 3), the *Armilla*[3] ([word *excommunicatio*,] No. 30) and by the canonists (on *Sext*, Bk. I, tit. xvi, chap. vii and on the *Constitutions* of Clement, Bk. V, tit. vii, chap. ii). The same view is supported by the laws above cited, in so far as it may be inferred from them that a prelate cannot exercise his jurisdiction within the exempt territory, a limitation which applies to every superior. From this fact, we draw the conclusion that the exempt locality, in so far as jurisdiction is concerned, is considered as outside the [enclosing] state; since, except in cases expressly mentioned in the law, an ordinary superior of the said state may not execute therein any act of jurisdiction; and the act of binding by a statute or law, in the place exempted, is an exercise of jurisdiction in that place; as is evident from the *Sext* (Bk. I, tit. ii, chap. ii), already cited. Therefore, the same argument exists in regard to the exempt locality; and to that locality one may well apply the principle under discussion, namely, that 'he who pronounces judgment outside the territory [of his jurisdiction] may be disobeyed with impunity.'

The same assertion, due proportion being observed, may be made with respect to exempt localities when they are enclosed within a state.

de la Palu. Gabriel. Antoninus. *Rosella.*

[1] [Not included in these *Selections*.—Tr.]
[2] [*Summa Rosella, liber qui Rosella casuum appellatur*.—Reviser.]
[3] [*Aurea Armilla* by Bartholomeo Fumo, O. P.—Reviser.]

CHAPTER XXXIII

ARE THE MUNICIPAL LAWS OF A GIVEN DOMAIN STRICTLY BINDING UPON ALIENS WHILE THEY ARE LIVING WITHIN THAT DOMAIN?

1. I have treated of this question at length in Vol. I, *De Religione*, Tract. II, bk. II, *De Festis*, Chap. xiv,[1] in connexion with the precept for the observance of festivals; and therefore, avoiding repetition in the present context, I shall note briefly the points which I there set forth and shall add certain observations more suited to this passage.

Three elements, then, must be distinguished in every law: first, its binding force with respect to the conscience, which I call its directive force; secondly, its coercive force, by means of which one may be punished according to law; and lastly, the force by which a definite form is laid down for contracts and similar legal acts, so that it sometimes happens that an act otherwise performed is not valid. The question placed at the head of this Chapter will be considered in relation to these three points, since they present their own difficulties.

Three elements are to be distinguished in law.

2. Regarding the first element there are various opinions, which I have set forth in the place cited [*De Religione, ibid.*].[1]

Those who hold to the first opinion absolutely deny that a person may be bound by the laws of any place, unless he has a fixed and perfect domicile therein. In favour of this view, I have cited as authorities, in the passage already referred to, de la Palu, Medina, Archidiaconus, Hostiensis and others; but I myself have rejected the view as improbable.

de la Palu. Medina. Archidiaconus. Hostiensis.

The basis of the negative opinion.

According to the second opinion, the laws of a locality are binding upon those aliens who are permanent residents of that locality to the extent, at least, of establishing a quasi-domicile therein; but this binding force does not hold with respect to other persons living in the said locality for a brief season, or passing through it. I have cited Felinus, Antoninus and others, in support of this opinion.

Felinus. Antoninus.

The second opinion.

However, the basis of both views is very nearly the same, namely, that non-resident foreigners are not subjects; for the status of subject, in so far as concerns the direction of conduct, and binding obligation, is acquired only through domicile, or, at least, through quasi-domicile. In addition to this argument based on reason, [certain supporters of the theory stated above] cite the example of unbelievers who are not bound by the laws of Christians, although they live among the latter; the example of members of religious orders in relation to secular persons; and that of novices in relation to professed religious. But I shall pass over these instances, since they are not pertinent; for they have to do not only with those who pass through a territory, but also with those possessing a fixed domicile in it. Of these cases I shall speak later (Bk. IV, last chapter).[1]

Proof by means of examples.

[1] [Not included in these *Selections*.—Tr.]

