CHAPTERS X–XXVII

Omitted from these *Selections*

FRANCISCO SUÁREZ

A TREATISE ON LAWS AND GOD THE LAWGIVER

BOOK VII

OF UNWRITTEN LAW WHICH IS CALLED CUSTOM

All twenty chapters of this Book are included in these *Selections*

OF UNWRITTEN LAW WHICH IS CALLED CUSTOM

Thus far we have confined our discussion principally to written law. At this point, however, we must turn to a particular study of custom in so far as it embodies law or brings it into being. This order Gregory IX followed in the First Book of the *Decretals*; treating first of constitutions, then of rescripts, and finally of custom. For even if we grant a priority in time to custom over written law, nevertheless it is the more reasonable procedure to take up the written law first, since its matter is more definitely fixed and its field more thoroughly explored.

It is to be added that among human laws those in a written form are earlier than those in an unwritten one, even though many jurists, whose doctrine Rochus Curtius follows in his treatise *De Consuetudine* (at the beginning),[1] assume it as a certainty that consuetudinary law arose first.

For even though men took up a life in common without laws before such were written—as is clear from the *Digest* (I. ii. 2)—it is to be inferred that they held in the place of law, not custom, but rather the personal rule of the king, which is neither law nor custom. This, in fact, is suggested by the language of the *Digest* (*ibid.*), but from the *Institutes* (I. ii, §§ 9–10) it may be inferred that the consuetudinary law was of earlier date among the Lacedemonians than the written law among the Athenians, from whom the civil law took its origin. Whatever may be the truth on this point, it is now clear that custom is often of earlier origin than written law and that frequently it is also more recent.

It is certain, in any case, that the written is the principal form of law, and that from it custom derives in great measure its force and meaning, as is clear from the *Decretals* (Bk. I, tit. iv, chap. xi) and what is there noted. This Book, then, finds its proper place here after what has preceded. In it we have followed the usual arrangement: we shall begin with a definition of custom in the light of its necessary conditions and its causes; we shall then discuss its effects; we shall conclude by treating of its abrogation or alteration.

CHAPTER I

THE DEFINITION OF CUSTOM, USAGE OR GENERAL CONDUCT, PRACTICE OF THE COURT, STYLE, AND HOW EACH DIFFERS FROM WRITTEN LAW

Isidore.

1. Custom, according to Isidore (*Etymologies*, Bk. II, chap. x and Bk. V, chap. iii), is a kind of law instituted by general conduct, which

[1] [In the Preface.—REVISER.]

Tertullian.

is accepted as law when law is lacking. He seems to have derived his definition from the passage in Tertullian (*On the Soldier's Chaplet* [Chap. iv]): 'In civil matters custom is accepted as law when the latter is lacking.'

A threefold difficulty with respect to this definition immediately presents itself. First of all, as to the generic classification: for custom would appear to belong rather to the domain of fact than to that of law; it is, then, not a law, but a fact or action frequently repeated. For this reason, Isidore immediately adds [*Etymologies*, Bk. II, chap. x] that custom is called such 'because it is in common usage'. But usage clearly implies not law but fact. And so in controversies as to whether in a certain matter there is or is not a custom, we are wont to say that the question is one of fact, not of law.

Isidore.

The second difficulty arises out of the use of the term *mores* (general conduct): for it would seem to include the thing to be defined in the definition, since *mos* (general conduct) and *consuetudo* (custom), 771 appear to be the same thing, differing only in name. In defining the term *mos* (general conduct) in the same passage (*Etymologies*, *ibid.*; also cited in *Decretum*, Pt. I, dist. I, cans. iv and v), Isidore says that, '*mos* is *consuetudo*,'[1] and what is astonishing, in the same place, he seems to repeat his error more unmistakably: '*mos* (general conduct)', he says, 'is custom which arises only[2] from general conduct.' Here he includes in his definition not only the thing but the very term to be defined. Again, his statement that '*mos* is custom that arises out of the general conduct of the people only' increases the confusion with the implication that it is possible for custom to be introduced in some other way.

The words 'which is accepted as law', in the second part of his definition, give rise to a third difficulty. They refer, as we shall point out later, not to an essential characteristic of custom itself but to its effect. They seem, also, to convey the opinion that consuetudinary law is not true law, but is reputed as law, and this, too, is false. Other difficulties on this point we shall deal with more conveniently as they arise in the course of the discussion.

Second opinion.

2. The foregoing difficulties have their origin chiefly in the ambiguity of Isidore's terms. Their exact meaning must, therefore, be fixed as a first step to an understanding of the matter of this discussion. We must, then, notice first of all the three terms: *usus*, *mos*, *consuetudo*. All three, it must be noted, are closely kindred in meaning, inasmuch as they are strictly predicated only of free actions. There is, however, some distinction among them.

[1] [This passage in Isidore reads: *Mos est vetustate probata consuetudo* (*Mos* is custom approved by time). —Tr.]

[2] [The Roman edition of Isidore's *Etymologies* by Faustinus Arevolo in a note, Tom. III, p. 192, states that Isidore often uses *tantumdem* for *tantum*.—Reviser.

Definition of *usus*.

In its strict theological meaning, *usus* (usage) signifies an act by which the will freely carries out that which it elects. This is in accordance with the teaching of St. Thomas through the whole of qu. 16 of I.-II; and with that of Augustine (*De Trinitate*, Bk. X, chap. xi, and *De Diversis Quaestionibus LXXXIII*, Qu. xxx). In these passages, Augustine contends that only a rational animal can properly be said to exercise usage, since only such a being freely applies itself or other beings to action: such application he defines as usage. Consequently, usage is, in strict philosophical terminology, predicated of any act of usage whatever, viewed absolutely, since it is any free exercise of a faculty in the adaptation of means to an end, just as any act of joy in regard to the achievement of the end is called fruition. In the speech of every day, however, usage signifies a repetition of like actions. In this way, as Gregory López notes ([on *Las Siete Partidas*,] Pt. I, tit. ii, law I [*glossa* b]), usage is said to grow out of actions repeated without change over a long and uninterrupted course of time. It is for this reason that he contends in his note that usage is a matter of fact, that is, of repeated, free, similar actions with respect to one thing. In the law referred to, on the other hand, usage is said to be that which results or springs from the repeated action. This would imply the possibility of a third meaning of the term, a point we shall take up in a moment.

St. Thomas.

Augustine.

Gregory López.

Definition of *mos*.

3. The term *mos* (general conduct), according to St. Thomas, (I.-II, qu. 58, art. I), is predicated not only of rational but of irrational beings also. For even in Scripture (2 *Machabees*, Chap. xi [, v. 11]) men are spoken of as acting *after* the *manner* of brutes; sometimes in a good sense, as: 'Rushing violently upon the enemy, like lions' (*leonum more*); at times, in a bad one, as in *4 Esdras* (Chap. viii [, v. 29])[1]: 'Those who have lived after the manner of cattle' (*mores pecudum*); at still other times, with an indifferent meaning, as (2 *Machabees*, Chap. x [, v. 6]), '[They had kept the feast of the tabernacles when] they were in the mountains, and in dens like wild beasts' (*more bestiarum*).

St. Thomas.

2 *Mach.* xi.

Nevertheless, as St. Thomas rightly observes (on the *Sentences of Peter Lombard*, Bk. III, dist. XXIII, qu. I, art. 4), this term *mos* (general conduct) is predicated of brutes only by similitude, or analogy, in so far as they always follow the same manner of acting by instinct; for *mos* in its proper meaning is found in free actions only. For the characteristic of morality (*genus moris*) begins only where the dominion of the will is found, as the same St. Thomas has said (*ibid.*, Bk. II, dist. XXIV, qu. 3, art. 2). Only the free act, therefore, is properly called moral. The reason is that

St. Thomas.

mos, properly so-called is found in free actions only.

St. Thomas.

[1] [*4 Esdras* in the Vulgate, *2 Esdras* in Anglican versions; an apocryphal book, frequently quoted.—Tr.]

the free act alone merits praise or blame, but a 'moral' act is similarly capable of praise or blame.

Aristotle.

Consequently, it is stated by Aristotle (*Nicomachean Ethics*, Bk. I, chap. xiii [, § 20]): 'When we speak of a person's moral character (*mores*), we do not say that he is a philosopher or a man of quick appreciation, but that he is gentle or temperate.' *Mos*, therefore, properly so called, is nothing *else* than a frequent repetition of, or continuance in, similar, human moral actions over some length of time. Thus, we say that this or that was done in accordance with general conduct. So, in *St. John* (Chap. xix [, v. 40]) we read, 'as the manner of the Jews is to bury', and in *Genesis* (Chap. l [, v. 3]), 'for this was the manner with bodies that were embalmed'. In the same way those who mutually conform in moral conduct are said to be of one manner (*Psalms*, lxvii [, v. 7]): 'who maketh men of one manner to dwell in a house.'

St. John, xix. Genesis, l. Psalms, lxvii.

Whence we may say that the distinction between *mos* (general conduct) and *usus* (usage) is this: the term *usus* may be applied equally to a general habit of action and to single actions; the term *mos*, on the other hand, may not be properly applied to a single action as *usus* may be, but only to a repetition of like actions. Wherefore, if the term *usus* is taken to mean a repetition of acts, it would seem not to differ in sense from the term *mos*.

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St. Thomas adds in the passage referred to above [on the *Sentences*, Bk. III, dist. xxiii, qu. 1, art. 4] that the term *mos* is used in another sense to signify a tendency to similar actions, that is due to their frequency; this tendency is nothing *else* than a certain *habit*. We might speak of *usus* in the same way, according to the opinion of Alfonso [X] in the law we have cited [*Las Siete Partidas*, Pt. I, tit. ii, law 1]. That law, since it includes several elements, I shall discuss presently.

St. Thomas.

4. Of custom regarded as factual (as it is stated in *Sext*, Bk. I, tit. iv, chap. i) the same observations may be made. *Consuetudo* (custom) and *mos* (general conduct)—as St. Thomas remarks in the same passage [on the *Sentences*, *ibid.*]—are practically the same, since both words have the same meaning, namely, frequency of moral actions. For custom, strictly so-called, is found only in free actions, since in necessary actions it is more correct to say that there never is any force of custom, and therefore, it does not exist in brutes, though by analogy it is sometimes attributed to them (*Institutes*, II. i, § 15).

Isidore. St. Thomas.

Again, custom resides not in single acts, but in the frequency of them. This Isidore suggests [*Etymologies*, Bk. II, chap. x] and St. Thomas [on the *Sentences*, *ibid.*] very clearly states: 'Custom imports a certain frequency with respect to actions which it is in our power to do or not to do.'

I have noted, however, that this remark applies only to custom factually considered, because we must distinguish two elements in

custom. The one is the frequency of actions, as such, which we may call formal custom. This, as we have said, is matter of fact—as usage is. The other is an after-effect of the repeated acts. This after-effect may be physical, as habit, which is not infrequently called custom but somewhat improperly by jurists, since it has reference to custom as fact. We shall, therefore, include it under the first head. A second after-effect may be one of the moral order, after the manner of a power or a law binding to such action, or nullifying another obligation. This may be called consuetudinary law or a legal rule introduced by custom.

For, just as custom induces a tendency to similar actions and a consequent ease and pleasure in their performance—and this is not only a moral but also a physical effect—which we call habit; so, in like manner, the customary action establishes a moral power or obligation, or, as we shall see later, changes established obligations, by creating not a physical but a moral power or bond which we call law. Thus, just as the word *mos* from meaning a repetition of free actions, has come to signify the habit or inclination itself, so custom, even though its primary reference is to actions as such, has been capable of being transferred to mean a juridical element (which is the result of the repetition of actions) by which it brings into being [now as law, not as physical habit] the repetition of like actions. The term for the cause is wont to be applied to the effect, and vice versa: thus we may apply the word custom either to the frequency of action or to the legal rule created by it.

Here we have the principle of distinction between the words *mos* and *consuetudo* used by Isidore in the passage just quoted [*Etymologies*, *ibid.*]: *mos* refers only to the physical acts; *consuetudo*, however, implies also the element of law. The term *usus* may be employed in the latter sense, according to the third meaning given it in the law referred to above—although it has other meanings. Isidore, however, as may be seen from his comments on this passage, applies the term *usus* only to facts.

Definition of custom of law and custom of fact.

St. Thomas.

5. It is now clear that in discussing the nature of custom, it is necessary to make clear under what aspect we are considering it: regarded as matter of fact it must be defined in one way; as matter of law, in another. St. Thomas's definition of custom is, as matter of fact, excellent [on the *Sentences*, *ibid.*]: 'Custom is the frequency of free actions all performed in the same way', that is, the frequency of the free use of anything that lies in our power.

St. Luke, ii.

It is to be noted, however, that not every sort of factual custom has the power of creating a legal rule. An evil custom, for instance, creates no legal force; nor does one that grows out of the observance of a law—although it is spoken of as custom. An example of the latter use of the term is found in the Second Chapter of the Gospel according to *St. Luke* (Chap. ii [, v. 27]): '[And when his parents brought in the

child Jesus] to do for him according to the custom of the law.' This kind of custom is often called *mos*, as in the Fifteenth Chapter [, v. 1] of the *Acts*, circumcision is described as being done 'after the manner of Moses'. There are numerous other like customs which we may pass over as irrelevant to our present discussion.

Acts, xv.

And therefore, to limit our definition to such custom of fact as is capable of introducing law, we must include in the definition, this term or something equivalent, namely, that custom is a legitimate repetition of actions in consonance with some law; or, that it is one in which all the conditions required by the law are fulfilled, or something to that effect. The definition of Isidore can be said to hold of custom understood in this sense; that is, the word *ius* must be taken, not in its formal, but in its causal[1] sense. If, however, we take into account the intent of Isidore, the context of his definition, and the strict meaning of its words, it is probable that he was not speaking in this sense.

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6. Wherefore, even though it is probable that Isidore, in the passages cited [*Etymologies*, Bk. II, chap. x; Bk. V, chap. iii], was considering custom under both its aspects and was speaking in the passage quoted in the *Decretum* (Pt. I, dist. 1, chap. iv), of custom as fact—for speaking thus, *consuetudo* and *mos* are the same; and that it was in this same sense that he said: 'custom is so called because it is in common use'; nevertheless, in the passage cited in the *Decretum* (*ibid.*, chap. v), where he gives the definition we have quoted, he seems to have been considering custom as a juridical element, that is to say, as law itself, which grows out of the factual custom or the repetition of the acts. Thus the way is made clear for solving the difficulties presented at the beginning of this Chapter.

7. To the first of these, indeed, we reply that in custom, two elements are to be found: the factual and the juridical, and therefore, we speak of it at times in one sense, at other times in the other sense. And since in relation to the laws which Isidore is discussing in that last passage, the juridical rather than the factual aspect of custom is more pertinent, he defined it under that aspect and under the category of law. His definition is adapted from the *Digest* (I. iii. 32), in the first part of which we read: 'In matters concerning which we do not use written laws, it is necessary that we preserve what has been introduced by conduct and custom'; and farther on [*ibid.*, § 1]: 'Long continued custom may not unwarrantably be cherished as law, and this kind of law is said to be constituted by general conduct (*mores*).' So also in the law of Spain ([*Las Siete Partidas*,] Pt. I, tit. 11, law 1 [law 4]), custom is defined as: 'Unwritten law which has grown out of long and continuous usage.' In the same manner, the jurists define custom under the same category (on rubric of *Digest*, I. iii), and Bartolus (on *Digest*, I.

Isidore.

[1] ['causal,' warranting the introduction of new law through custom.—Tr.]

iii. 32, in his *Lecture* and in *Repetition*, Qu. i), rightly distinguishes the two meanings of the word in almost the same manner in which we have. The phrase *non scriptum* (unwritten) added to the definition by the Spanish law and by many Doctors is virtually included in the statement that this law is established by general conduct (*mores*), which sufficiently distinguishes it from written law. In Chapter Three, I will give this phrase fuller discussion.

Bartolus.

8. Hence, the second difficulty is easily resolved: for, juridically considered, custom may correctly be defined as law founded by 'general conduct', since 'general conduct' regards fact and not law: thus, the thing to be defined is not in this case included in the definition; for the consuetudinary law is brought in by the repetition of free acts, and this repetition is called general conduct. So, also, there would be no fault in the logic, if the definition of custom as law were to include the term custom as fact, provided the distinction of meanings with respect to custom is kept clear.

Isidore's sentence that '*mos* is custom which arises from "general conduct" (*mores*) only'[1] has an excellent sense and is faultless, if we remember that the term *mores* is often predicated of single moral acts considered separately [that is, without reference to their being or not being actions done in observance of a custom]. *Mos*, however, as signifying custom is used as a kind of collective term, including the whole number or the repetition of acts. Thus *mos* (a customary mode of conduct), may be said to grow out of *mores* (general conduct), that is, out of free, 'moral' actions.

We may also consider that not any conduct (*mos*) but only the general and public conduct of the community is sufficient for bringing in consuetudinary law—the subject of our discussion—in the sense that it is able to introduce the strict obligation of law. For the private conduct of one person, or of a family, does not found a legal rule—as we shall see later. It is said, therefore, that the custom which suffices to introduce law must be drawn from the general conduct of the people: it must, that is, be so general as to arise out of the conduct of the community as a whole—of all, or the greater part of its members.

Lastly, Isidore adds to his definition the qualifying term 'only' to denote that only that conduct suffices for custom constitutive (if I may use that term) of law, which has come into being by usage alone and general conduct, without the assistance of statute and written law to introduce it. For a general line of conduct that has come into being through law, cannot, as such, bring in law, much as it may help to strengthen law already existing, as we shall point out later.

Isidore.

[1] [This appears to be a paraphrase of the same passage in Isidore, *Etymologies* (Bk. II, chap. x, and Bk. V, chap. iii), found near the beginning of this Chapter.—Tr.]

9. As for the third difficulty: we have already stated that although consuetudinary law is an effect of custom as fact, we must keep the two distinct and remember that our present concern is a definition of custom not as fact but as law, and that when the phrase 'which is accepted as law' is added to our definition, the effect of custom is not stated definitely, but its essential quality is explained.

It is said to be 'accepted as law', not because it is not true law, but because Isidore restricts the term *lex* to law in written form only. It is for this reason that he says that consuetudinary law is accepted as written law where the latter is absent.

Bartolus.

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Bartolus (on *Digest*, I. iii. 32, in *Repetition*, no. 6), states that by this phrase the distinction is drawn between custom and a right (*ius*) which arises from the usage of a single person, or which is not accepted in the place of law, nor is it a regulative right, but rather something that is itself regulated by some law. In order to grasp this point we must recall what has been said at the beginning of this treatise,[1] namely, that the term *ius* has two meanings. According to the one, it signifies a moral power of use: and this is ownership or quasi-ownership; for it may include an established right in holding a thing or a right to have a thing and can be called generally a right of ownership or quasi-ownership. In this sense, *ius* refers rather to fact [than to law]. In the second sense, *ius* is a right that carries the power to bind and command: this we may call the right of law, or legal right. The private usage, then, of a single person can confer a legal right to hold a thing, that is, ownership of a thing, or the right to a servitude (*ius servitutis*) and the like, as is the case in prescription.[2] This kind of right has not the force of law, and so it is correctly held to be not a regulative right, since it neither prescribes nor ordains anything, but rather a regulated right, since it has been acquired by the operation of some law. Custom, however, in the sense of our present discussion, is not of this latter kind, but is a legal right: it is so called because it is accepted as law and because for that law such custom is required as is established by the general conduct of those who employ the custom, that is, the community itself.

The difference between custom and prescription is noted.

10. Therefore, we have briefly indicated the distinction between custom, with which we are concerned, and prescription. The two words are often used as completely synonymous because of their likeness in some details. They are, however, in their proper connotations, radically different.

Bartolus.

Bartolus (*Repetition*, no. 10 to the said question 1, at end), as well

[1] [*Vide supra*, p. 30.—Tr.]

[2] [The right to a servitude, as the right of way, or of retaining ancient lights, is the right which a dominant tenement has established over a servient tenement by prescription or law. This right is the second meaning of *ius*, for it connotes forbearance on the part of others, against whom a prescriptive right has been set up.—Reviser.]

as other earlier commentators whom he cites, makes this point, as do other later writers, such as Panormitanus (*De Consuetudine*,[1] Chap. xi [no. 20]) and Rochus Curtius (*De Consuetudine* [Sect. iii]), with Gloss thereon (on word *legitime*), and Aimone Cravetta (*De Antiquitatibus Temporum*, Pt. IV, at beginning), Balbus (*De Praescriptionibus*, Pt. I, qu. 10), Rochus Curtius (*ibid.*, Sect. v, no. 3) and Covarruvias (on *Sext*, rule *possessor*, Tom. I, pt. II, § 3, no. 2), Matienzo (*Recopilación*, Bk. V, *De Matrimonio*, Tit. VII, law I, gloss 6, no. 3) and Luis de Molina Baetico[2] (*De Hispanorum Primogenitorum Origine et Natura*, Chap. vi, no. 10). The latter, Molina, sets down numerous distinctions on this point; but disregarding them (in detail), the root of the distinction [between custom and prescription] is more clearly perceived from what he says.

Panormitanus. Rochus Curtius. Gloss. Aimone Cravetta. Balbus. Rochus Curtius. Covarruvias. Matienzo. Molina.

Because in prescription as well as in unwritten law, there enters an element both of fact and of law, which is introduced by fact; therefore, prescription requires a certain custom, and unwritten law, again, sometimes requires a custom which is in a certain sense prescriptive, that is, one that is indubitable and in accordance with law.

The first difference.

11. They differ, first of all, and chiefly, in the kind of right which each establishes. Prescription, in its strict sense, does not introduce a legal or regulative right, as does law. It confers rather a right of ownership or one of a similar kind to the use or enjoyment of some corporeal thing, as a house, an article of clothing, or an incorporeal right, as the exercise of jurisdiction or the right of suffrage. Therefore, they differ also in the custom of fact by which the one and the other kind of right is introduced; for, the custom which establishes prescription demands conditions different from those which establish law. A custom of the people is essential for legal right; the usage of a private person is sufficient for prescription, unless the object that is to be the matter of prescription is to be acquired by a corporate body. Some of the jurists cited employ the term 'custom' whensoever it is a corporate body that establishes prescriptive right, or whensoever prescription is established against a corporate body. This use of the term is improper. The acquired right is not law but ownership or some right of use. In these cases the community acts as a single private possessor and owner: whether the person establishing prescription or against whom a prescription is established is an actual person or only a fictitious one is an entirely material [—not a formal—] distinction.[3] But we must not quarrel over terms.

[1] [The Latin text incorrectly has : *de Constitutionibus*. It should read : *de Consuetudine* (of custom). This refers to Title IV of Book I of the *Decretals*. Henceforth in Book VII, the commentaries of Panormitanus, Rochus, and other canonists on this Title of the *Decretals* will be referred to as : *De Consuetudine*.—Tr.]

[2] [Not to be confused with Luis Molina (1535–1600), Spanish theologian.—Tr.]

[3] [A material distinction, in the terminology of Suárez, is one that does not affect the main issue. Thus, the distinction between paying a debt with paper money or with coin is only a material or objective distinction. The debt is paid, whatever the medium.—Reviser.]

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12. Another difference is that for the validity of a true, legal custom—the subject of this discussion—the consent of the community, or of the prince against whom (as it were) the custom is set up, is necessary; but it is unnecessary in prescription to secure the consent of him against whom the prescriptive right is established, as I have noted elsewhere (Tract. II, *De Religione*, Bk. I, chap. v, no. 19).[1] It is for this reason, [namely,] that for setting up a custom, no legal title is necessary, since consent is sufficient; whereas to establish prescription, a legal title is necessary. This is the doctrine of the Gloss, Abbas [i.e. Panormitanus] (*De Consuetudine*, Chap. xi [, no. 30]) and of others (*De Consuetudine*, Chap. xi). This test is, however, a negative one, that is, it does not give final certainty in this matter: for legal title is often demanded for a prescription, but not always; while for custom, title is never demanded. For this reason, also, in prescription evidence of good faith is necessary; in custom, however, it is not always necessary, at least, not in the beginning.

The second difference.

Gloss. Abbas.

Finally, although in the case of each, some period of time is a775 requisite element, yet it is not the same in each case. In prescription, its length is that which is fixed by law; in custom, on the other hand, either the law does not fix the time necessary for the custom to be set up, or such a fixed period is not *per se* necessary; rather, that period suffices which gives time for the prince or the people to manifest consent—as I shall explain further on. Other differences are set forth by the authorities we have cited, but they lack foundation in reason or are such that their examination need not detain us.

CHAPTER II

DOES CUSTOM ALWAYS INTRODUCE UNWRITTEN LAW, AND IS THE DEFINITION GIVEN COMPLETE?

1. This question is raised by the presence in Isidore's definition of the phrase [in *Etymologies*, Bk. II, chap. x], 'when law is lacking'. He inserted it, evidently, either to make it clear that custom must be unwritten law; or, to point out that we are to assume that there is no written law [against which custom is set up]. Each of these interpretations would seem to be open to doubt. In the first place, because consuetudinary law is often found in written form: the feudal laws and our own Spanish rules of judicial procedure are considered as such. It is not, therefore, of the essence of consuetudinary law that it be unwritten. As to the second interpretation, there is also a doubt for we must notice that custom often derogates from existing law, as will be made clear later: it cannot, then, be true that custom may not suppose the existence

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

of written law. From this observation, we see that a third difficulty may be brought forward here, one respecting that other phrase [in Isidore's definition (*ibid.*)], 'which is accepted in the place of law'. For, as a matter of fact, the custom is not accepted in the place of law, but rather abolishes it, so that the custom imposes no obligation to a course of action, but at most does no more than permit it. A fourth objection may be added, namely, that this definition nowhere touches on the element that is of the substance and essence of custom, that is to say, its acceptance by the common consent of the people.

2. I answer, first of all, that the proper meaning and basis of the phrase 'when law is lacking' is that consuetudinary law is commonly introduced in default of law: for where there is already written law, custom calculated to introduce law is not needed; the written law suffices. Indeed, such custom does not seem to be morally possible, since it is of the essence of custom that it be established not by explicit but by tacit consent, as Bartolus notes (on *Digest*, I. iii. 32, in *Repetition*, no. 7) and as is clearly to be seen from the *Institutes* (I. ii, § 9). Thus, if a custom has arisen through the influence of a written law, it lacks for that reason power to introduce law; for it was begun and continued, not that men should be bound by it, but that they should obey some law already in existence. Nor is there any difficulty against our position in the fact that sometimes a custom is said to be introduced subsequently to a law. For this has reference, either to custom of fact only, which does no more than confirm the law; or, to a custom limiting or interpreting the law, and in this respect—as I shall show later—able to create new law. It is thus, it will be noted, not based upon the law, but is an addition to the law.

The true interpretation of the phrase 'when law is lacking'.

Bartolus.

Thus, custom is most properly pronounced to be unwritten law, and is held to be such in the *Digest* (I. iii. 36 and I. i. 6, and in *Institutes*, I. ii, §§ 3 and 9). The reason is that it does not of its nature demand a written instrument, nor does it flow from written law; nor even from the personal or express precept of the superior: it is introduced by usage, for this is embodied not in writing nor in words, but in facts. This is the doctrine of the theologians on certain church laws which have come down by tradition. Of these, we shall have something to say in the two following Chapters.

3. The jurists, however, dispute whether a written instrument is so incompatible with custom that if consuetudinary law be reduced to writing it ceases by that very fact to be such and becomes law of another order. Some have asserted that it does, as Bartolus notes (*ibid.* [, no. 8]), and as Gratian indicates in the *Decretum* (Pt. I, dist. 1, can. v, § *cum itaque*). In that passage, Gratian says that a custom not expressed in writing is properly called a custom, but that one reduced to writing

Bartolus. Gratian.

Rochus Curtius. Baldus.

becomes a constitution. Rochus Curtius (*De Consuetudine*, in Pref., nos. 5 and 6) and Baldus (on *Digest*, I. iii. 32) concur in this opinion. And Jason says (on *Digest*, XXVIII. vi. 2) that custom reduced to written form by one who lacks the power of making laws persists as custom, despite such written form. The truth of this is clear: this written form is not written law; but it may serve for remembrance and as a source of proof, just as we refer to the Fathers to prove traditions that are unwritten. If, however, custom be reduced to writing by one who has authority to establish law, it ceases to be custom by the very fact that it is so written: it is now written and not unwritten law, and is law not by 776 tacit but by express consent. It may be added that even though the law is written in legal form by one possessing authority to establish laws, nevertheless, if he does not intend, in giving it written form, to add any new force to that of custom, nor to publish or declare it authoritatively as a sufficient custom, it has no more than the force of custom, just as, in the opinion of many, is the case with the laws of judicial procedure. If, on the other hand, the authority fixes the custom in the strict form of written law, and in words that pronounce it binding, it is by that act no longer custom but written law.

Bartolus.

4. It appears to me, however, that even in this last situation the custom retains its own force and the essential character of custom unless it be abolished by a special written statute. Bartolus (on *Digest*, I. iii. 32, in *Repetition*, no. 8) was of this opinion, and other jurists frequently speak to the same effect (thereon and on *Digest*, XXVIII. vi. 2), including Antonio de Butrio (on rubric *De Consuetudine*, Chap. xi), and others cited by Rochus (*ibid.*, nos. 5 and 6). This can be proved also from the canon law (*Sext*, Bk. III, tit. IV, chap. ii), where it is said that: 'A custom of this kind is approved by Apostolic authority and demand is made that it be inviolably observed.'

Antonio de Butrio. Rochus.

Gloss.

Such a written law, then, does not abolish the custom which it orders to be observed, rather it adds new force to it; and, as the Gloss on that law observes, from being a particular custom it thus becomes a common law. There is no contradiction in the fact that there should be two founts of obligation—that is, of custom and of written law—for the same thing, any more than that there should be two statutes relating to the same thing. Thus, written laws themselves often cite both customs and statutes as at the same time giving proof of the rectitude of a provision and of the obligation which exists in respect of it. An example of this is the canon law (*Decretals*, Bk. IV, tit. XVIII, chap. iii) which says: '[this doctrine] is approved both by ancient custom and by the laws.'

Nor is the continuance of the custom and of its obligation useless, notwithstanding the existence of a written law on the matter. The reason is that if the custom is a particular one and the supervening written

law is general law—as in the *Decretals* (Bk. IV, tit. III, chap. iii), and if there is effected a derogation from that law by privilege, nevertheless, where the earlier custom existed in that matter, it is not held to have been derogated from by that privilege, unless there is an express derogation from the custom also.

There is here no question of a mere manner of speaking, but it is one of fact, for it may be of the utmost importance as regards moral effect, that a custom which had its beginning without benefit of law should stand as concurrent authority with the statute, and remain in full force as unwritten law; for the mere coexistence of a written law does not make impossible an unwritten law existing with its own peculiar force and in its own terms. The custom should, however, be complete and established with sufficient firmness before the written law comes into being; for if it exists only in inchoate form and the binding force is (as it were) anticipated and introduced by the statute, it will, clearly, be no more than simple written law.

5. To the second objection, that concerning a custom contrary to law—which seems to assume the existence of law—a reply is ready at hand, namely, that it is not against the nature of custom that there be in existence law of some sort on the subject, but only that there be a written law ordaining the very course of action which the custom is to bring in. But a custom which derogates from a law does not suppose a law that regards the same object as the custom, but rather the contrary, namely, that what the law forbade the custom permits—or conversely.

In what manner custom ought to assume the existence of law.

Bartolus (on *Digest*, I. iii. 32, in *Repetition*, no. 6) explains the phrase 'where law is lacking' in a different manner. He holds, that this phrase denotes that the custom is not to be condemned by the law: for, if the custom is not against the law, the law is clearly defective in respect of the rule which the custom is bringing in; if, on the other hand, the custom is contrary to the law, it should prevail over the law, and thus the latter should cease to exist in order that the custom may prevail. For if a custom of fact is counter to written law and does not remove it, then custom will under no circumstance be able to introduce law. This doctrine is true and ingeniously conceived, but it does not, I believe, express Isidore's thought, which was much simpler, as I have explained in a previous passage. Nor was it necessary to explain this point in detail in a definition, since, in the nature of things, it is clear that a custom could not introduce one legal rule contrary to another already existing, without cancelling it; for the simultaneous existence of two laws in mutual opposition involves a contradiction.

Bartolus.

6. There remains the third objection: a custom derogating from

a law already in existence is strictly custom, and is not law. My first reply to this objection is to remark that in the realm of moral actions, under the term 'habit', absence [of action] is understood to be included: thus, Augustine's definition of sin includes not only a word, or act, and the like, [contrary to the law of God,] but also the omission of words or actions in contravention to law. Thus, then, when custom is called law, one is to understand even its power to abrogate law.

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For one law voiding another is true law, even though it may not prescribe a course of action opposed to that prescribed by the law it has annulled. In the same way, then, a custom abrogating a written law is called unwritten law, since it is accepted as an abrogating law. Whence, it is said that just as permission[1] is included among the effects of law, and as a permissive law is held to be true law—since, even though it does not enjoin the commission of permitted action, it enjoins permission to do it—so custom, introducing law that derogates from statute, does so, indeed, not as imposing an act contrary to the previous law, but only as permitting that act. It thus enjoins permission for the act; that is to say, it forbids that any one be forced to obey the derogated law, or that he be punished for not obeying it.

Isidore.

The definition of Isidore set forth at the beginning of the treatise is approved.

7. I have recorded a fourth objection, because some have found fault with Isidore's definition as incomplete. Owing to the lack of some such words as 'by consent of the people', or 'by common consent', or, even, 'of the people', they say that the phrase should not be, as it is in Isidore's words, 'established by general conduct' (*mores*), but rather 'established by the general conduct of the people'. This is the opinion of Bartolus (on *Digest*, I. iii. 32, in *Repetition*, no. 6). In fact, he approves in this passage another definition, setting forth, by the addition of several terms, the conditions requisite for custom. Other canonists also object to Isidore's definition as too brief. Not a few offer other definitions. These we need not rehearse, both because they are of no use to us here, and because they are to be found in Hostiensis (*Summa, De Consuetudine*), in Rochus (*De Consuetudine*, Pref. nos. 13, 14), and in the passage of Bartolus (*ibid.*, no. 1 [no. 6]), in which he rejects his earlier opinion and takes his stand on Isidore's definition, just as it is.

Bartolus.

Hostiensis.
Rochus.
Bartolus.

It is my opinion, then, that none of those additional terms is necessary: they do not clarify the definition; rather, they obscure it. For, if we add to the definition the words 'the consent of the people', the question arises immediately: 'Of what people?' Is the consent of the council sufficient? The like question arises on each of the other terms.

The words 'established by general conduct' (*mores*) sufficiently

[1] [For *promissio* read *permissio*.—Tr.]

includes the element of consent; since, as I stated before, the general conduct is voluntary. It must be understood, of course, that the general conduct must be such as to suffice for establishing law. What conditions should obtain for this sufficiency, or, upon whose consent those conditions ought to depend, it is neither proper nor necessary to include in the definition. It is enough that the essential and formal character of the thing defined be given in the definition: an enumeration of all its causes is not called for. Such matters are more properly taken up in the course of the discussion.

CHAPTER III

OF THE VARIETIES OF CUSTOM, AND WHETHER IT INCLUDES FORUM AND STYLUS[1]

1. Since custom may be of many sorts, and since our discussion deals not with custom in general but only with that which pertains to human law, and has the force of introducing or of annulling it in some way, a review of the different kinds of custom is called for to clear the way for a discussion of that custom which is our proper concern. Such a review will assist us to a clearer and more precise concept of the nature of custom.

We will give special attention to custom as fact [rather than as law]. From this study we shall see to what extent law can arise from custom; for in this matter it must be noted that the clear understanding of the consuetudinary law depends upon the clear understanding of the fact as the prime cause and root of the law.

The first division of custom: that which has to do with things and persons taken separately or together, and that which has to do with the actions of men.

2. We may begin by distinguishing two kinds of custom: that which, as its subject-matter, has things or persons, considered separately or together; and that which is concerned with human acts. This distinction is touched upon and illustrated with examples, in [*Las Siete Partidas*,] Pt. III [Pt. I], tit. ii, law 4. Thus, the custom of paying or not paying tithes of the fruits of the field or of the vineyard pertains to things and (as it were) imposes a burden upon them, and the custom of paying or not paying personal tithes or personal taxes pertains to persons; the custom of fasting or praying, however, clearly pertains only to human acts.

Some writers maintain, therefore, that the first two kinds of custom—those, namely, relating to things alone, or to persons alone—or both together, pertain rather to prescription than to law, since directly and of themselves they give only an [established] right to hold

[1] [There appears to be an error in this title. No mention of 'forum' or 'stylus' is included in this Chapter. A discussion of these terms is found, *infra*, pp. 476 *et seq.*, Chapter, v, sections 3 *et seq.*—Tr.]

a thing (*ius in re*), or a right to claim a thing (*ius ad rem*), or a right against a person (*ius in personam*), and that this is a kind of moral power, and not law.[1] They argue that even though out of this moral right there arises an obligation in conscience to pay the tithes and the like, that obligation does not arise directly from the custom, but from the law of natural justice, which obliges men to render to others their due. Thus, as a result of prescription, there follows the obligation not to take away the thing obtained by prescription, an obligation which is derived immediately from the natural precept against stealing. And thus, also, from a servitude acquired by prescription allowing passage over a field, there follows, from the same principle, the right that one should not be obstructed in the exercise of the right. The same principle applies to any custom whatever relating to a thing or to a person. 778

But a custom concerned with human acts is said to pertain not to prescription but to law. The reason is that no one, as we said in the preceding Book,[2] establishes a prescriptive right concerning his own action, but he can be bound by custom, and by that custom there is established a consuetudinary law with respect to his personal acts.

3. But this doctrine calls for further explanation, chiefly, because there would seem to be *no* custom that is not concerned with human acts, since every custom consists of a frequency of human acts. If you say that all customs consist of acts, but that they are not all concerned with human acts, then the reply would be that if such were the case, there would hardly be any custom which is concerned with human contingencies. For though a custom of fasting be observed by human acts, nevertheless, those actions are concerned both with matters that are the object of temperance, and with that person who does them, whose passions it moderates. This is true of all customs. And if those customs which have to do with the goods of others or with persons distinct from the person observing the custom, are said to be concerned chiefly with things and persons, then it is true, of course, that a prescriptive custom is in a sense concerned with the things of another, since no one establishes a prescriptive right against his own property; and it is also concerned with a person distinct from him who establishes the right. This statement is true for two reasons: because prescriptive custom pertains to the matter of justice, and therefore ought to consist of acts which have regard to another; and because prescriptive right is always established against some person who must necessarily be a person distinct from him who has exercised prescription.

[1] [*Ius in re*, as the right which a worker has to keep the wages he has received. *Ius ad rem*, as the right which a worker has to get his wages. *Ius in personam*, as the right a man has that other people should not impede his free actions. This is a right to claim a forbearance. The right to life is an example, under different aspects, of all three.—Reviser.]

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

The aforesaid explanation is rejected.