The confirmation [of the theory in question] may be derived from the disadvantages [which would result if the opposite were true]; for, in that case, unbelievers when passing through Christian territories would be bound to observe the laws or rites of Christians, abstaining from meat on the days when it is prohibited, and so forth, which would be absurd. Moreover, the monks residing in the territory in question would be obliged to observe the synodal fasts, and such an obligation would be a grave burden, since they have many other fasts of their own, which the laity are not bound to observe, according to the decrees of the regulars. It would also follow that a religious of a given province is bound to observe the fasts, festivals, and laws on similar matters, peculiar to another country, when he is a guest therein, even if these regulations are not common to his whole organization. And in like manner, a novice would be bound to observe the rules of a religious order as long as he dwelt in the house of that order. But these suppositions are not acceptable.

3. Nevertheless, it must be asserted that the law of a locality is binding in conscience upon aliens and guests as long as they dwell therein, and in the same way as upon the permanent inhabitants. This is the common opinion of those who have interpreted *Code*, I. i. 1 and *Decretals*, Bk. V, tit. xxxix, chap. xxi, especially Innocent [IV], Hostiensis, and Panormitanus; it is brought out also in a passage of the *Sext* (Bk. I, tit. II, chap. ii), on which Geminiano and Sylvester (word *excommunicatio*, Pt. II, no. 4) have commented fully; and I have likewise referred to many others in the place cited. I have verified this same opinion by citing the authority of Augustine and the custom of the Church, as well as by various arguments.

The law of a territory is binding in conscience upon aliens while they live therein, and in the same way as upon permanent inhabitants.

Innocent. Hostiensis. Panormitanus. Geminiano. Sylvester. Augustine.

The true reason, however, is that a law is made for general application within a given territory, as we assume, and is therefore binding, for the period of their residence, on all persons actually living therein.

The deduction is proved, first, because from the standpoint of the final cause it is morally necessary for the good government of a province, locality or territory that the laws made for the same should have this [universally binding] effect; for it is necessary to peace and good conduct in that locality that aliens should conform to the customs of conduct of its people, as long as those aliens live with the people in question;

338 **It is necessary to peace and good conduct in any locality that aliens, while they are living in that locality, shall conform to the customs of conduct of its people, lest scandals result.**

[1] [Not included in these *Selections*.—Tr.]

a fact which is frequently indicated in the *Decretum* (Pt. I, dist. XII, can. IV; Pt. I, dist. VIII, can. II; Pt. II, causa XVI, qu. VII, can. XXII), and which experience makes sufficiently clear. For otherwise, disputes and scandals would result. Therefore, since laws are established with a view to the common welfare, peace and good conduct of the country, it is necessary that they should possess the [universal] force in question.

Secondly, the same conclusion may be proved from the standpoint of the efficient cause, that is to say, from the standpoint of the legislator's power. For every civil governor has the power necessary to preserve his state and to safeguard its morals; therefore, he has also the power to make laws which are binding upon all living within his domains; since it is on this ground that he is empowered to punish aliens who commit crimes therein; hence, by reason of these faculties he possesses [likewise] the power to bind by his laws all persons engaged in activities within his realm, in so far as such an act of compulsion is necessary to the welfare of his realm.

4. Thirdly, the same truth is evident from the standpoint of the aliens, since there are grounds sufficient to justify their subjection to such an extent that they may be bound by the laws of the territory; and this degree of subjection is all that is required. Therefore, the truth of the major premiss is evident partly because power in the sovereign and subjection in the governed are correlative, and we have proved the existence of the power in the prince, so that there is a corresponding subordination in the other extreme; and partly in view of the fact that, just as this obligation is (as it were) transient and relative, even so a temporary subjection (so to speak) is sufficient therefor, the sole requirement for that subjection being actual sojourn and presence, even though the sojourn may be of short duration. For just as a man in changing his domicile from one place to another by this very act manifests his will to be bound permanently by the laws of that new territory, or else becomes bound in consequence of his act and despite his will to the contrary; even so any person who wills to sojourn in a given locality for a brief time, by that very act manifests or should manifest a will to subject himself temporarily to the government of that territory, in everything relating to general habits of conduct and laws. This statement is confirmed by the converse argument. For an inhabitant of any territory, withdrawing from it for a brief period, at once and throughout that period ceases to be bound by the laws thereof, according to the argument of the preceding Chapter; and consequently, during that time, he is not actually a subject. Hence the converse will also hold true; for the principle is the same, and equity demands that in both cases equality—that is to say, due proportion—shall be observed.

Proof of the above proposition, from the standpoint of the aliens.

5. The basic argument of the contrary opinion has been refuted by the foregoing remarks. For we have already proved that in the case posited neither jurisdiction nor subjection is lacking, and we have elsewhere demonstrated (*De Censuris*, Disp. V, sec. IV)[1] one by one the following points: first, that a quasi-domicile is sufficient to establish the obligation in question; secondly, that a sojourn of a few days will suffice; and finally, that the said obligation should be extended in a proportionate degree to travellers remaining for a brief period in a guest-house. Moreover, what we said in that same passage, with respect to the law on the observance of festivals may well be extended to all laws, including those of a civil nature, with which, also, we dealt there in passing, but at some length.

The reply to the basic argument of the contrary opinion.

It may furthermore be added incidentally that this doctrine is applicable to religious persons who are pilgrims or guests in alien provinces or religious houses, in so far as relates to the peculiar regulations of those provinces or houses. I mention this fact, because some writers hold that persons of a religious calling, when travelling, are exempt from such regulations on the ground that they have no territory of their own, since the spirit of religion may be [considered as being] diffused throughout the whole Church. But this fact does not prevent the religious from having their own domiciles, according to the argument in the *Sext* (Bk. V, tit. VII, chap. i); and as to the point in question, the separate monasteries and provinces may have their own observances. We hold, then, that aliens are bound by these, for the time that they remain in such surroundings, due proportion being observed; for the principle involved is the same [as that in the case of the permanent residents], unless religious custom itself concedes to the aliens some particular exemption.

In what fashion this doctrine may be applied to persons of religious calling.

6. Finally, it is evident from the foregoing that certain persons have been mistaken in saying that aliens are bound to observe these laws, merely to avoid scandal. For this is not true. If it were, they would not, in the absence of [possible] scandal, be bound in an absolute sense and in secret, to obey these laws. Therefore, it must be stated that, although the occurrence of actual scandal accidentally increases the obligation, nevertheless, scandal is not therefore the true basis of the obligation; on the contrary, it is at most an occasion or motive which impels the legislator to make the law. But the obligation to obey this law does not lapse even if the particular motive does lapse; just as the carrying of arms in a given place or at a given time is

Not merely on account of scandal are aliens bound by the laws of the locality, but also because of the laws themselves and because those aliens are in a sufficient state of subjection.

[1] [Not included in these *Selections*.—TR.]

forbidden in order that quarrels may be prevented, and women are forbidden to adorn themselves in this or that specified way, that scandal may be avoided, while nevertheless, after the laws have once been established, the obligation to abstain from these acts exists not merely on account of the scandal, but *per se*, by reason of the laws themselves. So it is in the case under discussion; for the necessity of 339
avoiding scandal and of maintaining morality within a state may cause the making of laws for all who are living in that locality; and, accordingly, after the law has been made, aliens are bound to conform thereto, not only for the sake of avoiding scandal, but also because of the law itself and because they are in a sufficient state of subjection, as has been explained.

7. But one may ask whether a law for any state or territory may be made which is binding only upon the aliens dwelling therein. For Innocent [IV] says (on *Decretals*, Bk. V, tit. xxxix, chap. xxi) that such a law cannot bind non-resident foreigners unless it is formulated in general terms, and is binding *per se* upon the inhabitants and concomitantly (as it were) upon the non-residents. It may be that Innocent was influenced by the fact that the principle of uniformity, and of the accessory which follows upon the primary factor[1] would apply in the latter case; whereas this principle could not be applied if the law related only to non-resident foreigners, who, essentially and directly, are not subjects of the commonwealth or prince in question.