4. Nevertheless, the division so stated is not satisfactory. First of all, since in prescription properly so called a distinction must be made between the person against whom the prescriptive right is established, and the subject-matter of the prescription. For, in the first aspect, every prescriptive custom is engaged, as is obvious, with a person; in the second, however, it is engaged not only with a thing and a person, but with human facts. Thus, a prince can establish prescription against his vassals that they should render this or that person service, either in war or at his place of residence, or on his lands. A custom of such service or ministry creates a prescriptive right with respect to similar acts, just as the custom of fasting is said to create the obligation of fasting.

And so, in the same way also, a custom which affects another person, and actions and property which are put at the service or use of another, may, without the support of prescription, create law. Thus the pious custom in the Church of making voluntary offerings, of which the *Decretals* (Bk. V, tit. III, chap. xlii) speaks, is concerned with the objects offered as its proximate matter, with God as the person to Whom they are offered, and with the Church or the priests as the persons for whose use they are offered: nevertheless, out of such a custom, concerning such matter and such persons, an obligation in law can arise. In fact the commoner opinion is that it does arise, as may be seen from the text just quoted. And although it is probable that the obligation can be sufficiently explained as a form of prescription, it is nevertheless certain that it can bring in the obligation of a human law, if other conditions are fulfilled. For in the case of a mere custom of private devotion, such as attending a procession on a certain day, or assisting at the divine office without a real obligation[1] so to do, that custom could establish a law enjoining that act. Why, then, cannot the custom of making an offering have the same effect? Finally, on the contrary, not every custom which affects personal action not done in the service of others suffices for establishing a legal rule: the customs of writing, painting, and the like are concerned with facts but they do not suffice to make law.

How the aforesaid division of custom should be interpreted.

5. That division of custom, to serve the purpose of our present discussion, should be understood not in a material sense (so to speak) but in a formal one, that is, it should be determined rather by the purpose or scope—as I may call it—of the custom.[2] For one kind of custom would seem to be directed toward establishing right relating to things or between persons: such may properly be said to be con-

[1] [Real obligation refers to the obligation of beneficed clerics to assist at divine office. If they neglect this duty, they are not entitled to a proportionate part of their income.—Reviser.]

[2] [That is, we should distinguish custom from custom, not on the ground that they differ in regard to material and objective actions, but because their purposes are distinct.—Reviser.]

cerned with things and with persons. It is true that this sort of custom should be regarded as pertaining to prescription and not to unwritten law, which, by a substitution of terms, we are here calling custom. Nor is there any difficulty in the fact that such a custom may at times [779] be engaged with human acts as its proximate matter. And this, either for the reason that in such a case these acts are regarded not as human acts in the sense that freely willed acts are, but as things of such or such worth and value; or, at least, because such a custom is rightly included in that custom which is concerned with persons, since through it the person remains liable and bound—not, however, by custom as law, but by a right affecting the person acquired by another in virtue of the custom, and this right is a prescriptive one. So also, contrariwise, a custom, or rather usage, through which a prescriptive right to an action is wont to be obtained, although it may seem to affect as its proximate matter the action to which a right is obtained by prescription, nevertheless falls directly upon the person who was formerly responsible for the action, and by this quasi-custom he is freed of obligation.

6. The second kind of custom is of its nature classified solely with respect to the usage or non-usage of like acts, as they are exclusively the acts of the agent himself. These acts may be immanent (as it were) as fasting and praying, &c.; or, they may be acts that terminate in an external object, as writing, plowing, and so on, whether they have relation to another person or are free of such a relation. The reason is that all these acts are capable of developing custom because of their very nature, or because of their uprightness without regard to any right acquired through them in respect of another person or thing.

To this sort of custom belongs that which is capable of bringing in a preceptive rule; and in that respect it may be said to be concerned with acts, since it intends by its nature their use or exercise. Customs that concern extrinsic objects and persons must not, however, be excluded from this class. The reason is that through them also a particular obligation of human law may come into being, if they are performed only under that aspect [—that is, as being prescribed—] as the argument concerning the custom that creates obligation proves. Similar examples could be easily adduced.

For the custom of almsgiving can be such as to introduce law, because even though almsgiving is concerned with an extrinsic object and a person distinct from the donor, it can be performed on the ground of pity, and as a good practice of the agent himself, without any relation to any right which another [the recipient] has. The general ground, therefore, would seem to be that such acts, although they have a relation to another, and involve matter extrinsic to the agent, may become obligatory by the mere force of custom—although by them no right is yielded to another—just as they can be commanded by

human law, or, as a man may bind himself to such an act by a vow or by a mere promise. We must add, however, that not every such custom, even though it deals with mere facts, is sufficient to establish unwritten law. Only that custom which is concerned with free actions in so far as they are good or bad relatively to the common good, can do that. For as it is the nature of law either to command or prohibit actions of this sort, so the same nature is necessary for legal custom, if I may so speak. Thus, we exclude such customs as that of writing and the like, which are morally indifferent, private, and of their nature produce only facility or skilful usage in actions of that kind, but impose no obligation of exercise; as custom—of the sort that we are discussing—of its nature does.

The second division of custom: universal and particular.

7. Secondly, this moral custom [, that is, custom founded on human acts,] can, in its main division, be differentiated into most common, that is, universal; common, that is, public; particular, that is, private. This division is derived in part from the *Digest* (XXX. l. 3), and is more fully set forth by Hostiensis (*Summa, De Consuetudine*, Chap. xi, no. 11), by Baldus, and others cited by Rochus (*De Consuetudine*, in Pref., nos. 20, 21). But they explain the division differently, as may be seen by reference to their works.

Hostiensis.
Baldus.
Rochus.

For my part, however, under the first category [, universal custom], I include, most of all, those customs of the whole world which constitute the *ius gentium*, as I have stated in Book Two.[1] For that *ius gentium* is true law, and in its own order it binds as true [particular] law, as I have there proved. Furthermore, that *ius gentium* is unwritten, a fact that is also obvious. Therefore, it was introduced by the usage and general conduct, not of one or another people, but of the whole world. Hostiensis, therefore, calls it universal, that is, most common custom. Consequently, in passing, we can understand that the definition of custom, given above on the authority of Isidore, is strictly applicable to the *ius gentium*. Nor is this attribution [of being due to custom] contrary to the rectitude of the *ius gentium*, viewed in itself, because the *ius gentium* is truly a kind of custom; and so it has its force not solely in virtue of natural law, as I have proved, nor by virtue of the will of some human prince, as is evident.

Nevertheless, if we restrict the name and character of custom to what we at present are dealing with, namely, civil, that is, human [780] law,[2] as contradistinguished from the *ius gentium*, then, by the name of

[1] [*Supra*, p. 351.—Tr.]

[2] [The difficulty in adequately rendering Suárez's argument here has prompted the following elucidation.

Suárez is proving that custom gives rise to law. However, he restricts custom to that particular kind of custom which is common custom (i.e. civil), not wishing to include universal custom, for he is considering particular laws of particular places. He wishes it understood that he is speaking of human

custom is to be understood only the custom that is common [not universal], which we can call civil custom; and with due proportion, the definition of custom is to be restricted so that by the term law [in the definition of custom] is to be understood human, that is, civil [positive] law, including also canon law. Or else, at all events, this restriction is to be understood as indicated by the phrase *moribus utentium institutum* (instituted by the general conduct of those who employ the custom). The reason is that the said phrase signifies that this kind of law [, due to custom,] should be introduced as new law, either in a particular place or province, that is, introduced as law over and above the common laws of nations, which are considered virtually natural laws. The point can be further explained when we say that the law [introduced by custom] is reputed as law, when written law is wanting, whereas the *ius gentium* is introduced not as though in default of written law, but as being in itself necessary, and whereas also, because of its nature, it postulates that character of necessity, since on no other basis than that of necessity could it be introduced by mankind.

The principle of custom should be restricted for the present purpose so that it excludes the law of nations.

So we shall set aside for the present the first member of our division. Under the head of this sort of custom may be included ecclesiastical traditions whose beginnings and whose author we do not know, but which are observed by the Universal Church, for these embody unwritten law and are strengthened by the practice of the whole Church. For since the Church is essentially universal, for the whole world, these customs may properly be said to be universal, and most generally adopted. On these traditions we shall add in the following sections a few remarks from which it will be seen whether they are to be counted amongst those traditions which are capable of establishing unwritten human law.

In what manner ecclesiastical traditions embody law.

8. Particular, private custom is that which is followed by one person only, or by an imperfect community, a community whose consent is not sufficient to institute law, such as a private household or family, which is unable itself, or through its head, the father of the family, as I have shown in Book One,[1] to make laws. Such private custom we shall not, therefore, count for the present as custom, for the same reason, namely that it cannot establish law.

By private custom is to be understood[1] that of one person or that of an imperfect community which cannot enact laws.

(civil) law, not of the *ius gentium*, and that it is human law to which he is referring in the phrase *moribus utentium institutum*. His restriction is the more reasonable, because, as he says, a law that is introduced by a general manner of conduct is a new law and is introduced in particular localities, not in all places, as is the *ius gentium*, the latter being a kind of natural law, introduced by and for all mankind in all places. He makes his point still clearer by saying that consuetudinary law arises only in default of positive written statute. This is not true of natural law, because it does not arise and come into being in default of written statutes, but develops because it is essentially necessary. So, too, there is no other way, humanly speaking, for the *ius gentium* to be introduced than by way of necessity, for it applies to and is necessary for all mankind. It could not, therefore, have ever arisen if it merely supplemented particular local laws.—REVISER.]

[1] [The 1612 edition here used has 'not to be understood'.—TR.]

This is the common teaching of the jurists such as Bartolus (on *Digest*, I. iii. 32, in *Repetition*, no. 6) and Antonio de Butrio (*De Consuetudine*, Chap. xi [, no. 45]) and others. The reason is that if a custom is that of a private person, such a one cannot impose a law upon himself, nor establish an obligation by the mere force of repeated acts, even though the person have a fixed will of acting always in that way. If a promise be added, an obligation arises, not by reason of the custom but by virtue of the promise; and this not by reason of law, but by reason of the fact, that is, of the vow or pact, for on that basis, natural law creates an obligation, as I explained in the treatise on vows.[2] So true is this, that even though the agent may have, in another capacity, the power of making law, he cannot establish it by personal custom, a point which Rochus has noted (*De Consuetudine*, Pref., nos. 16 and 22). The same principle with respect to himself applies to the prince as to a private person, for in his personal actions or in their repetition he acts as a private person, not as prince, nor can he command himself by placing a legal obligation directly on himself as we saw above. So, furthermore, from the private or personal custom of the prince, no consuetudinary law falls upon his subjects. And this, both for the reason that, first, one of the conditions requisite for consuetudinary law is that it be introduced by the tacit consent of the people, and such consent does not intervene, except by the usage and conduct of the people themselves. Without that condition, therefore, the private custom of the prince is insufficient. Again, the subjects are not bound to imitate the prince in their actions, even his most praiseworthy and repeated acts, unless he enjoin it. He does not, however, sufficiently enjoin an action by simply observing a private custom, since thereby there is no express or tacit sign of his will to command it—as is clear. Bartolus has well said (on *Code*, VIII. lii. 2, at the beginning): 'The power of establishing consuetudinary law is given to the prince only when it is yielded by the consent of the people.' Thus, it is clear that personal custom never establishes law.

Bartolus.
Antonio de Butrio.
Rochus.

9. The same principle holds with respect to the custom of an imperfect community—one family, for instance—since one family is incapable of imposing upon itself an express law, as I demonstrated in Book One, and is, then, much less capable of establishing a tacit law, such as custom is.

Furthermore, although such a community can establish certain private ordinances, which, even though they do not bind as law, do so at least as pacts or mutual agreements; still, the persons of such a

[1] [Chap. vi, § 22; *supra*, p. 88.—TR.]

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

community cannot be even thus bound, it seems clear, on the ground of custom alone, because the pact or the promise is not created by custom alone, unless prescription intervenes, or some law or institution is assumed upon which such consent to the binding power of the pact is founded. For the same reason, although the father of a family can impose a precept within his family, he cannot bind them by his own custom, since personal custom is not a tacit sign of a precept. 781

10. We are left with the conclusion, therefore, that custom of the second sort only, that which we have called the common, or public custom, is capable of introducing positive human law properly[1] so called. The word custom, in this discussion, has reference to this sort alone. This is the meaning of the term as used by Bartolus (on *Digest*, I. iii. 32, in *Lecture*, no. 4 [in *Repetition*, no. 6]) and Baldus (on *Code*, rubric VIII. lii), Panormitanus, Rochus and all the commentators (*De Consuetudine*, Chap. xi). This is clear both from a sufficient enumeration of its parts, and from our discussion on the definition of custom, the second part of which we shall explain more fully in the following Chapter.

What custom establishes law.

Bartolus.
Baldus.
Panormitanus.
Rochus.

It should, however, be noted that it is one thing for a community to be capable of possessing the power of making laws, another that it should actually possess such power. For only those sovereign commonwealths which have not transferred their jurisdiction to some prince have this power *per se* in respect to their civil laws. The capacity, however, for making laws resides in all perfect communities, that is, cities or peoples, which have the power to be bound by their own laws, whether common or municipal, even though they have a prince over them, since, with his consent at least, they can make laws.

The public custom, therefore, of any community that has the capacity of being bound by its own laws, may establish law, in so far as it rests with the community so to do, even though it may not actually have the power of making laws. It is true that such a custom calls for the fulfilment of more conditions in order to establish law in a community *de facto* lacking that power, than in one that has it, because, for that effect, at least the tacit consent of the prince is necessary, as we shall explain later.

11. We conclude then, at length, that according as the communities are more or less extensive or general, we can distinguish a number of kinds of public custom which are included in the second group of our division. Out of this variety of custom arise a variety and multiplicity in consuetudinary law. For if the community is ecclesiastical, its custom will introduce ecclesiastical law; if lay, it will introduce civil law. Likewise, if the custom be that of the whole Church—to refer to our first division—it will introduce common canon law, concerning

[1] [For *propriis* read *proprii*.—Tr.]

which there are many decrees (in *Decretum*, Pt. I, dist. xi); if that of a whole province, the consuetudinary law will be (as it were) national; if one of a particular bishopric, the law will be (as it were) synodal or diocesan[1]; if that of a private chapter or community, the law will be (as it were) municipal. The same sort of relation will hold true of the civil customs. For if the custom be that of one kingdom, it will be (so to speak) that of the realm, that of a province, or national; if it is the custom of a city, it will be municipal. But common civil law of this order cannot be found apart from the *ius gentium*, since the various realms are not able to be at one in the general conduct of the citizens. And even though the realms are sometimes alike in respect of a certain custom, it is by way not of one entity but of several similar entities, just as in various kingdoms they will have many laws that are alike, but the law of one is not binding on the subjects of any other, nor conversely.

I do not think that praetorian law should be placed in this class, whatever certain jurists may hold—see Rochus (*De Consuetudine*, no. 22)—since the two, consuetudinary law, that is, and praetorian, involve conditions repugnant to each other, as will be clear to any one considering the matter. I shall, therefore, pass it over as scarcely relevant to our subject.

CHAPTER IV

OF A THIRD DIVISION OF CUSTOM: THAT WHICH IS IN ACCORDANCE WITH LAW; THAT WHICH IS OUTSIDE LAW; AND THAT WHICH IS CONTRARY TO LAW: AND OF CERTAIN POINTS OF ECCLESIASTICAL TRADITIONS

1. A third principal division of custom is made under the following heads: that which is according to law; that which is outside the law; that which is contrary to law. This division is that made by Abbas [i.e. Panormitanus] (*De Consuetudine*, Chap. xi, near end), Antonio de Butrio (*ibid.* [Chap. x]), Rochus (*ibid.*, Sect. V, no. 5) and Cardinal[2] (*ibid.*, Qu. 45 [quoted by Rochus, *loc. cit.*]), and is that implied by Hostiensis (*Summa*, *De Consuetudine*, no. 11). This triple comparison may be made in respect of the natural law, of positive divine law, and of human law: thus, in respect of these three kinds of law, there arises a threefold division, each consisting of three members.[3] Of each of these, we shall speak briefly. We shall touch upon them all, in order that, having set aside those matters that are irrelevant to our

Abbas [Panormitanus].
Antonio de Butrio.
Rochus.
Cardinal.
Hostiensis.

[1] [Synodal, because passed in Synod; diocesan, because extended to the diocese, but not to the province.—Reviser.]
[2] [Gratian, Italian canonist, later Cardinal.—Reviser.]
[3] [The complete division is: *Consuetudo iuxta, praeter, contra legem naturalem, legem divinam positivam, legem humanam*.—Reviser.]

discussion, and having briefly treated of those points which are of less difficulty, we may pass on to matters that are germane to the subject and present greater difficulty.

2. With respect, then, to the natural law, it would seem that no moral act can be outside it, at least, in the concrete; for every concrete moral act is—according to the more probable opinion—either good or bad. Such an act must, then, be either in conformity or at variance with the natural law since the natural law is a rule for all human acts. But custom is constituted by concrete human acts. Therefore, every such act must be either in conformity or at variance with the natural law. No custom, then, can be outside that law.

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3. Nevertheless, since we speak of the natural law as forbidding certain acts, or as rigorously enjoining the performance of other acts, so we may say that a particular custom is in accord with the natural law, since it proceeds from it, and through it the natural law itself is observed. A custom of an entirely opposite character will be contrary to law, since by it the law is violated—if no more than slightly.

What acts are in accordance with the natural law, and what contrary to it.

A third kind of custom will be outside the natural law when it consists of actions that are, according to a probable opinion, indifferent in the concrete[1]; or of good actions, which, although they are approved by the natural law or enjoined by it as to mode or precise character—that is, if they are done, they should be done in this or that way—are not absolutely enjoined as to performance: they are performed without the command of the natural law.

4. The first sort of custom, then, namely, that according to the natural law, although it may, as is obvious, be excellent, has not that moral effect which is the subject of our present treatment. For it does not introduce new positive law in respect of the same acts, since those acts are done not with such intention or will [of introducing custom]; but rather with the intention of fulfilling the natural law, as we noted above.

Such custom is, of course, useful for adding strength (so to speak) as far as we are concerned, to the natural law, by keeping fresh its memory, and by facilitating its observance on the part of the whole community. Such a custom may at times—if it be approved by prudent, wise, and virtuous men—serve to interpret the law of nature.

A custom contrary to the law of nature is not worthy of the name of custom; it rather merits that given it in the language of the laws—a corruption. It can, therefore, have no effect as law, either by abrogating or introducing law, as St. Thomas teaches (I.-II, qu. 97, art. 3, ad 1) and as is

A custom contrary to the law of nature has no effect.

St. Thomas.

[1] [According to St. Thomas Aquinas there are no human acts which, in the concrete, are neither good nor bad. But the Scotist school maintained that there could be such, as, for example, the picking of a straw from the ground.—Reviser.]

made clear in *Decretals* (Bk. I, tit. iv, chap. xi) and *Decretum* (Pt. I, dist. viii, can. v and Pt. I, dist. viii, can. ii), together with similar chapters in Distinction viii of the *Decretum*. Moreover, a custom of this kind is said (in *Authentica*, CXXVII, Coll. IX, tit. ix, chap. i = *Novels*, CXXXIV, Chap. i) to derive no cogency from any period of observance, however long. The reason is evident, since the law of nature is, as we have seen, immutable and so cannot be abrogated. Furthermore, such acts contrary to the law of nature have an essentially evil character, and it is inconceivable that they should have obligatory force. These arguments prove not only that no binding law can be introduced through such acts, but also that they cannot abrogate the obligation of the natural law or extinguish any of its precepts, either in whole or in part, since in respect of these, the natural law is, as we saw in Book Two, immutable.