Innocent.

A doubt.

Nevertheless, I think that the contrary opinion is true—a view which Hostiensis supports, on this same passage [*Decretals*, Bk. V, tit. xxxix, chap. xxi, no. 7], also; Panormitanus, more decidedly; and Sylvester, too. The principle, however, is the same, applied in due proportion; for it concerns the general welfare of the state or commonwealth to regulate the manner in which non-residents shall conduct themselves while there, and to determine the means necessary for this end. Otherwise, the state would not be sufficiently protected. Nor can such power reside in any source other than the state itself or its governor, since the guardianship and care of the locality have been entrusted to him. Therefore, just as the said non-residents have a peculiar mode of living, that is to say, of being located in a given place, so in many matters they may require special statutes. Hence, they may be bound by such statutes; since they are constituted subjects to this extent by the mere fact of their sojourn, as we have already pointed out. But we assume that these laws must be just, and suitable, not only

Hostiensis.

The true answer.

Panormitanus. Sylvester.

A law may be enacted for any country, binding upon such aliens as reside therein when such a law could promote the common welfare.

[1] [An example of this maxim would be a promise confirmed by oath. The oath is accessory; the promise is the primary factor or principal. If the promise lapses, the oath lapses also.—Reviser.]

to the locality in question but also to the non-residents themselves, observing a due proportion between the two; for thus the said laws will satisfy every qualification for placing those non-residents under a valid obligation.

8. On the second point, regarding coercive force, that is, the question of whether by that force also a law is binding upon foreigners —in other words, upon non-resident aliens—a special reason for doubt is derived from the *Decretals* (*ibid.*), in which the following question is raised: when a bishop issues in his diocese this general decree, 'If any one shall be guilty of stealing, let him be excommunicated,'[1] will the decree be binding upon aliens? To this the Pope replies that it is binding only upon the subjects of that bishop, a reply for which there can be no other reason than the fact that the bishop does not have coercive power over aliens, but has it only over subjects.

On coercive force: the reason for the doubt.

Decretals.

The Gloss thereon [on *Decretals*, *ibid.*] replies, as to this point, that such a decree of excommunication applies to foreigners, not as such, but in so far as they have become subject by reason of their offence; and accordingly holds that the text [of the Pope's answer] must be interpreted as referring to those who are subjects by whatsoever title. However, this explanation in reality inverts the force of the Pontiff's response, and renders it frivolous and absurd. For that is the very point at issue, namely, whether the said aliens are subject by reason of their offence; hence [the Pope] is speaking of subjects, not in the sense employed [by the Gloss], but in that in which inhabitants are designated simply as subjects. Furthermore, a certain inconsistency is involved in the reply quoted from the Gloss. For in a case of punishment by excommunication, the proximate reason for the subjection of the offender cannot be the fact that an offence has been committed in a given place; on the contrary, one must necessarily assume the existence of an obligation to obey the prelate of that locality, since for excommunication there must have been contumacy in regard to the Church, and since an offence against the natural law, as such, is not a sufficient ground. This being the case, as I presume from the very nature of the question, a condition of subjection existing before the commission of the offence must consequently be assumed, from which subjection arises the obligation of obeying a law embodying a given prohibition under pain of excommunication. Hence, since the discussion in the text concerns this censure, aliens may not be classed as subjects by reason of an offence, but are termed thus, because they were inherently subjects, before the law or offence in question existed. So also Panormitanus and others interpret this same text [on *Decretals*, *ibid.*],

The reply contained in the Gloss is rejected.

Panormitanus.

[1] [This quotation, as given by Suárez, varies slightly from the text of the *Decretals*.—Tr.]

admitting, in consequence, that aliens are not included under the censure when it is imposed in a general decree.

9. Nevertheless, it must be admitted that a law made for a given territory does apply, even as to its coercive force, to non-resident foreigners who linger therein; that is to say, such foreigners may be punished in that territory for the transgression of the said law, either through a judge, or through the force of the law itself, if the latter carries with it a penalty, *ipso facto*. This is the opinion of the authors cited above, as well as of the commentators on the *Decretals* (Bk. V, tit. xxxix, chap. xxi). The reason is evident, since the same title of subjection, or power, is operative in regard to this coercive force, as that which was shown to be valid in regard to directive force. Indeed, directive power would not be efficacious unless coercive power were annexed thereto. Besides, if an alien is bound, essentially and in conscience, to obey the law of a particular state, then, by transgressing that law he commits an offence in that territory and against that state; and therefore, by reason of this offence also, he remains subject to the coercive power of the commonwealth in question, according to an *Authentica* on the *Code*, III. xv [*Novels*, LXIX, chap. i].

The opinion of the author.

340

10. However, the following limitation is usually added: that the non-resident foreigner shall not be superior in rank to the author of the law in question, since no superior can be subjected to an inferior by coercive authority. For instance, if a bishop should impose a prohibition upon his clerics under pain of excommunication to be incurred *ipso facto*, and if his metropolitan should act contrary thereto, even in the bishopric of the former, that metropolitan could not [by this act of disobedience] incur the penalty of excommunication. This fact is noted by Sylvester (on word *excommunicatio*, Pt. I, no. 9) and by Panormitanus, on the *Decretals* (Bk. V, tit. xvii, chap. i, no. 11 [no. 12]), the latter touching upon the same point elsewhere (on *Decretals*, Bk. II, tit. ii, chap. xx).

Sylvester.

Panormitanus.

Soto.

Soto also expresses this opinion in a passage (on the *Sentences*, Bk. IV, dist. xxii, qu. 2), wherein he extends the rule to apply to prelates of equal rank, saying that neither the archbishop, nor another bishop, offending within the diocese of a suffragan or bishop, can be bound by the censure of the latter. Panormitanus, however, rightly asserts that this principle applies to a superior in jurisdiction; for although one prelate may be the equal or even the superior of another in dignity, while he remains within the diocese of the latter, he can be bound by its laws, wherefore he can also be bound by its censures or punished on account of an offence committed within that diocese.

This holds true with respect both to ecclesiastical laws and to

civil laws, according to an opinion also expressed by Innocent, on the *Decretals* (Bk. I, tit. xxxiii, chap. xvi), and supported by the *Digest* (I. xviii. 3). The reason for this view is that a dignity without jurisdiction does not exempt the person enjoying that dignity from subjection because of an offence, just as it does not exempt him from the obligation of obeying the law violated; and therefore, such dignity is incidental (so to speak) in relation to jurisdiction.

Innocent.

The foregoing holds true [only] from the standpoint of ordinary law, and on condition that a given person is not [specifically] exempted by reason of the said dignity; for in that case, one bishop cannot be punished by another bishop of equal rank.

One bishop cannot be punished by another of equal rank.

On the other hand, when any person is superior in jurisdiction, it is clear that he may not be bound by an inferior (*Decretals*, *ibid.*). Moreover, just as such a superior is not subject with respect to coercive power or punishment, neither is he subject with respect to directive force or obligation in so far as this obligation exists by virtue of a law; for the principle is the same in regard to both sorts of subjection, the law itself being dependent upon jurisdiction. Whether or not the person in question may be bound for some other reason, however, is a point which we shall discuss later, when treating of the lawgiver himself;[1] for as to this question almost the same principle holds.

11. Therefore, in answer to the objection made on the basis of the *Decretals* (Bk. V, tit. xxxix, chap. xxi), it must be said that in that passage the reference is not to a law or to a statute, but rather to a precept or sentence passed by an individual, although it may be made in general terms; a fact which is clear from the text, and which is agreed upon by all the interpreters thereof.

Decretals.

The passage cited from the *Decretals* refers not to a law or to a statute, but to a precept or sentence passed by an individual.

But it is necessary to explain the difference between a statute and a precept, that is, a general sentence passed by an individual.

The difference between these.