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The third kind of custom, that which we spoke of as outside the natural law, may be thought of as composed of actions essentially good or of indifferent actions.

The first kind is true custom, fit by its nature to introduce law, if other elements concur. It is with this custom that we shall principally have to do. But a custom constituted by indifferent actions, regarded in itself and its object, can have no effect on the introduction of law, since indifferent acts, as such, cannot be strictly enjoined. Still, if in them there is found some usefulness essentially good, some law might be introduced through them as custom, or at least, human law abrogated. This point we will explain later when we speak of the effects of custom.

5. The question here arises whether this doctrine holds true of custom with respect to the *ius gentium*. We are not here dealing with a custom in conformity with the *ius gentium*, since it is clear that such a custom is a continuation of universal custom, and is consequently the same law and not a new one. Nor does any difficulty present itself in regard to custom outside that *ius gentium*, for such a custom can be essentially good, and can be capable of establishing law, if no obstacle exists.

A question.

The difficulty arises then with respect to custom contrary to the *ius gentium*: some jurists, among them Panormitanus (*De Consuetudine*, Chap. xi, no. 23) and Rochus (*De Consuetudine*, Sect. V, no. 16), unreservedly deny that it can introduce law. Their denial is grounded on the opinion that the *ius gentium* is truly and strictly the natural law. We, however, have in a previous passage[1] drawn a distinction between the two; and so, when the term *ius gentium* is [, in the light of that distinction,] used in its proper sense, the reason urged [by those authors] is of no value.

Panormitanus.
Rochus.

6. I believe, therefore, that it must be stated that it is not

[1] [*Supra*, pp. 342, 351, 352 *et seq.*—Tr.]

absolutely inconceivable that a part of the *ius gentium* should be abrogated by custom. The reason is that that [act] which is contrary merely to the *ius gentium* as such, is not intrinsically evil, since what is opposed [to such action] is not essentially a matter of obligation of the natural law. The example usually adduced is from the Gloss (on *Digest*, VIII. vi. 14), for it is a rule of the *ius gentium* that no one be deprived of his possessions, even for the public service, without compensation, and still, through custom, a rule might be introduced that possessions may be taken without compensation. Some deny the force of this example, but they do so without good reason; for since custom can establish the mode and conditions of ownership, it can establish the principle that private possessions be held on the condition we have mentioned, and as a kind of servitude to the public welfare. Nevertheless, if the matter be carefully considered, there is here no formal derogation of any law through such custom, but rather a change in the subject-matter of law, just as the same sort of change may be made in the natural law, as I said above, and as appears from the example we gave concerning prescription and the like. Thus, the objections usually brought against our assertion are solved by this one argument.

Parts of the *ius gentium* can be abrogated by custom.

Gloss.

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An example more to our point is that respecting the slavery of prisoners captured in war, a practice that was introduced by the *ius gentium*, and which can be abolished by custom in such a way that in a given province it is no longer permissible, and the same holds true, in my opinion, as to the division of ownership rights. An example may also be offered from the case of the Church; for the Lenten fast of forty days is (as it were) a part of the *ius gentium*, and yet it has been changed in some places by custom, at least partially, with respect to some of the early days of Lent.[1]

7. It should be added that while admitting the possible abrogation through custom of some portion of the *ius gentium*, nevertheless, it is morally impossible that the whole of this law could be abolished, since in that case all nations would have to concur in a custom contrary to the *ius gentium*: which is morally impossible. And this, both for the reason that such uniformity in any matter is hardly found, and especially for the reason that the *ius gentium* is in close harmony with nature. Whatever, then, is contrary thereto is of rare occurrence. It follows from this (a consideration that should be noticed in this matter) that a custom contrary to the *ius gentium* can be approved and tolerated in the case of one people, in such fashion that it does not result in serious harm or prejudice to another people. Thus, if in some territory, passage over highways were permitted only under irksome conditions,

Morally speaking, the *ius gentium* cannot be abolished as a whole.

[1] [That is, the Monday and Tuesday before Ash Wednesday.—Reviser.]

such a custom could not extend to foreigners who in their territory allow such passage without such conditions, save in the case of a toll levied for a just cause, and one applying equally to strangers. Under those circumstances, such a custom would no longer be contrary to the *ius gentium*. But it would be otherwise, if the just cause for this condition should cease to exist. For then it would be contrary to the natural law to extend such a custom to foreigners, because it would be opposed to that law to deprive of their rights by the law of that custom the persons who were obliged to obey it, since they do not come within the jurisdiction of those who could rightfully introduce such a custom.

8.[1] But from the foregoing may be drawn an objection to the solution just given. Thus, a prince may not enact anything contrary to the *ius gentium*, because his power and jurisdiction are inferior thereto—as Baldus states (*Libros Feudorum*: Tit. *De Nat. Feud.*, Chap. i and Tit. *Qui Feudum Dare Possunt*, Chap. i, last section), in which he is followed by Jason (on *Digest*, XLIII. xii. 2, in *Repetition*, no. 3); therefore, neither can the custom of one nation derogate from the *ius gentium*, because the custom is not more powerful than the law of a prince.

Baldus.

Jason.

A reply to this may be made, first, by a denial of the inference for the reason that the joint consent of the people and of their prince to the custom can be of more weight than the consent of the prince by which he enacts law. For it is probable that the prince might not be able to compel his subjects to accept a rule contrary to the *ius gentium*, and still that rule could be established by common consent and custom.

Secondly, I maintain that a prince may, perhaps, enact a law contrary to the *ius gentium* by derogating from it in some matter which it is expedient not to observe in his realm and relatively to his subjects, as, for example, he might enact a law that in his realm there should be no slaves, but that all men should be free, or something similar. For this exercise of power is not opposed to [natural] reason, nor to the proper government of the state. Hence, just as a prince might enact law against another custom, so also he might make a rule contrary to that portion of the *ius gentium* which affects his government; and the reason is that, because of its universality alone, the *ius gentium* is not there the stronger or more immutable with respect to his subjects: it is so only with respect to other nations.

9. In the second place, the third division set forth above is to be applied also to the positive divine law: for some customs are in accordance with it, others are outside it, and still others, contrary to it.

With respect to the first group, that custom is said to be in accordance with the divine law which includes the observance of a certain body of divine positive law, that is strictly preceptive. For, if the term law in this case be given a broader interpretation so as to include the counsels

[1] [Section-number missing in Latin text.—Tr.]

[of perfection], then we may say that a custom in accordance with the counsels may be held to be according to the divine law. Nay more, every morally good custom to which Christ gave specific approval can be said to be in accordance with the divine law; and in this sense, no such custom can be outside that law. For the present, however, we shall call every custom made up of acts in accordance with the divine law, yet not prescribed thereby, a custom outside that law; therefore, a custom by which a divine precept is fulfilled, we shall call a custom in accordance with that law. 784

Under this latter heading, then, certain unwritten traditions of the Church would seem most properly to belong. For when the divine law as to baptism, or the Eucharist and the like, has been put into written form, any custom in accordance therewith is not part of the unwritten law, as is evident from the foregoing, since such a custom has the written law for its source, and it initiates nothing new in law. Hence, though this may sometimes be called a custom or *mos* (general way of acting), as is evident from *St. Luke* (Chap. ii [, v. 27]) and *Acts* (Chap. vi [, v. 14] and Chap. xv [, v. 1]), it is to be understood as custom of fact, and an observance of some written law, and not as a distinct law in itself. The unwritten traditions of the Church can belong to this class.

St. Luke, ii. *Acts*.

10. Nevertheless, at the outset we must note that, strictly speaking, tradition and custom are different things. Tradition relating to general conduct—and it is of this tradition that we are here speaking—is evidently the first institution of some action or of a mode of acting; or it may be understood as meaning a body of doctrine through which such an institution is given or made known to men. Custom, on the other hand, which embodies the tradition, is the fulfilment, and (as it were) the preservation of the original tradition. Hence, tradition may be written or unwritten, but custom exists as usage, and so is unwritten. Thus, St. Paul said (*2 Thessalonians*, Chap. ii [, v. 14]): 'hold the traditions which you have learned, whether by word or by our epistle'; that is, whether orally only or in writing; and thus he assumes that both kinds of tradition exist. When he says 'hold', he commands the usage and the execution, wherein consists the custom. The same is to be gathered from the passage in the *First Epistle to the Corinthians* (Chap. xi [, v. 23]): 'For I have received of the Lord that which also I delivered unto you'; that is, by word first, and later, in writing, by his epistle. He indicates usage and custom when he adds [*ibid.*, v. 33], 'Wherefore [...] when you come together to eat' &c. Thus, Tertullian also, in Chapter iii of his work *On the Soldier's Chaplet*: 'If no Scripture has determined this [tradition], certainly custom has corroborated it, and the custom, without doubt, originated in tradition'; and he adds in the next Chapter: 'There is offered you tradition to authorize it, custom to

Tradition and custom are not the same.

St. Paul.

Tertullian.

confirm it, and faith to live it.' Therefore, he distinguishes custom from tradition, so much so, indeed, as to say: 'How can a practice be observed which has not been handed down by tradition?'

11. But on this point it is further to be noted that just as custom sometimes emanates from the written divine law, so it could have emanated from and have taken its rise from the same law in unwritten form. For as written form is not, as we said above, of the essence of law as such, it is much less of the essence of divine law. Indeed, New Law, of its nature, as we shall show in Book Ten,[1] demands no more than an oral form, and was thus handed down in the beginning, as is evident from various passages in Paul. It is most certain that there are now many unwritten traditions of the Church which emanated from a divine command, and which embody such commands, as may be gathered from the Council of Trent (Session IV). The same will appear in the treatise relating to the Sacraments and to Faith, on which we shall have to speak at length,[1] and is also clear from the learned chapters of Bellarmine in *De Verbo Dei* (Bk. IV [, chaps. v *et seq.*]).

Bellarmine.

However, such are not truly customs of law, but customs of fact; since, although they contain unwritten law, they are not laws established by custom; rather, the custom emanated from divine law. Hence, such law is not human, but divine; and the traditions themselves are called divine, even though they have been preserved by custom. Such custom added no new element to their binding power as law, although it has the highest value for the interpretation of the law: for as custom manifests the divine precept, so, too, it sets forth (so to speak) the mode of observance, that is, the conditions of its fulfilment.

I note, in passing, that besides these traditions, there are other unwritten traditions, which are believed to have originated not from divine, but from Apostolic precepts and laws: the law, for instance, of the Lenten fast, and of the observance of the Lord's Day, and the like—which are called Apostolic traditions. The custom of observing these traditions can be styled Apostolic law. This is not consuetudinary law, since the custom did not initiate the law, but the reverse; and so these are customs—in the sense that we are using the word here—not of law, but of fact.

What customs emanate from Apostolic precepts.

But at times, a custom of the Church, although observed universally, could have originated without the aid of any express precept, written or oral, whether of divine or of Apostolic origin, as seems likely in the case of certain sacramental[2] ceremonies. Here we find custom existing

Sometimes an ecclesiastical custom may originate apart from any precept.

[1] [Not included in these *Selections*.—Tr.]
[2] [Suárez means that certain ceremonies came into existence by custom, and the Church sanctioned them, so that they became what are called 'Sacramentals', such as blessing with holy water, blessing the fire, ringing the church bells.—Reviser.]

without any binding tradition, but not altogether without tradition. For the very initiation of a custom by the Apostles, and approval by the first pastors of the Church, gave to a practice the force of tradition. Thus, Augustine said (*On Baptism*, Bk. IV, chap. xxiv): 'What the 785 Universal Church holds, and has always held, even though it be not defined by the Councils, is most properly believed to have been handed down by Apostolic authority.' The reason is that these immemorial customs, if they are observed by the Universal Church, are believed to have had their beginning in the days of the Apostles, and that, not independently of their teaching and their authority, at least by way of approval.

What ecclesiastical custom is there outside divine law?

12. The second kind of ecclesiastical custom, namely, that which is outside divine law, may now be easily explained. For such in general is every custom which, on the one hand, has not proceeded from, nor is, on the other, contrary to a divine precept. But this is not enough to warrant the inclusion of such custom with that which embodies unwritten law, unless it be added that it came from no express law, Apostolic or human, as I have said a little above,[1] as is clear from our discussion on the definition of custom; and as we shall soon repeat in dealing with human law. But if a custom is outside divine law, and took its rise from no express law, then it is of itself sufficient for establishing unwritten consuetudinary law by the tacit consent of the people, and of prelates, or princes.

Such are those traditions which the Universal Church observes, yet which are not expressly commanded by Christ our Lord or by the Apostles; as, for example, lay communion under one kind, infant baptism, etc. But it must be noted that universal ecclesiastical customs of this kind do not always establish unwritten law that obliges their adoption, or observance as [legal] custom: as, for instance, making the sign of the cross on the forehead, or prayer towards the East—which Tertullian (*On the Soldier's Chaplet*, Chap. iv) and Basil (*De Spiritu Sancto*, Chap. xxvii, which is cited in *Decretum*, Pt. I, dist. xi, can. v), and others whom I cited in another passage include under such traditions. They also put forward as examples of this sort of tradition, customs which do not bind under precept. Such traditions, for all that, do establish a sort of law, or rather, indicate one that approves (as it were) of such acts. For such a custom of the Universal Church, although it is not a matter of special obligation, in respect of some particular usage, still does impose the obligation of believing that such a usage is licit and holy. It does so, both because the usage is always regarded as having Apostolic approval, and because the authority of the whole Church guarantees it [to be licit and holy], since the Universal

Tertullian.
Basil.

[1] [*Supra*, this Chapter, § 9.—Tr.]

Church cannot err in morals by following a sinful practice or by approving it.

A custom contrary to divine law is of no effect.

13. There can, finally, exist a custom contrary to the divine law, a custom which the Scripture calls, in a disapproving sense, the 'tradition of men' (*Matthew*, Chap. xv [, v. 3]): 'Why do you also transgress the commandment of God for your tradition?'; and, that which is referred to in *Mark*, Chap. vi [Chap. vii, v. 8]: '[leaving the commandment of God, you hold] the tradition of men.' Hence, Paul said (*Colossians*, Chap. ii [, v. 8]): 'Beware lest any man cheat you [by philosophy, and vain deceit;] according to the tradition of men [. . . and not according to Christ]'. These traditions, too, St. Peter (*1 St. Peter*, Chap. i [, v. 18]) called vain. Custom of this kind cannot, therefore, have the moral effect of law, and so it in no way concerns us. For it is impossible that such custom should abrogate a divine law. This is the doctrine of St. Thomas, as we saw (I.-II, qu. 97, art. 3, ad 1), and that of Panormitanus, with the Gloss, and others (*De Consuetudine*, chap. xi).

Matthew, xv.
Mark, vi [vii].
Colossians, ii.
St. Thomas.
Panormitanus.
Gloss.

And the reason is that even though the matter of such a law be not intrinsically evil, but evil only because it is prohibited, and as such not essentially impossible of initiation by custom; still, because the prohibition is a divine one, men cannot prevail against it, since men cannot change the divine law or the divine will. Nor can God be thought of as conniving at such custom and abolishing the law because of it, as we shall see later that men may do [in the case of human law]. There is no principle or ground for imputing such a possibility to the divine will; nor would it be expedient, or befitting the divine authority; His law must be immutable, as we shall see later when we come to deal with the law of grace.[1]

Some, however, of the jurists to whom we have referred, assert that custom can have the effect of limiting and relaxing (as it were) the divine law if a reasonable cause exists. This must not be taken as meaning a limitation or dispensation properly so called, which has for its effect a partial abrogation of the obligation of a previously existing law. In this sense, the assertion is clearly false. The reason that holds good in respect of the entire law, holds equally good for any part thereof, in due proportion, as we shall state at greater length (Book Ten).[1] Therefore, this [apparent limitation and relaxation of the law] should be looked upon rather as a kind of interpretation of the law; for custom may thus interpret even the divine law, which in such a case, and because of such an intervening cause, is not binding, because it was not framed for such a situation.

A custom in respect of divine law can be its interpreter.

14. It remains for us to apply the same third division[2] to human

[1] [Not included in these *Selections*.—Tr.] [2] [i.e. of custom, *vide supra*, p. 463.—Tr.]

law, for it is with that law we have chiefly to deal, and because in such law it happens more commonly that a custom may be in harmony with, outside of, or contrary to law. Indeed, there is no dispute concerning these two latter groups, nor need we add any special remarks about them here, since the main discussion regarding them will be found in the following Chapters. But concerning the first group, some jurists contend that no custom can exist which is in accordance with human law. This was held by Felinus (on *Decretals*, Bk. I, tit. III, chap. i, no. 17), by Antonio de Butrio thereon, as well as Giovanni da Legnano and Dominicus de Sancto Geminiano (on *Sext*, Bk. I, tit. II). Others, however, to whom I have previously referred, who propound this third division, hold the opposite opinion, for they advance it particularly with respect to human law. The difference of opinion is not actual, since the latter group are speaking of custom of fact, while the former are speaking of custom of law. It is clear that there are customs of fact in accordance with human laws, as the custom of hearing mass on feast days, or of going to confession during Lent, and the like. Thus, human law is like the divine or the natural law, in that there may exist a repetition of actions in conformity with it—in short, a custom of fact.

On custom which is in accord with, outside, and contrary to human law.

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Felinus.

Antonio de Butrio.

Giovanni da Legnano.

Dominicus de Sancto Geminiano.

Custom in observance of human law is one of fact.

15. Nevertheless, it is certain that no new unwritten or consuetudinary law is introduced by means of such a custom, and the aforesaid authors are speaking in this sense when they say that even though a people obey a law for a thousand years, they do not thereby introduce custom [, i.e. consuetudinary law]. The reason is touched upon above: such custom of fact is merely a form of observance of a pre-existing law; and so it does not tend to the introduction of any new law, since the custom was formed or continued not for that purpose, but only to fulfil a law already in existence.

Nor does the prince [, in tacitly accepting such a custom of fact,] form a new purpose of introducing another legal rule relating to that matter, since he is merely continuing (as it were) the intent that was always in his mind, that his law should be observed. Wherefore, Baldus truly says (on *Code*, VIII. lii. 3 [in commentary, Sect. 3, *Leges*]) that a custom in harmony with law is not regulative in character but is imitative of the law, or executory as it were. From which the Gloss (on *Sext*, Bk. I, tit. IV, chap. i) and Panormitanus (*De Consuetudine*, Chap. xi, no. 21) correctly infer that if that law be abrogated by a later one, the custom [that grew out of its observance] is abolished also, even if no mention is made of it. The reason is that it does not add any new obligation, and it is held to be established, not on its own merits, but as something annexed to and founded upon the law; and so it has no binding force when the law which forms its basis is abolished.

Baldus.

Gloss.

Panormitanus.

Whether, when it existed as a custom first, and later a written law was established, the custom can persist after the revocation of the written law, is a point we have touched upon in a previous Chapter. The reader may consult Felinus (on *Decretals*, Bk. I, tit. III, chap. i, last rule to no. 15, particularly limit. 7) and Rochus (*De Consuetudine*, Sect. 5, no. 7), for further study of this question.

Felinus.

Rochus.

16. But even though this custom does not introduce law, it may have some influence on pre-existing law as regards its preservation and future effects. In this sense, it is said first of all, to confirm the law. Thus, Gratian (in *Decretum*, Pt. I, dist. IV, can. iii) held that: 'Laws are established when they are promulgated; confirmed when they are approved by the general conduct of those who use them.' The same is made clear in the *Code* (VIII. lii. 3). And Bartolus (on *Digest*, I. iii. 32, in *Repetition*, no. 4) explains the matter well when he says that 'such custom confirms the law not directly, but by removing that which would prevent[1] the law from exerting its efficacy, namely, the contrary custom and the abrogation of the law'. So, in almost the same way, this sort of custom may be said to render aid to the law, as may be gathered from the *Decretals* (Bk. II, tit. XXXIX, chap. xiv), since the custom makes easier the observance of the law, and in a certain sense, makes the law itself less liable to change, as we have just explained.