Panormitanus thereon (*Decretals*, *ibid.*), gives the following answer: such a sentence operates [only] at the time when it is passed, so that it binds only those whom it finds at that time suited to be so bound; whereas a law is always operative and therefore always binding [even] upon persons who have newly become subjects.

However, this answer is not acceptable, first, because according to the *Decretals* (*ibid.*), a general sentence of the sort described does not include foreigners, even if they are actually present within the territory affected thereby

The explanation given by Panormitanus is rejected.

[1] [Bk. III, chap. xxxv of *De Legibus*, which is not included in these *Selections*.—Tr.]

when the sentence is promulgated; but if a precept or sentence is framed in terms of a statute it will apply to foreigners; and therefore a distinction must be drawn [between the sentence passed by an individual and the statute], and not merely in relation to persons subject at some future time, even if we assume that equal subjection—that is, equal presence in the territory affected—exists [in both cases]. Secondly, the explanation given by Panormitanus is unsatisfactory, because even in relation to the future, the distinction in question does not hold good. For if, through a precept issued by an individual, sentence is declared in regard to some offence that may be committed in the future, such a sentence likewise holds good for that future time; it has reference always to that time; and it extends its application to persons newly born in the region affected, as well as to those who newly transfer their domicile thither, even if the said persons were not subjects at the time when the precept was imposed.

Another point to be considered is that a statute not only prescribes or forbids, but also punishes of its own force and *ipso facto*, and contains within itself a sentence legally framed; but the obligation imposed by the precept [of an individual] extends, no less than does the binding force of a legal sentence, to those who, after the first publication of such a statute [or precept], come into the territory in question and there commit the offence. Consequently, as far as this point is concerned, there is the same principle applicable [to a statute, and] to a general precept issued by an individual and including a general sentence which imposes a penalty, *ipso facto*, upon future transgressors. For if in the case of a statute one takes into consideration that permanence whereby it is always applicable and therefore always binding, why shall not the same quality of permanence be considered in the case of a precept issued by an individual, which also endures, according to his intention, so long as he lives or while he remains in office? And if, on the other hand, in the case of a [violated] statute it is understood by a fiction of the law that judgment is handed down at the time when the offence takes place in a given territory, even if that offence is committed by a foreigner who recently has come thither, then why will not the same legal fiction hold good of a judgment declared in the precept of an individual?

12. Therefore, I maintain that the distinction to be drawn is due 341 to the differing characters of a law, and a simple precept issued by an individual. For a law, as I have said previously[1] is perpetual; while the precept of an individual is transitory, and easily subject to change. Hence it follows that a law by reason of its perpetuity is likened to custom, and is held to be well known to all, and laid down for observance by all.

The difference between a law, and a simple precept issued by an individual.

[1] [*Supra*, p. 125; *De Legibus*, Bk. I, chap. xii.—Tr.]

On the other hand, the precept of an individual has not this equivalence to custom, nor is custom introduced thereby, since a precept is easily changed, nor is it wont to be so widely known; so that a precept of itself binds only the inhabitants of a territory, its true and permanent subjects; whereas a statute is binding upon all who reside in that territory.

Therefore, another distinction should be taken into consideration, namely, that a law (*lex*) is made for a given territory, since it is the 'law of the state' (*ius civitatis*) as Bartolus said, or 'law of the territory', (*lex territorii*), according to Panormitanus, and consequently is binding by means (so to speak) of the territory itself; that is to say, in so far as the persons bound dwell within that territory, just as a local interdict binds those living in a given locality. On this account a statute, outside the territory for which it is decreed, has no binding force over persons who are in other respects subject to it, a fact which we have noted above.[1] On the other hand, the precept of an individual—that is, a personal precept—is directly applicable to the persons of all subjects, so that it presupposes subjection and is therefore not binding upon aliens even when they are living in the territory affected. On the contrary, it may bind subjects even though they are living outside of that territory, as I have said elsewhere (Vol. V, *De Censuris*, Disp. V, sect. v),[2] in a passage wherein I made many observations on this difficulty. Here, however, I have merely attempted to indicate wherein the doctrine in question is applicable to all human laws, including civil laws.