What effects the aforesaid custom has.

Gratian.

Bartolus.

Another effect of this custom is to interpret the law; indeed, it is called in the canon law (*Decretals*, Bk. I, tit. IV, chap. viii) and in the civil law (*Digest*, I. iii. 37): 'an excellent interpreter of the law'. Bartolus (on *Digest*, I. iii. 32, in *Repetition*, nos. 4 and 5) and Panormitanus (*De Consuetudine*, Chap. viii, no. 28 [no. 7]) speak of it in the same way. The reason is that it indicates in what sense the law was originally made and received. But if at any time this custom induces such an interpretation as to introduce some change from the first form of the law, the custom will then be something more than a mere interpretation, and will, in that respect, be a custom not in accordance with the law, but one that is superadded to it. On this point, the same principle applies as in custom contrary to the law, since the custom introducing change is in some respect in opposition to the law as it was at first, for it is said to derogate from that law in some particular. We shall, then, treat of it with regard to this effect at the same time that we deal with custom that abrogates law.

17. Finally, it is usual to speak of another effect of this kind of custom, which is called the extension of law. Thus if, for example, a law is made originally for laymen only, and then through custom

[1] [The term *removens prohibens* means, literally, removing an obstacle. For example, if I cut a string which is holding up a weight, the weight will fall. The string prevented it from falling. My action removed the obstacle to the fall of the weight. My act was *removens prohibens*, or a cause *per accidens* of the fall of the weight.—REVISER.]

comes to be observed by clerics, it may happen that by reason of custom it will bind clerics also, who would otherwise not be bound by the force of the law itself. This may be gathered from Panormitanus through his comment (on *Decretals*, Bk. II, tit. XXVII, chap. viii, no. 4), Felinus (on *Decretals*, Bk. I, tit. II, chap. x, no. 62 [no. 65]), Covarruvias (on *Decretals*, Bk. IV, *De Matrimoniis*, Pt. II, chap. vi, § 10, no. 18 [no. 35]), and Tiraqueau (*De Iure Primogenitorum*, Qu. 44), who hold that a just custom, one common to clergy and laity, binds clerics; and that, therefore, *a fortiori* a custom of the clergy will bind the clergy, even if that custom is established in accordance with a law for laymen.

Panormitanus. Felinus. Covarruvias. Tiraqueau.

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But on this point it must be remembered that a custom according to law in the sense that it exists by force of law and by its command, is one thing; and that a custom according to law in the sense that it is modelled on the law, and is like to and imitates it, is another matter. Here we understand the term 'custom according to law' in the first sense. Such custom does not really extend law except, possibly, by way of the interpretation that it may give to the words of the law. Nor, in the above example, does custom accord with law in that [, i.e. the first] sense, since it proceeds not from the civil law, but from the free will of those who have wished to perform what the civil law prescribed, even if they were not bound thereby—which was the case of the clerics in our example. Hence it may be said that that custom—of the clerics—was according to the civil law only by imitation; it is not, therefore, strange that it should introduce new law. For custom has this force *per se* according to the *Code* (VIII. lii. 3); and the fact that it is an imitation of another and extrinsic law is of no importance, nor does it take from the custom its force. Hence it is that this custom is not properly an extension of the prior law, but the establishment of new law of another order or jurisdiction. For the obligation which arises concerning such persons comes really not from the force of the prior civil law, but from a new ecclesiastical law introduced by custom of the clergy. That kind of custom, as such, is thus shown to be of the type which is outside the law.

CHAPTER V

OF THE VARIOUS DIVISIONS OF CUSTOM ON THE BASIS OF SUBJECT-MATTER

1. Customs may, in a fourth way, be grouped on the basis of the things or subject-matter with which they are concerned, and on this principle a number of subdivisions, or easier classifications, can be included in custom. Thus, custom

Custom is either canonical or civil.

may be distinguished as canonical or civil, just as written law is divided into similar branches. For if a custom relate to spiritual matters, it will be canonical, as the custom of fasting, or that of the observance of a feast-day. And in general, every custom, proper to the clerical order as such, is canonical, even when it might sometimes seem to be concerned with secular matter; for it always touches upon such matter as affecting the property of churches, or the property or persons of clerics, and under this aspect it is sacred or spiritual. But a civil custom is one that is proper to laymen, and is rightly concerned with subject-matter that is temporal. For it resembles civil law, as may be seen from the reasoning of the *Code* (VIII. lii. 3).

2. One may object that this division is not an adequate one, because there are customs observed in common by the clerics and the laity and binding upon both orders—as we saw from Panormitanus and other writers in the preceding Chapter—and such a custom must be called not canonical or civil, but mixed. To this I reply first, that such a custom includes clerics merely in their character as citizens, as its subject-matter pertains to temporal government and to the common welfare of the state. As such it is a civil custom: partly, since it tends wholly towards a temporal end and falls within secular authority; partly also, because it emanates from the state as a human organization; whence the law or custom will be termed a civil one. Nor is there any unfitness in the fact that such a custom should bind clerics as citizens, because they are included in the term state (*cives*), as Bartolus (on *Digest*, L. i) and Panormitanus (on *Decretals*, Bk. II, tit. XXVII, chap. viii) note. And, again, they may be bound by the written civil law, in respect of its directive force, as has been previously explained. Custom may, on the other hand, relate to clerics as such or simply as Christians, in which case the custom is essentially a canonical one. The reason is, that only a canonical custom can bind clerics as such, and only such a custom is of that higher order of custom which can include laymen also; for custom always follows the principle of written law and [therefore] depends upon a power and jurisdiction of the same order [as law].

Panormitanus.

Bartolus. Panormitanus.

Customs may be canonical in two ways. In the first place, the subject-matter and object of a spiritual custom may relate to clerics and to laymen as Christians, and such a custom makes no distinction between the two orders and is canonical: as the custom of observing a feast-day is common to both. A custom may be canonical, in the second place, solely on account of some propriety or likeness; as, for example, for the reason that in a certain locality both civil and ecclesiastical judges observe the same custom in their decisions. Thus, strictly speaking, we have here not a single custom, but two, one canonical and the other civil, which are regarded as one merely by a combination of

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the two. Thus, our division is an adequate one; and, in passing, we have said all that is necessary in exposition of it. It will also be of service in our use of terms in the following discussion.

3. Custom may, again, on the basis of its subject-matter be divided into general conduct (*mos*), strictly so called; and style (*stylus*), rite (*ritus*), and forum (*forus*). This division will become clear from our explanation of the last three terms, for we include under these words every other custom not comprehended under general conduct (*mos*), strictly so called.

In the first place, then, style means some special usage of writing or speaking, as may be inferred from the *Decretals* (Bk. V, tit. xx, chap. vi), where, for determining what are genuine Papal rescripts, it is said that, among other matters, style must be taken into consideration. Some hold, from that passage, that the term in question means [in law] only a customary manner of writing, for this is the meaning given the term in the *Decretals* (Bk. II, tit. xxx, chap. viii). This is the opinion of Rochus Curtius, also (*De Consuetudine*, Preface, no. 28 [no. 27]), and of others whom he cites. The translation of the word, too, favours this definition; for its primary meaning apparently is a bronze instrument for writing; the word was then applied to the writing itself (*Code*, I. ii. 1); and thence to the fashion or arrangement of the writing. But even though the term is so used in the above-cited laws, that fact does not exclude other meanings, for it also signifies a 'usage' or manner of speaking. Thence also the word would seem to have served to signify a certain usual mode to be followed in judicial procedure. Thus Cynus (*on Code*, VIII. lii (liii). 1 [2, no. 7]) said that style is the practice of some court, and Baldus holds the same (on *Code*, *ibid.*, 3). By a substitution of terms the practice of the Roman curia is thus usually called its style. And what Bartolus says (on *Digest*, I. 1. iii. 32, in *Repetition*, no. 10, at end of qu. 1), on this matter is almost of the same import, namely, that style is a custom which relates to a method of speaking or proceeding—that is, in court. On this account, Bartolus says (on *Code*, VIII. iii (liii). 2, no. 9) that style may be established only by the judicial acts of those whose business lies in the courts. Angelus de Ubaldis (on *Institutes*, I. ii, § 9), however, insists that style has the same meaning with reference to legal decisions as it has in other matters. This is certainly true in the general meaning of the word, but when we consider its use in connexion with the explanation or the introduction of law, it seems to mean properly a certain order in the drawing up of judicial decisions; including thereunder all [legal] documents, bulls, and rescripts. For even if in executing them, judicial procedure does not intervene, yet their style is considered in judicial decisions. Many points relating to this word have been collected with erudition by Cristóbal de Paz

The meaning of style.

Rochus.

Cynus.

Baldus.

Bartolus.

Bartolus.

Angelus de Ubaldis.

Cristóbal de Paz.

in his writings on the laws of Spain (on *Las Siete Partidas*, Pt. I [, nos. 34–40]) which are called styles.

4. So, not to linger upon the mere meaning of the word, and to come to the matter as it pertains to law, we can distinguish—as we have done in the case of custom—two kinds, style of fact and style of law.

What is style of fact?

To my mind, style of fact is not so much the frequency of the actions of writing, speaking, or proceeding, in a certain way, as that quasi-conventional form which is wont to be kept in the order of speaking, writing, or procedure, so that in the different parts, there will be used such and such words, or that the parts will be arranged according to a certain method or order. This meaning is evident from general usage, and from the laws cited; and may also be inferred from the *Code* (I. ii. 1), where it says: 'The style of the last will must be free'[1]; that is, the form of making testamentary disposition of property. The reference here is clearly to style as matter of fact and means not frequency of actions, but the form followed in drawing up such a document. The term is also more clearly used in the same sense in the *Code* (X. x. 3). So, too, Terence in *The Lady of Andros* [Prologue, line 12] said: 'But there is a difference in the sentiment and the style.' But since it is especially in speaking or writing that such a form is customarily employed, the usage itself, or the custom of speaking and writing in this manner, is termed style. And so style signifies a custom as fact, and in this meaning it was used by Baldus (on *Code*, I. ii. 1 and IX. xlix. 7). But this view must be understood to apply not absolutely to every custom, but only to custom in matters of the kind to which I referred above.

Terence.

Baldus.

5. If, then, there arises from such a style of fact an obligation to observe such a method or order in passing judgment or in procedure, 789 then in this respect style will be a special and unwritten law. Whence, since it does not seem ordinarily possible that this obligation can be introduced through style as fact in such wise as to have the force of law, except in those things which concern judicial matters, style would seem specifically as an element of law to be restricted to a customary order in court proceedings, as we said in citing Bartolus. For in other matters, utterances, or writings, a usage of speaking or writing according to such and such a mode, would seem to have too little relation to the common good to make it possible for the said usage to establish law. But in judicial matters it may be of great importance, so much so, as Ancharano remarked (*Consilia*, 53), that the style of the court makes law in cases where there has been no legal decision.

Bartolus.

Ancharano.

Accordingly style, as a thing properly termed judicial, relates to judicial procedure. Hence, style is a certain kind of unwritten law, which sometimes creates a positive obligation, allowing no departure

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

therefrom, according to the *Code* (IX. xxxv. 11); at other times, it abolishes an obligation in such a way that, although by the general law a decision should be handed down by the court, yet because of the style of the court, this is held to be unnecessary. Upon still other occasions, style establishes an interpretation of the law, even an authentic one, such as must be followed. In what manner style may be introduced, so as to have those effects, must be explained in its due relation to custom, and wherever it possesses any special peculiarity, that will be pointed out in the course of our discussion.

Various effects of style are touched upon.

6. Thus, at length, we can understand what the laws of style are, and what is their nature. When a law is said to be a law of style, the term may be understood in two ways. One way is that this denomination be derived from the object of the law, that is, the subject-matter with which the law is concerned. Such a law of itself does not, properly, pertain to custom, but rather to written law, which arranges for the style to be observed in judicial procedure, just as the rhetorical rules that are given, for the orderly arrangement of the matter, for the dignity, clarity, and grace of written or spoken compositions, may be called the laws of style. Of such sort are the laws of style of the Spanish Kingdom, in which the style of conduct or custom is frequently cited. So, I am of the opinion that this denomination was derived from the subject-matter itself, although Cristóbal de Paz (on *Las Siete Partidas*, Pt. I, no. 53 [no. 73]), explains this rubric [on style] otherwise. A law of style may, in a second way, take its name from the intrinsic mode whereby it has been introduced through usage alone in such forensic or judicial subject-matter, and so is properly unwritten law, and a form of custom, as has been explained.

What are the laws of style and what is their nature?

Cristóbal de Paz.

Rochus.

7. The second member of our division is rite (*ritus*). For Rochus Curtius places it among those matters which relate to custom, when he says (*De Consuetudine*, Pref., no. 28) cited from Panormitanus (on *Decretals*, Bk. I, tit. xi, chap. ix): 'Rite is a custom that gives solemnity in the performance of some action; so that when usage provides for the solemnity of an action, it may be called rite or observance.' His only reference in support of his definition is to a passage (*De Consuetudine*, Chap. xi) in which no particular mention of rite is made. According to this description, even style may be a form of rite, although not every rite may be called a style. Panormitanus (on *Decretals*, Bk. III, tit. xxx, chap. xxxii) gives it a more restricted meaning: 'Rite signifies general conduct in spiritual matters.' According to this definition, not every solemnity of action may be called a rite, but only that expressed in sacred matters, as in sacrifice, the Sacraments, and the sacramentals; or in prayers, or in the

The meaning of rite.

Panormitanus.

Panormitanus.

divine offices. This seems to be the general ecclesiastical usage of the word. Indeed, Panormitanus never proved that the word signified a species of custom; for, on the contrary, he said (on *Decretals*, Bk. I, tit. xv [tit. xvi, chap. iii]): 'Rite is a certain form and solemnity in an action relating chiefly to the sacramental act.'

Panormitanus.

8. Accordingly, the doctrine that we have set forth concerning style should, it would seem, be applied also to rite. For a rite may be factual, or legal. Likewise, rite of fact, primarily and of itself, consists in a certain solemnity or ceremony in some action. In the three Chapters of the *Decretals* cited, it is used with this meaning. Whence neither custom nor frequency of actions are of themselves necessary for rite of this sort: for more commonly it is introduced prior to any kind of usage, either by word, as when Christ our Lord instituted the essential rite of the Sacraments; or, again, by writing, as is clear in many of the accessory solemnities and sacred observances instituted by the Church. But it is not intrinsically impossible, and in fact it often happens, that a rite of this sort should be introduced by usage and custom. Such a custom may be, therefore, spoken of as a certain rite, and this is the meaning of the authors quoted above. But it will be necessary to distinguish between the rite as fact, and the rite as law. For in the first aspect, it is a repetition of actions in a certain manner and in a certain matter; in the latter, it may be an unwritten law with respect to that matter, which has been initiated by that repetition. Thus, almost all canonical customs in actions concerning the divine worship, in so far as they give to those actions a form, or special mode, may be called rites. What, however, is the nature of that law, and how it is introduced, must be determined from the general rules concerning custom. For there is no peculiarity in this kind of observance, such that it cannot be treated of, under the principles that apply to custom.

Rite of fact and of law.

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9. A third branch of custom in this general classification is 'forum'. This term is not commonly used in this sense in the general law, and so Bartolus, Panormitanus, and Rochus, and other writers on custom make no mention of it. But in the laws of our kingdom, Spain, forum is reckoned among the customs (*Las Siete Partidas*, Pt. I, tit. ii, law 7), as Gregory López notes [*glosea* n], in commenting on that law.

What is forum?

Bartolus.
Panormitanus.
Rochus.[1]

Gregory López.

When the derivation of this word is considered, it would seem to mean the same, or almost the same, as style in the sense in which we have explained that term. For in popular usage, forum usually means a public place set apart for trafficking and the business of selling, and is so used by Isidore (*Etymologies*, Bk. XV, chap. vi). And, it is because courts are usually held in such public places that Isidore believes that

Isidore.

[1] [For *Lochus* read *Rochus*.—Tr.]

the name has been transferred to mean the place of judgment. The term 'forum', he says (*Etymologies*, Bk. XV, chap. ii and Bk. XVIII, chap. xv) signifies a place for conducting litigations; and the word is said to have been derived from the verb *fari* (to speak). This derivation is contained in the *Decretals* (Bk. V, tit. XL, chap. x). Hence, the word also means the special domain of each judge or prelate, in which sense it seems to be used in the *Decretals* (Bk. II, tit. II), as Hostiensis, Panormitanus, and others have noted in commenting on that title. Hence, also, by an extension of meaning, judicial actions are wont to be called 'forensic actions'—as they are in the *Digest* (II. xii. 9). So also, public documents are termed 'forensic instruments' and these are accepted as proof in the court, as may be seen in the *Code* (IV. xxi. 20, § 2). So, then, customs relating to the order of judicial procedure are called forensic customs.

Hostiensis. Panormitanus.

10. In Spain, then, these customs are held to be included under the name of forum; for the laws which are spoken of as those of the forum, take their origin from usage, as is said in the preface to the collection of those laws. There is also no doubt that in such matters usage may initiate law; there is no reason for doubting that custom can establish law in that matter, any more than in other matters. Hence it is said in the *Digest* (XL. vii. 21): 'We ought to follow the custom of those who are handling the matter.' Elsewhere the *Digest* (L. xiii. 1, § 10), expressly states: 'High regard is to be cherished for a custom of the Court.' Bartolus makes a note of the same tenor (on *Digest*, I. iii. 32).

Bartolus.

In what manner forum and style differ.

In this sense, then, it is evident that forum differs only slightly from style, and thus, although in the laws of Spain those of forum and style are distinct, still the latter are held to be quasi-interpretative of those of the forum, as is stated in the rubric on the laws of the forum. Nevertheless, forum and style are distinct. My ground for this statement is that forum does not, as is the case with style, signify an order or mode in the use of words, or in procedure, but apparently designates all the laws that are competent by reason of judicial authority, or have a relation to it and its usage. Therefore, the whole body of laws relating to the use of judicial authority can, apparently, be designated by the name of forum, the name being taken in a collective sense, although even individual laws of this sort are usually called *fora*—in Spanish, *fueros*.

Whether forum includes written and unwritten laws without distinction.

11. For these reasons, some writers maintain that in this acceptation, forum signifies not custom alone but both written and unwritten laws indifferently—the latter being those introduced by custom in relation to matters of jurisdiction and judicial procedure. This opinion was held by Burgos de Paz (Law 1, *Tauri.*,[1] No. 385):

[1] [Marcus Salon de Pace, *Ad Leges Taurinas insignes Commentarii* (Pinciae, 1567).—REVISER.]

'for the laws of the forum are written, yet they are properly comprehended under the name of forum'. But the more common opinion of Spanish jurists is that these rules are not of legal validity, save by force of custom, so that a written law of forum has no legal force, nor sufficiency as proof, unless its usage has been proved. This is the teaching of Gregory López (on *Las Siete Partidas*, Pt. I, tit. ii, law 7 and Pt. VII, tit. xv, law 28), of Suárez[1] (*Prœmium Fori*, Nos. 1, 2, and 3), of Diego Valdés in *Additions*[2]; of Cristóbal de Paz (in rubric to law on style, Pt. I, no. 36), and others on *Tauri.*, Law 1 (which is law 3 of tit. i, Bk. II of *Compilación*), from which the same conclusion is drawn.

Gregory López. Suárez. Valdés. Cristóbal de Paz.