13. A third point proposed above [Section 1, this Chapter] is whether or not a law prescribing a given form for legal trials, contracts, or other similar acts, and invalidating those carried out in any other form, is efficacious within its territory, even over non-subjects.

The third [element, or source of] doubt.

Upon this point, it must be briefly said that, in this respect, also, the law must be obeyed in its own territory, and that the act in question must be adjudged in accordance with that law. Such is the opinion held by Bartolus, Jason and others, on the *Code* (I. i. 1); by Felinus, on the *Decretals* (Bk. IV, tit. 1, chap. i, nos. 2 and 23 *et seq.*); and, with excellent comments, by Panormitanus (*Consilia*, Pt. II, no. 52), and Tiraqueau (*De Iure Primogenitorum*, Qq. 46 and 48). The meaning of this statement, indeed, is that an alien who makes a will or contract in a given territory, ought to observe in so doing the form prescribed by the laws of that realm. Therefore, when the said form is not observed, the contract in question is invalidated by the force of the disregarded law, and will be void even though made by an alien; a rule which holds also with regard to the other acts mentioned.

An alien making a will or contract ought to observe therein the form prescribed in the locality where he is.

[1] [*Supra*, p. 395; chap. xxxii.—Tr.] [2] [Not included in these *Selections*.—Tr.]

The reason for this fact is that the said law is a rule governing the act itself, in so far as relates to the power of binding by virtue of locality, as I have already pointed out.[1] Therefore, this law obliges all persons in that locality to observe also the form of procedure which it prescribes; and, just as it includes the power to punish, so also it includes the power to invalidate. [The truth of] the consequent is made evident by the same reasoning [as that applicable to the antecedent], and also by the fact that the act in question is subject to the law without qualification; and, therefore, that same act is subject in relation to its entire validity. The confirmation of this statement is that acts which require a certain customary form and solemnity are not valid without the support of law (*Digest*, II. xiv. 6); and in the situation described above, the law does not support the act, but rather is opposed to the same; therefore, that act will have no validity. Finally, in matters and acts of this kind, the local custom should be observed; and consequently, the local laws should also be observed. This doctrine is supported by those same civil laws to which the authors above cited refer at length; and since these laws fall properly within the field of those authors, I will not tarry longer over a discussion of this point.

The confirmation.

14. However, from the foregoing remarks, we may infer that the validity of the acts in question, and their binding force in the court of conscience, must be viewed in accordance with laws of this character; since a positive law nullifying such actions has the same effect upon their binding force. The same statement must be made with regard to legal trials; for they should be carried on in accordance with the form and mode prescribed by the laws of the place in which they are conducted; and to these laws, therefore, the alien litigant must conform. Otherwise, that is to say, if his actions are rendered null by the local laws, he will achieve no valid result. And the same holds true with regard to other [acts of a legal nature, on his part]. We assume in all cases, however, that the laws are just and have regard to the property located in that place, and to the acts performed therein; since the said property and acts must be subject, on the ground of locality to the jurisdiction of the territory in question, even if [the person involved] is not subject thereto inherently and in a personal sense, that is to say, not subject in matters apart from the locality; all of which the above-cited authors set forth at greater length.

Hence it is inferred that a positive law nullifying the validity of the act, consequently nullifies its binding character.

At this point there arises the question of taxes, and whether a foreigner is bound to pay them. This point, also, must be settled according to the principles stated above. For if a tax is owed by reason of property

In what sense an alien is bound to pay taxes.

[1] [*Supra*, p. 403; § 3, this Chapter.—Tr.]

located in a certain place, or an act performed in that place, then there will be an obligation to pay that tax, even on the part of an alien, generally speaking, and assuming that the tax is a just one. But such an obligation does not exist with respect to other taxes, which are of a personal nature. On this entire question, I shall have much to say in Book V.[1]

[1] [Not included in these *Selections*.—Tr.]