But if this is true, then certainly the laws of the forum, as written laws, are not legal prescriptions. For a written law does not derive its essence and force from usage, but from enactment and promulgation. These laws, however, were not instituted or proposed as in themselves binding, but only in so far as their usage was manifest. They are, then, mere registers of custom, and frequently their rules—despite their written form—are to be classified as unwritten and consuetudinary. That they exist in written form is not incompatible with this character, as we pointed out before.

12. But whatever may be true of these special laws of forum, there 791 is no doubt that there could have been written laws relating to the whole body of forensic business, and again, that others could have been introduced by custom; and so, all that we have said as to factual style, or about written or unwritten law, may, in due proportion, be applied to forum. We may also add that, even though in the Kingdom of Castile the forensic laws were limited to the subject-matter of judicial procedure, it is possible that in the other kingdoms, as in Aragon, &c., they were interpreted in another manner and with a wider meaning.

13. For, in those places, the forum would seem to be the name given to the ancient laws of those kingdoms, which are peculiar to them and which had been confirmed by (as it were) inviolable usage, especially those which pertained to the mode of government and of the exercise of jurisdiction of the prince, and of [the manner of] subjection of people and nobles. It is possible that they included other matters also; and it is not clear to me whether they owed their origin to express institution, or were introduced by custom. For they might have had their origin in either manner, if, as we assume, they are just and reasonable. With the exception, therefore, of these special terms or customs, all other laws introduced by usage, in whatever moral matter, retain the general name of custom. Thus, it becomes clear that

[1] [This is Rodrigo Suárez; sometimes spelled Juárez or Xuárez, a Spanish jurist of the 15th century.—TR.]

[2] [D. Jacobus Valdés, *In Comment. ad prœmium fori Roderici Xuárez, Additiones.*—REVISER.]

this classification multiplies consuetudinary law not formally (as it were) but only materially; that is, with respect to the things or the subject-matter with which law is concerned. The same is true of other like groupings which could easily be thought out.

Division of custom into positive and negative.

14. Lastly, we must note another division of custom: into positive, and privative or negative custom, a division which may be useful in our later discussion. The former takes its origin from positive usage and consists, in so far as it is a custom of fact, in a certain repetition of actions, and therefore, as law, it sets up a disposition or an obligation to act. The latter sort, on the other hand, is passive in character and originates from non-usage, and so it is sometimes named [negative custom]. To the extent that this non-usage is frequent and continuous, it possesses the character of a custom, which consists (as it were) of fact; and where it establishes some legal rule, it merely fosters a disposition or obligation to refrain from action. But, at this point, we must mark the distinction between negative and privative non-usage, a distinction which we shall more fully explain in our discussion of privilege.

Negative non-usage does not establish custom—as Paul de Castro rightly noted (on *Digest*, I. iii. 32)—because it is not an action, nor a moral omission, and so does not possess the character of a moral and voluntary usage, without which the introduction of custom is not possible.

But privative non-usage which is continuous, or repeated upon due occasions, does establish moral custom for quite the opposite reason. The chief reason here is that such non-usage cannot practically exist without a positive act in the sense that theologians use the term in discussing acts of omission. This [quasi-positive act in non-usage] may happen in two ways. In the first, because non-usage consists in the absence of some proper circumstance, or of some formality in a positive action; for example, the contracting of an incestuous marriage without a dispensation. For on account of its frequent occurrence, many conclude with Navarrus that this is a true custom which might have abolished that impediment [to marriage]. This sort of custom must be called not merely negative, but positive, since it consists not in a simple omission but in the performance of an action implying a negation [of the law]; nor would the mere negation suffice to establish custom without the action. It may, again, happen that the non-usage consists in the mere absence of action at a due time; as the omission to hear mass, despite the law, on a certain day. For such a custom to establish law, this omission must be voluntary, and at least in that respect it involves an action [of the will]; but formally, it consists in the absence of due action, and thus the custom is called privative.

Such a custom can also be called desuetude, although this term

may be ambiguous, as is observed by Rochus Curtius (*De Consuetudine*, Pref., nos. 30 and 31), since desuetude in its proper meaning seems to assume the [previous] existence of custom: for it is because it recedes from custom that it is termed desuetude, whether the recession be by means of contrary actions, and so through a custom positively contrary in character, or whether the recession occurs solely through the omission of an ancient usage. It may, it is clear, occur in either way.

Rochus.

Thus, desuetude may occur through contrary custom. A negative custom may also exist, but it is not desuetude, if it does not assume the existence of a contrary custom. Desuetude can, indeed, be said to exist even without any regard to actual previous custom, but only to one that might or should have come into being. This apparently is the meaning in which the jurisconsult Julianus uses the term in the passage cited in the *Digest* (I. iii. 32 [, § 1], at end). In this sense, desuetude consists formally in the absence of due actions and thus, properly, it signifies a negative or privative custom. So for the sake of clearness we shall use the term in this sense. As to how it may possess the moral force and effect of custom, we shall see in the discussion that follows.

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CHAPTER VI

WHAT IS A GOOD AND REASONABLE CUSTOM AND WHAT IS AN EVIL AND UNREASONABLE ONE

1. This is another possible division of custom and one which we must make in order to explain the moral nature and the effects of custom. I have thought, then, that a discussion of it should be taken up at this point. A twofold division, however, is suggested by the title: one into the good and bad, the other into reasonable and unreasonable. These divisions are not synonymous; the second implies an element not included in the first. We must, then, take up each division separately.

Good and bad customs.

2. When, then, custom is divided into good and bad, we must take the words in the sense of moral goodness and rectitude, and of the evil contrary thereto. The reason is that other sorts of goodness, regarded in themselves, or of evil contrary only to them, do not render men or their customs either good or bad. We are here considering custom solely in its moral aspect, and as it is able to constitute or annul some rule of human conduct. Accordingly, no third group, such as indifferent custom, is added here. Such a custom, according to the more probable opinion, is either not possible in usage and practice, as is more likely, or, even if such be admitted, it is, viewed as indifferent custom, irrelevant for setting up law, unless it

is converted to some kind of rectitude, in a way presently to be explained.

Hence, we see that this division of custom is concerned with custom of fact; for legal custom cannot be of an evil character, or opposed to rectitude, since this very evil would be in contradiction with the nature of law. For, just as a statute if it is evil is no true statute, so also, an evil law is no law; and therefore, an evil custom can exist only in fact and can never establish a legal rule, unless the element of evil is taken away.

A bad custom can be only one in fact, never in law.

Our present division is, then, based upon custom as a fact common and public in some community. Thus, this division is of itself sufficiently clear, first with respect to the existence of both members, since just as individual persons may follow good or evil customs, so may a whole people or community; secondly, with respect to its sufficiency as we have already explained; and, finally, with respect to the distinction between the members, a distinction which is evident from the terms themselves.

3. In order, however, that we may explain more fully the meaning of this distinction and difference in its parts, I note, further, that a custom can be good in two ways: in one, it can be good in so far as its object is alone concerned; in the other, it can also be good from the character of the agent and from the circumstances of the morally good actions by which the custom is introduced. In this latter meaning custom is called good in the absolute sense; in the former it is so only under one aspect—that is, objectively—if the other requisite conditions are lacking.[1] The reason is that absolute good arises only when all elements [in an act] are good, and therefore a custom to be absolutely good must be brought into being through acts good in every respect; for a custom to be good only objectively, however, it is sufficient that it be concerned with an object good of its nature, that is, either with acts which are in their object good or with those which could be performed with moral rectitude, and done from a just motive.

A good custom is of a twofold character.

In a similar—even if not exactly the same—way a subdivision of bad custom may be made. For, since evil is the result of a defect of any kind at all,[2] so through whatsoever element a custom is bad, it can be called so absolutely. Nevertheless, one custom may be evil in view of the object of the actions which by their frequency constitute the custom, that is, because they are evil in virtue of their object. Another custom, on the other hand, may be concerned with subject-

[1] [That is, an act is morally good absolutely if object, motive and circumstances are good; it is good only under one aspect, if the object alone is good, but motive and circumstances not so.—REVISER.]

[2] [A reference to the teaching on the moral act: *Bonum ex integra causa; malum ex quocumque defectu.* An act is good, if all its determinants are good. It is bad, if any one determinant is bad. The determinants are: object, motive, circumstances.—REVISER.]

matter not evil in itself, and nevertheless be, in another aspect, evil in respect of the agent, or of some other circumstance, or condition which precludes goodness. When, then, custom is intrinsically and from its object evil, it deserves not the name of custom, but of abuse or corruption, as is said in the case of laws. For such a custom is not capable of establishing true law, nor is it possible that through it a customary act can become good or not evil. But if the custom be at least objectively good, or not evil, although it may have been introduced not in a praiseworthy way, but through evil actions on the part of the agent, it nevertheless retains something of the character of a good custom, and from that aspect it is not inconsistent that it may preserve or establish some rule of unwritten law.

4. For a clear exposition of the foregoing, I add the further observation that it is possible for a certain custom to be bad of its nature, because the actions constituting it are either intrinsically evil, or because they are, as prohibited actions, so evil that they cannot be made good actions by any human power. Such a custom is properly called an evil custom by reason of its object. It is certain that this sort of custom cannot introduce law, since it is opposed to either the natural or the divine law, of which we have treated before.

A custom intrinsically evil establishes no law.

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In another way, however, an action or the subject-matter of a custom can be evil merely because it has been forbidden by human law. It cannot be said of such a custom that it is simply no custom, and of no moment, as will be evident from what will be said immediately, and from the discussions in the subsequent Chapters. The following rule is applicable to this sort of custom, namely: 'Many actions are forbidden to be done, but once done, they are valid.' The reason is that this kind of custom is not essentially evil, nor does it contain evil from which it cannot be separated by human power and will; and so, while in its inception the custom is bad, it can lack evil in fact, if the evil at last ceases, or if human prohibition is withdrawn. Thus, such a custom is absolutely and without qualification evil not by reason of its subject-matter when viewed in itself, but only by reason of the presence of a human prohibition, and in virtue thereof. There is, therefore, no radical impossibility of its introducing law.

The same will be all the more true, if the actions through which a custom is established are neither evil in themselves, nor even forbidden by human law, but are done with some evil circumstance on the part of the agents. But since such a circumstance may be separable from the action, the custom may be valid as to the substance of the action, but not as to its circumstances; just as we have said elsewhere concerning a vow. Thus, if there be a custom of celebrating some feast by means of unfitting sports, or by bull-fighting, such a

custom is not truly binding in respect of the manner of the celebration, but can be so regarding the observance of the feast. This is the principle we must go on, unless it is in some way made clearly certain that it was not the will and consent of the people to bind themselves otherwise [than as to the manner of celebration]—for, as we shall state below, a custom cannot be introduced without consent. In this case, that circumstance [, unfitting sports, &c.,] may be said to be of the substance of the custom, and in consequence, the custom is bad intrinsically, owing both to its object on account of the said disorderly nature thereof and to its essential connexion with the action [of celebrating the feast in such a way]—at least from the main intention of the agents.

5. Now we must give our attention to a difficulty raised with respect to the other member of our division, the one which distinguishes customs as reasonable or unreasonable. For it is not quite clear whether these two sorts of custom are the same as the other two which we have enumerated; nor is it clear by what rule they are to be distinguished both from one another and from those others.

Reasonable and unreasonable custom.

The Doctors experience difficulty on this point and express various opinions. First, Navarrus (*De Alienatione Rerum Ecclesiasticarum ac De Spoliis Clericorum*, Sect. 14) defines that as a reasonable custom, 'which is not directly or indirectly contrary to natural or divine law'; and conversely, 'every custom which is directly or indirectly opposed to natural or divine law and such custom only' is unreasonable. To say that a custom is contrary to the natural or the divine law is to say that it is evil by reason of its object or subject-matter, as is evident from what we have set down in a previous paragraph. Moreover, Navarrus proves his proposition. He cites, first, the authority of Augustine (*Letters*, cxviii, Chap. ii [*Letters*, liv, Chap. ii, in Migne ed.]) to the effect that: 'what is proved to be neither contrary to Catholic faith, nor opposed to good morals, is to be treated as indifferent'. In the second place, he says that that which is in conflict with natural or divine law cannot be established by custom; and conversely, that whatever is not so opposed, may be established thereby; and therefore Navarrus concludes that the first of these is unreasonable custom, and the latter, reasonable.

Navarrus.

Augustine.

The inference is clear, since evidently no custom can prevail unless it is reasonable, and no custom can be denied introduction save an unreasonable one. The proof of his antecedent is that whatever may be established through human law can be established by a custom; and, conversely, that what may not be introduced by custom cannot be introduced through human law. Human law, however, can establish whatever is not in conflict with natural or divine law, but not what is repugnant to them—according to the reasoning of the *Decretum* (Pt. II, causa XXVII, qu. i [qu. ii, can. xix]), the *Constitutions* of Clement (Bk.

II, tit. XI, chap. ii). Therefore, Navarrus repeats this same opinion elsewhere (*Consilia*, Bk. III, *De Censibus* [, cons. vii]), saying that a custom is not unreasonable, unless it is opposed to natural or divine law. This is also the opinion of Gerson (*Alphabetum Divini Amoris*, Pt. III, lxii, letter P),[1] and *Supplement* to Gabriel (*on the Sentences*, Bk. IV, dist. xlii, qu. 1, art. 3, doubt 6 [sole qu. conclus. 9, doubt 6]).

Navarrus.

Gerson.

Gabriel.

6. Other writers, however, state the matter otherwise, and say that every bad custom, because it is contrary to law—whether natural, divine, or human—is unreasonable. Whence, they hold, on the contrary, that that custom is reasonable, which is good at least in respect of the action itself, and is of a subject-matter not prohibited, whatever may be the extrinsic and accidental evil it may take on from the agent. In support of this position the Gloss (on *Decretals*, Bk. I, tit. IV, chap. xi, word *rationabilis*) is cited, to this effect: 'I call that reasonable which is not disapproved by the laws.' This is more clearly stated in another Gloss (*ibid.*, chap. iii, word *canonicis*): 'A custom opposed to a canonical ordinance is not valid'; and this seems to take its force from the text of the *Decretals* itself (Bk. I, tit. IV, chap. iii), wherein it is stated that a certain custom is said to be not reasonable, since it is 'in conflict with canonical ordinances'. The conclusion is that it is sufficient that a custom be bad for the reason that it is forbidden by the ecclesiastical law, for it to be held unreasonable. This is the tenor of the *Decretals* (Bk. II, tit. XXVI, chap. xii), inasmuch as that Chapter decrees that 'nothing can be obtained by prescription which is contrary to obedience'.

Gloss.

Gloss.

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Many other similar laws are cited by the aforesaid Glosses. This position can be confirmed by reason, on the ground that a just law is reasonable; and that, therefore, a custom opposed thereto is unreasonable; therefore, every custom which is evil, either from the nature of the object, or from the fact that it is forbidden by divine or human law, will be unreasonable: conversely, every custom not so forbidden will be reasonable.

7. Nevertheless, my first reply in refutation of the opinion thus set forth is as follows: that the distinction between reasonable and unreasonable customs is not to be found in the fact that they are or are not forbidden by natural or divine law; nor to be found in goodness or evil which they possess by virtue of their object, or subject-matter. The proof is that, although every usage contrary to divine or natural law is unreasonable, yet it is not such custom only that is unreasonable—as I shall make clear by two proofs.

First reply in refutation of the preceding opinion.

[1] [The reference is to Gerson, *Sermo coram Rege Franciae*, 7ª *consideratio*, and *Tractatus de Potestate Ecclesiastica et de Origine Juris et Legum, consideratio* 10, may be found in Vol. IV *Gersonii Opera Omnia* (Antwerp, 1706).—REVISER.]

The first is that, if we speak of usage regarded in its relation to the initiation of consuetudinary law, then a certain usage or custom might be wholly good in fact, and still be unreasonable in its relation to the initiation of law; and this, not because it is deficient in goodness, but rather because (so to speak) it is excessive. But such a custom is not contrary to natural or divine law, either directly or indirectly. Therefore, . . .

The major premiss is evident from the example of a custom observed by a whole people of hearing Mass daily, an act of the greatest rectitude; but if this custom were observed with the intention of establishing law, it would be in that respect imprudent, and on that account the custom could be termed unreasonable. The same is true of like customs. This reason, however, is not convincing, because it is not the custom that is unreasonable, but the intention of initiating obligation through it, or in regard to it rather is unreasonable, and as such may be said to be contrary to natural law. Similarly, a positive law enjoining that practice would not be unreasonable in respect of its subject-matter considered in itself; but the law itself would be so, and as such would be opposed to natural reason and prudence.

Now if, on this ground, this subject-matter may be termed unreasonable—not because it is evil, but because it is lacking in fitness for a general law—so, on the same ground, it is contrary to natural reason, which dictates that not all good actions are to be the matter of human law. The same principle applies, in due proportion, to the obligation induced tacitly by custom and explicitly by law.

On this ground alone, then, it is proved that a consuetudinary law can be unreasonable, and therefore void, even though the custom in itself is not unreasonable, a very true statement; just as it is possible for a law to be bad, although the action directed by the law may not be bad. Nevertheless, the argument would seem to be a sufficient refutation of Navarrus' thesis [in *Consilia*, Bk. III, *De Censibus*, Consil. vii], both because it demolishes the basis of his argument, as I shall presently show, and again because he[1] seems to think that a custom is not unreasonable in relation to the initiation of law, save in so far as it is directly or indirectly opposed to divine or natural law in the actions that constitute it, or in the fact itself of the custom, as Navarrus pointed out in the basis of his argument.

Navarrus.

8. Secondly, however, that opinion of Navarrus is more clearly refuted by the fact that many customs, not contrary to divine or natural law, are held to be unreasonable in the field of law. And they are unreasonable not only in relation to the establishment of law on account of an excess of goodness, but

Second refutation.

[1] [Reading *ille* for *illa*, though *illa* might stand in spite of its being strange to say that an opinion can think; *illa . . . videtur sentire*.—Reviser.]

absolutely and in themselves, on account of some defect or irregular quality which, although it does not attain to that quality of evil [which would make it intrinsically unreasonable], is sufficient to constitute the custom a truly unreasonable one: therefore, in order that a custom be accounted reasonable it is not sufficient that there be that twofold negation, nor that it be good, or [at least] not evil, so far as its object is concerned.

A proof of the antecedent of my argument is derived from the custom of not obeying in all its details a general interdict laid upon a place, a custom that is discussed in the *Decretals* (Bk. I, tit. IV, chap. v), and which is there called unreasonable, although it contains nothing opposed to natural or divine law. Abbas [, i.e. Panormitanus] (*De Consuetudine*, Chap. v, no. 3 [no. 2]) makes the observation that every custom that is contrary to what is good is unreasonable, and this is in accord with the *Decretals* (Bk. III, tit. I, chap. xii). He understands, however, by the contrary of what is good—that is, what is fitting—those actions which do not always include something opposed to divine or natural law; as, for example, that laymen should be seated in choir with the clergy. This is not contrary to divine or natural law, yet it is not fitting, and it is, therefore, impossible for this practice to be introduced by a custom. The canonists hold the same thing with regard to the custom of clerics engaging in hunting for the sake of pleasure, as does Giovanni d'Andrea (on *Decretals*, Bk. V, tit. XXIV, chap. ii). Rochus (*De Consuetudine*, Chap. xi, no. 30) refers to a number of such instances.

Giovanni d'Andrea. Rochus.

Yet Navarrus would say that these and similar acts are indirectly opposed to law, either natural or divine. But this solution is 795 not satisfactory. First, because it is impossible to define adequately in what that indirect contrariety consists, since the act can exist in its totality without any violation of law, natural or divine; again, because a deed forbidden by human law appears to be all the more indirectly contrary to the natural law, since the natural law enjoins obedience to superiors, and yet Navarrus admits that the custom in question is not either directly or indirectly against divine or natural law; and, finally, because there is the fact that the custom is not evil from its matter or its object but is, for all that, held to be unreasonable.

Navarrus.

Navarrus.

9. And now, the first principle of Navarrus's argument can be turned against him, for it is not true to say that human law can command whatever is not opposed to divine or natural law. For although it cannot enjoin the performance of anything in conflict with these laws, it does not follow that it is able to prescribe everything not in opposition to them—as has been stated above. This is clear from a consideration of the works of the counsels [of perfection]; or, of those good actions which are not compatible with the counsels, such as marriage; and (which is more to the

Navarrus's argument turned against him.

point) of those actions which are less proper or less decorous—though they are not contrary to the said law—as in the case of a law prescribing the playing of games which are somewhat unseemly or not expedient, even if they are not bad; or a law granting to clerics some way of acting or some habit not sufficiently upright, and the like. Therefore, human laws can be unreasonable, even if they are not evil, on the ground that they permit actions forbidden by divine or natural law. So, too, the same can be true in the case of customs.

10. Then, in reply to those who hold the second opinion,[1] I observe that for a custom to be unreasonable, it is not sufficient that it should be opposed to the canon law, nor is this opposition always necessary [for the custom to be so]. Panormitanus and almost all the other commentators (*De Consuetudine*, Chap. xi, no. 5) are of this opinion, including Bartolus (on *Digest*, I. iii. 32 and on *Code*, VIII. lii. 2). I shall refer in a moment to the opinion of certain other writers also.

For a custom to be unreasonable it is not necessary that it be contrary to the canon law.

Panormitanus.

Bartolus.

The first part of this assertion is proved from the fact that an unreasonable custom cannot prevail in opposition to human law, as is clear from the *Decretals* (Bk. I, tit. IV, chap. xi); and yet, as I shall prove below, it is possible that a custom contrary to human law can prevail against that law. Therefore, not every custom which is in conflict with human law can be held to be unreasonable.

The second part of our assertion is evident in respect of those matters which are contrary to divine or natural law, even if they are not especially forbidden by human law. In addition to these, however, there are some things which, while not especially prohibited by any law, possess an impropriety, or some condition, on account of which they are thought of as unsuitable, or unworthy of being established by custom. Hence, a custom relating to such matters will be unreasonable even if it is not contrary to the canon, or to the civil law.

The antecedent of this argumentation is founded on the words of Paul in *1 Corinthians* (Chap. xi [, v. 4]): 'Every man praying or prophesying, with his head covered, disgraceth his head'; and later [*ibid.*, v. 6]: '[But if] it be a shame to a woman to be shorn or made bald, [let her cover her head].' Now, these and similar things are not absolutely forbidden by natural law as morally bad, but nevertheless, while they are forbidden by no positive law, divine or human, yet they involve a certain lack of decorum, as is signified by St. Paul, when he adds [*ibid.*, vv. 14–15]: 'Doth not even nature itself teach you, that a man indeed, if he nourish his hair, it is a shame unto him? But if a woman nourish her hair, it is a glory to her.' On this passage Ambrose comments [on *1 Corinthians*, Chap. xi, vv. 14–15]: 'He wishes

1 Corinth. xi.

St. Paul.

St. Ambrose.

[1] [Cf. Section 6, this Chapter.—Tr.]

that this practice be regarded as naturally good, and that it be almost a positive command.' Ambrose here properly uses the words 'naturally' and 'almost', because, the positive law apart, this propriety is natural, in the sense that the natural law prohibits the contrary not strictly but only 'almost'. That limited prohibition is sufficient, however, to render a custom unreasonable, if opposed to what is becoming. This is also made evident in those activities which—while not forbidden by positive law, nor possessing within them an intrinsic evil—theologians speak of as 'suggestive of' evil, since they involve some danger of moral harm, especially if they are frequently done or generally permitted: such as the sale of judicial offices, or the reception of gifts by ministers of justice; or similarly the practice of bestowing a spiritual favour upon the offering of a temporal gift, even though the latter is not given as the price of the former; or the failure of prelates to visit and correct their flocks—and the like. Therefore, customs in matters of this sort, apart from any law prohibiting them, are deservedly held to be unreasonable.

Finally, this matter can be explained from what we have already said on the subject of oaths and vows: that there are some things which, although they are not evil as actions, are evil as promises: as that a husband should promise not to accuse a wife of adultery; or a promise not to revoke a will, and the like. Thus a promise can be unreasonable, even if its subject-matter is forbidden by no law.

The same, therefore, is true of custom. Such in general is any custom which affords a licence to sin: as would be a custom which gave illegitimate children an equal status with lawful heirs, or, one which punished homicide with a light pecuniary fine. These and other illustrations are more discursively treated by Rochus (*De Consuetudine*, Chap. xi, no. 26).

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11. Whence I conclude that a custom can be unreasonable, even if its subject-matter is not evil, as is evident where its subject-matter happens to be unbecoming, or where it brings with it an element of danger, or possibilities for harm if it should be introduced into common public observance; and this, despite the fact that it is neither evil in itself, nor forbidden by any positive law, such as may be the case in many of the examples cited.

The author's conclusion that a custom can be evil, although its subject-matter is not evil.

And, on the other hand, it is possible that a custom may be bad at least in its inauguration[1] and in the actions by which it is introduced —since they are prohibited at least by human law—and nevertheless may not be unreasonable, because, apart from human law, its subject-matter is not entirely unsuitable for the introduction of a custom

[1] [*in fieri* strictly means 'in its becoming'; *in facto esse* means 'in its actual existence'. Thus, we speak of marriage *in fieri*, which is the making of the contract, and of marriage *in facto esse*, which is the married state.—Reviser.]

Panormitanus. respecting it. This quite clearly is the opinion of Panormitanus (*De Consuetudine*, Chap. xi, no. 4), where he says that the principle of that law, that 'the authority of custom of long standing is of no little moment', can be applied to a bad custom also. For such a custom can, if it is reasonable, prevail against a law; hence, Panormitanus assumes that a bad custom can be reasonable. But this statement is to be understood of that sort of custom which, though bad in its inception, can cease to be bad when established—a matter which we shall explain later.

12. Our conclusion, then, is that the division of custom into good and bad is not the same as that into reasonable and unreasonable. The justification for this statement is found in the fact that the goodness and the evil [in customs] are derived from their objects, or from some law not forbidding the actions or forbidding them; their reasonableness or unreasonableness, however, should—it seems—be judged from their fitness for general usage and for consuetudinary law, as I shall explain in the following Chapter. Nor do the observations made by those who maintain the second opinion opposed to ours, refute this assertion, since the laws and glosses they cite in their support speak in a different sense, as will be presently explained in another section regarding this division. The question there to be answered is: in what manner can a custom contrary to law be a reasonable one? This we shall deal with later on, where we consider in what manner a custom may prevail in opposition to human law.

13. It remains, however, to ask in what consists the unreasonableness of a custom; or, what, beyond and apart from prohibition, is required to make it unreasonable; and conversely, what, apart from goodness, is necessary in order that a custom may be held to be reasonable; and, finally, by what test this can be discerned. Panormitanus treats of this subject at length (*ibid.*, Nos. 5 and 6), where he rehearses many opinions on this point. This is also fully discussed by Rochus (*De Consuetudine*, Sect. 2, no. 20), Bartolus (on *Digest*, I. iii. 32 and on *Code*, VIII. lii. 2), on which Jason and others comment and Menochio adduces many examples (*De Arbitrariis Iudicum Quaestionibus et Causis*, Bk. II, centuria 1, case 82). They all, however, set forth this division in one of two ways, as well as the distinction existing between the members of it.

Panormitanus. Rochus. Bartolus. Jason. Menochio.

14. They do so, first, on the basis of the effects of the customs, namely, that that custom is considered unreasonable which will be opposed to the liberty of the Church; or which will afford in some way licence or occasion to sin; or which will be harmful to the general welfare; or which will have some such condition annexed to it—even if the custom is not contrary to divine law. For if a custom should have such a condition, it is always judged as being in the highest degree unreasonable.

What is an unreasonable custom?

On the contrary, however, that custom will be judged reasonable which will not be contrary either to divine or to natural law, or which will not possess any of the aforesaid conditions. It is possible that Navarrus, as quoted above [*Consilia*, Bk. III, *De Censibus*, Consil. vii], meant nothing more than this; and he seems to have thought that all these conditions could be summed up directly and indirectly by the phrase [opposed to natural or divine law]. To me, however, this seems to make the matter much more obscure, because one cannot understand his exposition without reference to similar examples. For the indirect opposition of which he speaks is never necessarily such that, by reason of it, the matter of the custom is truly and strictly of an intrinsic malice contrary to the natural law, since in fact, as I have shown earlier, this is not necessary to unreasonable custom.

Navarrus.

15. Another mode of making answer to this, is to say that no absolutely general criterion can be laid down in this matter: decision must be left to the judgment of a prudent mind. This rule is stated by the Gloss (on *Sext*, Bk. I, tit. II, chap. i, word *rationabile*), and is followed by Francus de Franchis, and other writers on that law. This was also the opinion of Hostiensis (*Summa*: on *Decretals*, Bk. I; tit. IV, chap. xi, § *Quid sit consuetudo*), and his doctrine is accepted by Giovanni d'Andrea, Panormitanus, and others in their comments (*De Consuetudine*, Chap. xi). Bartolus and other authorities take the same view.

Gloss. Francus de Franchis. Hostiensis. Giovanni d'Andrea. Panormitanus. Bartolus.

Those writers who do not reject the first mode of answering the question, but accept it as useful for forming the mind of the judge in a particular case, do leave the final decision to the judgment of a prudent man. These writers are here speaking of the judge who is to decide in the external forum on the character of a custom: with due proportion this mode may also be applied to the case of a confessor in 797 his judgment in the internal forum, and to a divine in giving an opinion. The aforesaid writers understand that this principle has application in the absence of a declaration by positive law as to whether or not a custom is unreasonable; if such a declaration has been made by law, generally speaking, this is the criterion to be applied, as I shall presently explain. Finally, Baldus (on *Digest*, I. iii. 32), and Jacobus Fontanus (in his scholium on *Sext*, Bk. I, tit. II, chap. i) add that in a case of doubt the custom is to be presumed reasonable, and that judgment must be given in its favour. I interpret this statement to apply when a custom is ancient, and has been observed by good men, or by all men in common. When explained in this way, this solution seems to me entirely sound.

Baldus. Jacobus Fontanus.

16. Yet for the fuller exposition of the above point, we must add the rule inserted in the *Decretals* (Bk. III, tit. XI, chap. i), where those customs are held to be unreasonable 'which are neither favoured by reason, nor in harmony with the sacred ordinances'. This phrase is

derived from the Lateran Council under Alexander III (Pt. I, chap. xvi [Pt. III, chap. xvi, ann. 1179]), where it was positively enjoined that those customs are to be observed, 'which are favoured by reason, and are in harmony with the sacred ordinances'. From the words of either passage the inference is to be drawn that a custom is unreasonable if it is without rational basis, even though it be not clearly contrary to reason.

But in order to judge whether a custom is wholly lacking in rational basis it will be necessary to recall that for our present discussion, the reasonableness or unreasonableness of a custom is to be judged chiefly by the criterion of its moral effect, and that this can be manifold. For at one time the custom has the effect of creating an obligation with respect to its observance; at another, of permitting such and such a usage by revoking a law prohibiting it; occasionally, too, it has no more than the effect of approving such an action, or at most, of reasonably urging and inclining men to use it. The effect, then, in respect of which the custom is said to be reasonable or unreasonable, must be carefully weighed that the custom may be so judged. For it may call for the fulfilment of more conditions to achieve one purpose or effect, than to achieve another. Thus, the fulfilment of more conditions is required for a custom to have the power of introducing law, for instance, than is required for a custom to be merely good: and so, in order that it be reasonable, in relation to this end [of establishing law], it is necessary to consider whether the custom possesses, in addition to its character of goodness, the other conditions required for a just law; as, that the burden of its observance be tolerable, and also that it be useful for the public welfare. If, however, a custom is regarded in its relation to the revocation of a human law, in order that it be reasonable, it is not necessary that it be not a bad one—at least not bad because it is prohibited; but it will suffice that, of itself and apart from any prohibiting law, it is not evil. It must, however, have some reasonable cause, on account of which it may be established against the existing law; because otherwise it would be established against the law in an unreasonable way. For, in general, the revocation of a just law without cause is unreasonable. This we shall show later.

Two principal effects in this subject-matter of a custom.

17. Wherefore, in considering a custom in relation to those two effects which are of chief importance in this subject-matter—namely, that of enforcing the performance of similar actions, and that of giving release from the obligation to such actions, despite the law—the best rule, it seems to me (assuming the moral rectitude of the subject-matter, at least in respect to its not being repugnant to divine and natural law), is to test the custom by the conditions necessary for a just law, or for the just

The best rule for discerning whether a custom is reasonable or unreasonable.

revocation of a law. For if these conditions shall have been found to be present in due proportion in the custom, the custom will be judged reasonable in the same proportion; if, however, these conditions are lacking, the custom will be unreasonable, by comparison with such and such an effect.

I find this rule laid down by Geminiano (on *Sext*, Bk. I, tit. II, chap. i), and Antonio de Butrio (*De Consuetudine*, Chap. xi), who are followed by Sylvester (on word *consuetudo*, Qu. 1), Soto (*De Iustitia et Iure*, Bk. I, qu. VII, art 2), and Sánchez (*De Sancto Matrimonii Sacramento Disputationum*, Bk. VII, disp. iv, no. 41 [no. 14]). I have used here the words 'by comparison', &c. because, if the custom is to be judged apart from these conditions, and merely in the sense of usage, or voluntary repetition, it will be judged to be a reasonable one, if its matter is not bad. According to this rule, it will be easy to pass judgment upon a custom, in relation to whatever other effect it may have, as we shall make clear in subsequent Chapters dealing with these effects.

Geminiano. Antonio de Butrio. Sylvester. Soto. Sánchez.

In the next section,[1] another subdivision of unreasonable custom will be explained.

CHAPTER VII

WHAT SORT OF CUSTOM IS OR IS NOT CONDEMNED IN LAW

1. Another division of custom now requires explanation, that, namely, of custom condemned in law and that permitted by the law. This division, although it is related to the preceding group, is yet distinct from it, as we shall see. The title of the question is understood as concerned with positive human law; for what concerns the natural law in the matter has been sufficiently discussed in a former Chapter.[2] For a custom which has been found by a prudent judgment applying right reason to be unreasonable will also be condemned in natural law; and a custom which has not been found unreasonable by right reason will not be condemned by the law. Divine law, however, has no rule on this matter, as is evident.

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It will, then, be necessary first of all to learn what kind of custom is to be held as condemned by positive law. Some writers hold that every custom expressly and specifically abrogated by law is condemned in law. Others add that this abrogation is not enough, but that it is necessary that the custom be forbidden by law. Others, again, hold that even such prohibition is not sufficient, but rather that it is necessary for the custom to be declared

A custom to be condemned by law ought to be declared unreasonable or specifically prohibited upon that ground.

[1] [i.e. of the following Chapter.—Tr.]
[2] [*Supra*, p. 463; Chap. iv.—Tr.]

unreasonable through law or else that it be prohibited specifically on this very ground, that is to say on the ground that the custom is unreasonable. This last assertion is the true one, and the one more commonly accepted. It is clearly held by Navarrus (*Consilia*, Bk. III, *De Censibus*, consil. vii), Covarruvias, and other writers presently to be cited. We must, then, explain and demonstrate it.

Navarrus.
Covarruvias.

2. Therefore, I assert that human law at times abrogates custom; and that at times also it prohibits custom; and that at other times it condemns custom. I say, also, that these three effective dispositions of law are distinct. I do not find the foregoing statement set forth very explicitly by the authorities; in fact, I find even that they frequently confound the meaning of these three. Yet the three are really distinct, as can be gathered from the common teaching on these matters. Indeed, even a fourth member might be added, namely, 'an unqualified opposition to a custom'. But this last, although it is in some respects distinct, seems rather to coincide with the third. I shall, therefore, prove the truth of each of the three separately.

First conclusion.

As to the first point of our first conclusion, in respect to the question of abrogation, or revocation of a custom, I say that it does no more than annul an existing custom. For the phrase derogating from or revoking or (what is the same thing) a revocatory clause proposed in law in absolute terms, can, in the strict meaning of the words, apply only to a past fact: therefore, a law abrogating a custom can affect only a custom already in existence. Just so a written law revoking a contrary law relates to one already in existence: for if there were no law that pre-existed, the revocation would be unnecessary, and even useless. Nor could such a law have been made, except in a case of error, or on the condition that if there is such a law, it be revoked. Therefore, such a law always has reference to a previously existing one. The same is true, then, of a law revoking a custom.

It follows from this that when there is attached to a law the clause, 'notwithstanding any custom whatever', as in the *Constitutions* of Clement (Bk. I, tit. III, chap. vii), and in similar laws, that phrase revokes only a custom already existing: it does not prohibit future custom, since such a clause regards not the future, but merely the past. A custom which can have existence only in a future time, and does not yet exist, cannot be in opposition to a law in the present. Such a clause can annul only a custom which can operate against the law, and hence this law relates solely to an existing custom, and does not extend to future custom. The same is true of every revoking clause, however phrased, unless a qualifying note is added to it.

In what way one must understand the clause 'notwithstanding any custom whatever'.

This position is supported by the consideration that such an effect is of a burdensome character; the meaning, then, of the words of such

a clause should not be extended beyond their force and strict meaning. Usage also confirms this opinion; for when a lawgiver wishes to extend the effect of law beyond the usual one, he makes an explicit statement of that intention, as we shall presently explain.

3. For almost the same reasons, a simple abrogation of a custom is not equivalent to a condemnation thereof, since a custom can be abrogated, not because it is unreasonable, but simply for the reason that it pleases the lawmaker so to do, since he judges that, under present conditions, this course is more expedient. It is, obviously, possible for a certain custom to be, in a certain situation, in some way inexpedient, even if it is not essentially bad or unreasonable. This seems to be self-evident if we keep in mind what was said in a previous Chapter[1] about bad and unreasonable custom. When, therefore, a law revokes a custom simply or without any further declaration, there is no presumption that the law condemns it as unreasonable. Just as, when a subsequent law revokes a prior one, it is not therefore to be presumed that it condemns the earlier one as bad or unreasonable. Generally speaking, from a legal standpoint, what is not proved to be evil, nor condemned as such, is not presumed to be bad, but rather is presumed to be good, even if some other course is at the time preferred because it can produce more useful effects, or is judged to be here and now more expedient.

A simple abrogation of a custom is not equivalent to a condemnation of the same.

Finally, this opinion is clearly to be gathered from the passage in the *Sext* (Bk. I, tit. II, chap. i), which says that a law does not abrogate a reasonable custom, 'unless an express provision is made in the law'.[2] These words imply, therefore, that law does at times revoke a reasonable custom, and that, from the fact of revocation alone, no conclusion is to be drawn that the custom is unreasonable or condemned.

This doctrine is in both its members that commonly taught, a fact that can be seen from the Gloss on the *Constitutions* of Clement (Bk. I, tit. III, chap. vii, word *consuetudo*) and Alexander of Imola thereon [*Consilia*, Bk. VI, consil. 134, no. 33], Dominicus de S. Geminiano (on *Sext*, Bk. I, tit. II, chap. i), Angelus de Clavasio (*Summa*, on word *consuetudo*, no. 9) and Sylvester ([word *consuetudo*,] Qu. 6, no. 10), although the latter seems to contradict the first part of our thesis. Of this obscurity I shall, however, speak in a moment. Ancharano, Panormitanus, and others (on *Decretals*, Bk. I, tit. II, chap. xiii) hold the same opinion, as also does Felinus (on *Decretals*, Bk. II, tit. XIX, chap. ii, no. 11), where he cites Bartolus, Baldus and other writers. Navarrus, (*Consilia*, Bk. III, *De Censibus*, consil. vii), and Covarruvias (*Variarum Resolutionum*, Bk. III, chap. xiii, no. 4, concl. 4) are also in

Gloss.
Imola.
Dominicus de S. Geminiano.
Angelus de Clavasio.
Sylvester.
Ancharano.
Panormitanus.
Felinus.
Bartolus.
Baldus.
Navarrus.
Covarruvias.

[1] [*Supra*, p. 483; Chap. vi.—Tr.]

[2] [Suárez indicates by italics that this statement is a direct quotation from the canon law. As a matter of fact, only the clause 'unless an express provision is made' is a verbatim citation from the *Sext*; the first part of the statement being a paraphrase.—Tr.]

Antoninus.

agreement with us here, although the latter seems to hold a different doctrine on the second point, where he agrees with Antoninus, whose opinion I shall discuss immediately.

Antoninus. Archidiaconus. Giovanni d'Andrea.

4. Antoninus ([*Summa Theologica,*] Pt. I, tit. XVI, § 6) seems to hold a doctrine opposed to that set down in the first member of our assertion, and cites in his support the authority of Archidiaconus and Giovanni d'Andrea (on *Sext*, Bk. I, tit. II, chap. i). For Antoninus says that even though the law does not condemn the contrary custom, if it abolishes that custom simply and without qualification, nevertheless, it is to be understood as abolishing not only existing custom but future custom also. This seems to be the import of the teaching of Angelus de Clavasio (*ibid.*) and of Sylvester (*ibid.*, no. 9), in the case of laws that carry a clause derogating from a custom. In support of their opinion they cite the authority of Bartolus and Antoninus, and derive it from the arguments of Panormitanus (on *Decretals*, Bk. II, tit. XIX, chap. ii, no. 8) and those of Felinus (*ibid.*, no. 11). They seem to hold [that the law *condemns* future custom] even if the law does not expressly prohibit for the future. This seems to be the trend of their argument, namely, that the law is continuously in force; therefore, if the law once and for all explicitly derogates from a custom, it does so for all time, and is continuously in opposition thereto. Covarruvias (*Variarum Resolutionum*, *ibid.*, concl. 2), also, can be cited as holding this opinion. In the passage in which he seems to do so, he uses the word *reprobandi* (condemning), which involves a different principle, as I shall presently show.[1]

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Angelus de Clavasio. Sylvester. Bartolus. Panormitanus. Felinus.

Covarruvias.

Other authors, however, to avoid self-contradiction, speak not of a law merely revoking a custom, but only of that which stands unconditionally opposed to a custom. But this involves still another principle, as I shall immediately make clear by indicating the words by which such opposition arises out of the law, and what effect such opposition has. And so the argument advanced [against our position] may at most have some force in the case of a law that stands in unconditional opposition to a custom, but it has no weight against the doctrine we have laid down. For a law dealing merely with a past action always has, of course, force against that action; but it never can have force against something in the future, which was not in being when the law was enacted.

A law prohibiting a custom contrary to it has reference to both past and future customs.

5. As to the second point of our first conclusion, that concerning law prohibiting a custom, it must be said that the law forbidding a custom contrary to it, annuls not only past custom, but also future custom: or rather, it sets up a barrier to or prevents its introduction; it does not, however, on that account, condemn such a custom.

[1] [*Infra*, Section 7.—Tr.]

The first part of this assertion assumes that law does sometimes prohibit a future custom. This is the common doctrine, and as an example of such prohibition there is usually offered the law of the *Digest* (XLVII. xii. 3, § 5). This law, it is true, refers to a municipal ordinance, but it is cited for purposes of comparison. Thus Tiraqueau (*De Utroque Retractu*, Pref., no. 17) infers from this law that 'when a law condemns (that is, prohibits) a future custom, it does so by specifying that custom'. Hence the authors just cited, Antoninus, Angelus de Clavasio and Sylvester accept the first part of the above conclusion. Navarrus and Soto (*De Iustitia*, Bk. I, qu. VII, art. 2), have done the same more explicitly.

Tiraqueau.

Antoninus. Angelus de Clavasio. Sylvester. Navarrus. Soto.

The reason here is clear, since a prohibition has reference to actions in the future: for it cannot forbid those which are past; nor can it forbid present actions, not, that is, in so far as they have already taken place, but only to the extent that they may not persist in the future, for only as such are they capable of prohibition. Hence, if a law prohibits a custom, it opposes not only that which has been established, but that which is to be established, and, in so far as the law of itself can do so, it sets up an obstacle against its introduction.

Now the law is understood to prohibit a custom, first, if it expressly prohibits that any custom be permitted introduction contrary to that law; or when it forbids its introduction, as Navarrus says. Again, the law does so—as is probable—when it absolutely prohibits every contrary custom, even if that law does not expressly mention the future or the introduction of the custom, as when it says, 'It is our will that no custom have force against this law', or carries a clause to that effect. Such a law would seem to have reference to all such custom, both that which is in existence and any that can be introduced. It would seem also to oppose all such, because the words are quite absolute and universal in application, and apply without distinction of past and future, and there is no evident reason why their application should be restricted.

The writers of whom we have been speaking interpret as of the same import a clause which derogates without qualification from a contrary custom. Antoninus speaks in this sense, when he says that a custom is abolished absolutely by such a law. Such a meaning can be inferred from the example which he brings forward from the *Code* (XI. lviii [IV. xxxii. 26, § 3]), where it is said: 'Nor is it permissible for a judge to increase the said rate of interest by reason of a custom existing in the region.' These words would seem not only to revoke an existing custom, but also to oppose it absolutely, even for the future, because these words include not merely a revocation, but also a prohibition. This is evident from the words *nec licet iudici* (nor is it permissible for a judge): for the words *non liceat* (it is not permissible) express a prohibition, and are, therefore, addressed to judges exercising their office not only at that time, but at all future times. The words apply, accordingly, to future

custom in the time of any judge whatsoever. The reason given above is rightly applicable here, namely, that the law is continuously in force.

Bartolus.

But from this passage [, i.e. *Code*, IV. xxxii. 26, § 3] Bartolus infers only that the law revokes a custom of the past. Nevertheless, in the context of that law, the force of those words would seem to be stronger. 800 I gather, however, from the opinion of Bartolus that the words [of such a law] are not to be readily extended to future customs, but are extended only when this is demanded by the strict meaning of the words.

A law prohibiting a future custom does not therefore condemn it.

6. The second part [of our assertion in Sect. 5] namely, that a law which prohibits absolutely a custom in the future, does not therefore condemn such a custom—has been taught more explicitly by Navarrus in the passage cited (*Consilia*, Bk. III, *De Censibus*, consil. vii) than by the other writers on this matter. He says that a custom is not unreasonable from the fact that a law is in opposition to it, annulling it or commanding that it be not established, unless the law at the same time declares that the custom is unreasonable or a corruption of law.

Bartolus.

This doctrine may be inferred from a passage of Bartolus (on *Digest*, I. iii. 32, in *Repetition*, after opposit. 10 [opposit. 11], no. 5), in which he makes a distinction between a condemnation and a prohibition of a custom—even when the prohibition is explicit and relates to the future. And the proof which we used to establish the first conclusion concerning law which revokes custom, can be used with little change here. That consideration is especially applicable which is drawn from the argument that a written law can revoke an existing custom, not on the ground of its being unreasonable, but for other reasons. So also, a written law can forbid the future establishment of the custom, not because it is unreasonable, but because for other considerations it seems expedient to the lawmaker to forbid it: either because he presumes that the reasons moving him to revoke it will be continuously applicable, and so he is moved by them to prohibit it; or because he may wish, perhaps, through the addition of the prohibition to give greater inducement and compulsion to the observance of the law. Therefore, from the prohibition for the future alone, we cannot infer or presume that the custom[1] is unreasonable, or that it is condemned as such. But what effect such a law may have on the custom thus prohibited, we shall see in the following Chapters.

A custom is condemned when it is expressly declared to be unreasonable.

7. I come, therefore, to the third point of our first conclusion, that which deals with custom condemned by law. For the conclusion to be drawn from the foregoing discussion is that a custom is condemned in law, when to a revocation or prohibition there is added in express terms the declaration that the custom is unreasonable.

[1] [Reading *consuetudo* for *lex*.—REVISER.]

Such a declaration is made in the laws in various ways. An example is the passage in the *Sext* (Bk. III, tit. III, only chap.), where the words, 'disapproving entirely of that custom', are used. In the *Decretals* (Bk. II, tit. XIX, chap. ii), we read: 'we condemn such a custom'. In the *Decretals* (Bk. I, tit. IV, chap. v), a certain custom is made void since 'by reason thereof the force of ecclesiastical discipline would be broken'. Again (*ibid.*, chap. iii), a custom is abolished 'because it is held to be not reasonable', and (*ibid.*, chap. vii), 'since this is rightly thought to be not so much a custom as a corruption'. In the *Decretals* (Bk. III, tit. VII, chap. iii), a certain custom is termed 'evil', and later another is declared to be 'contrary to what is proper, opposed to rectitude and in violation of the canonical ordinances'. Accordingly, I think that the principle stated above is valid when a custom is termed 'an abuse', and is declared as such not to be of obligation, as is stated in the *Decretals* (Bk. I, tit. IV, chap. x).

Covarruvias.

When, therefore, in some such fashion, a custom is condemned, then the law has the force, not only of prohibiting it, but also of declaring it to be bad—as Covarruvias held (*Variarum Resolutionum*, *ibid.*, conclusion 2). Thus, the law is said to revoke such custom specifically. For the same reason words of this kind are necessary, because without them the law does not state what the character of the custom was or is; it does no more than forbid it.

8. Whence, it follows that, even though it is a custom of the past which the law annuls, if, by way of justification, it adds that the custom is corrupt or is unreasonable, by that very fact the law also forbids and condemns a future custom of the same sort, as long as the circumstances remain the same.

Panormitanus. Tiraqueau.

This opinion is that of Panormitanus (on *Decretals*, Bk. II, tit. XIX, chap. ii, nos. 7 and 8), and Tiraqueau (*De Utroque Retractu*, Pref., nos. 18 and 19), who refers to many other authorities. Their argument in proof of this opinion is that an unreasonable custom is prohibited by every law and for all time, according to the *Decretals* (Bk. I, tit. IV, chap. xi), and other Chapters. Navarrus was also of this opinion, and the passage in the Gloss (on *Decretals*, Bk. I, tit. IV, chap. xi, word *rationabilis*) is of the same sense: 'that is a reasonable custom, which the laws do not condemn'. The word 'condemn' (*improbandi*) here is to be taken in its proper meaning, and it must be understood in the same sense where it is stated at the end of the Chapter that reasonable custom is one 'which is not opposed to the canonical ordinances'—those ordinances, namely, as Navarrus notes, which condemn unreasonable customs. Whence the same Gloss adds, an unreasonable custom is one 'which is condemned by law', and from all the laws which it cites, it is clear that the word 'condemned' is used in its proper sense.

Navarrus. Gloss.

Finally, writers must be understood in this sense when they say that a custom condemned in law can no longer be valid; and although they sometimes use the word 'derogation' in this connexion, they can be modestly interpreted as holding the doctrine here set forth. The proper definition of the term 'derogation', and the difference between a custom from which there has been a derogation and one that has been prohibited or condemned, I shall explain in Chapter xvi of this Book.

9. It remains to notice that this condemnation of a custom can be understood as accomplished by the law in two ways: by a mere declaration of law, or by way of regulation as well. The former takes place only when a custom is either so clearly evil as to be contrary to natural or divine law; or when it is evidently useless, and harmful to or at variance with the general welfare. The latter way seems to be used when it is not immediately evident from natural or divine principles alone that the custom is unreasonable, and nevertheless for the sake of greater decorum, or for the good of religion, or for the rigour of discipline, the law provides that the custom in question is to be held as unreasonable. For unquestionably it is possible for human law, and especially for the canon law, to do this, since such a regulation by the law may be in the highest degree proper in the interest of good morals.

Condemnation of a custom can be effected in a twofold manner. 801

The distinction between these two modes of condemnation is to be seen in the language of the laws themselves. For sometimes a custom is condemned by the phrase *declaramus* (we declare), as in the *Decretals* (Bk. I, tit. IV, chap. x). At other times, however, the verb *irritare* (to make null and void) is used, as in the *Decretals* (*ibid.*, chap. v), where it is said: 'We have decided that such a custom is to be made null and void.' These words indicate, in their *strict* sense, that such a custom previously and of itself was not void; and consequently, that it is not essentially unreasonable, but only that it has been made void by law. This point is admirably made by Molina, in his work *De Iustitia et Iure* (Tract. II, disp. 79). Still, I hold that by such nullification, a custom of that character has remained for ever condemned by law. For that nullification (*irritatio*) was not a nullification of some particular fact, nor was it (so to speak) a transitory one; it was constitutive of law, and as such, universal and perpetual; therefore, it applies always, and always resists a custom of that kind as an unreasonable one. This is made clearer by the fact that this voiding [law] was imposed not as the punishment of a fault, but for the reason that, 'if such a custom were to stand, the force of church discipline would be broken'. [This voiding law] was, then, set up in essential opposition to the establishment of a custom in that matter, to prevent for all time the disruption of the force of church discipline that would be brought about through

Molina.

such a custom. For it is not alone the intrinsic character of the things to be done or not to be done that determines the nature and condition of a discipline, but rather the fact that the law rules that this or that must or must not be done. It is for this reason that we said that the condemnation of the custom of which we have been speaking was not a purely declaratory one, but rather one regulatory in its nature.

10. In this sense, also, are to be understood many laws condemning certain customs or prescriptions, which, from the nature of the case alone, do not immediately seem to be unreasonable. In the same way, some decrees condemn customs which unsettle canonical ordinances, or curtail them, as being opposed, that is, to the exactitude intended by them. Moreover, in this sense is to be understood the Gloss quoted above (on *Decretals*, Bk. I, tit. IV, chap. xi, word *rationabilis*), which says that a custom is unreasonable which the law condemns. This meaning would seem to be the only one admitted by Baldus (*Consilia*, Vol. V, cons. 401 [cons. 349]), when he said that in order that a custom may be spoken of as reasonable, it is enough that it be not condemned. Yet this statement does not seem to be strictly true; since a custom can be essentially, and of its own nature, unreasonable, although it has not been condemned in law.

Gloss.

Baldus.

It is possible, then, that these writers intended their words as applying only to the external forum; or, at all events, that opinion can be understood to refer to a condemnation by law, either on some particular ground, or, at least, upon general principles—as, for instance, that the custom weakens the force of church discipline, or that it derogates from the liberty of the Church, or for some reason of a similar character.

Finally, a distinction can be drawn between these two modes of condemnation; for that which is purely declarative seems to be the more immutable of the two, as founded in natural reason alone, or in the divine law; the other, which is positive, since it emanates from human law, can suffer change, either through new law, or sometimes by reason of change in the matter itself. This is the opinion of Panormitanus (on *Decretals*, Bk. II, tit. XIX, chap. ii, no. 8, and *De Consuetudine*, Chap. xi, no. 12 [no. 21]), as we shall explain at greater length in Chapter xvi of this Book.

Panormitanus.

CHAPTER VIII

CONCERNING ANOTHER DIVISION OF CUSTOM INTO THAT WHICH IS VALID BY PRESCRIPTION AND THAT WHICH IS NOT

1. This is the last division of custom, and I have determined to discuss it in this Chapter, because a clear notion of it is necessary both

for a treatment of this matter, and for the explanation of the effects of custom. In this whole matter, the chief difficulty centres round the nature of custom valid by prescription, and we shall, therefore, give most of our attention to that; for when that has been made clear, it will be easy to explain the nature of custom not validated in that way.

Cynus. Pierre d'Ailly. Panormitanus. Angelus de Ubaldis.

Certain civil jurists, we must begin by noting, have said that there is no such thing as consuetudinary law obtained by prescription. Cynus and Pierre d'Ailly, who are referred to by Abbas [, i.e. Panormitanus,] (*De Consuetudine*, Chap. xi, no. 7) and Angelus de Ubaldis (on *Code*, VII. xxxix. 8) held this opinion. They were induced to think so, because custom is not settled law; but rather it settles 802 law. For it is thus, as we have pointed out in Chapter One of this Book, that the custom of which we are treating is to be distinguished from prescription. The custom, accordingly, that we are here discussing, is not prescription; it cannot, therefore, be validated by prescription.

The logical validity of this argument is established as follows: when it is said that a custom is validated by prescription, the assertion is made either of a custom of law or of a custom of fact. But the first cannot be separated from the second, because whatever is established by prescription is established through prescription by a usage of some sort. Therefore, if the legal custom is validated by prescription, it must be validated by some usage, which is nothing else than the custom of fact itself. With reference to that, we must ask in turn: by what usage can it be validated by prescription? By some usage distinct from itself, or by itself? But not the first, because we observe a custom not by another usage, but by its own, because custom is itself a usage, and a usage is not exercised by a different one. Otherwise, we should be involved in an infinite series. Nor is custom established by itself, since it is not a prescription as assumed; and nothing comes under the heading of prescription except by some specific act of prescription.

Several confirmatory arguments are advanced for this position. One is based upon the fact that every prescription requires good faith, but this requirement is not necessary in this sort of custom, for it can sometimes, as we have said, be established by means of sinful actions. Likewise, a prescription demands a definite period of time, fixed by law; but in the case of this custom there is no law that requires a fixed time for the prescription. Finally, every prescription is obtained against some individual who is unwilling to have it established; but this element is not present in the custom of which we are speaking. For all these reasons, validation by prescription cannot be demanded in this sort of custom, and therefore the distinction laid down by us cannot stand.

2.[1] Nevertheless, we must assert first, that there is a custom which

[1] [This section-number omitted in text.—Tr.]

settles law, that is, which is legal, and which can be validated by prescription. This statement is explicitly made in the canon law (*Decretals*, Bk. I, tit. iv, chap. xi), in the words: *legitime praescripta* (legitimately established by prescription); it is sufficiently suggested by the *Sext* (Bk. I, tit. iv, chap. iii), as also in the *Decretals* (*ibid.*, chap. viii), on which the Gloss comments in the last note, as well as in the *Decretals* (Bk. II, tit. xii, chap. iii), on which the Gloss also comments (on words *De Consuetudine*), and in other passages to which writers on this matter refer.

The existence of a customary prescription is approved.

In connexion with these references, the reader must remember that the laws use a different manner of language, when they deal with the true prescription of things, or of private rights. [This caution must be given] since we are dealing, not with prescription, but with legal custom. In respect of that, we find scarcely any law requiring that a custom be validated by prescription, except[1] the aforesaid last chapter (*Decretals*, Bk. I, tit. iv, chap. xi). For the *Sext* (Bk. I, tit. iv, chap. iii) may perhaps refer to prescription, since it treats of the custom of a bishop with respect to his exercising his jurisdiction without the advice of his cathedral chapter. But the *Decretals* (Bk. I, tit. iv, chap. viii), makes no mention of a prescriptive custom by name, but merely says: 'If the custom has been such as to prejudice the common law [...].' *Decretals*, Bk. II, tit. xii, chap. iii, is best interpreted as relating to a true prescription concerning a right of election, and *Decretals*, Bk. I, tit. vi, chap. l, deals with prescription, also, in speaking of the subject of elections, as do other Chapters which are cited.

Nevertheless, one law is sufficient to oblige us not to depart from its terms. Upon this point, the canonists thereon (on *Decretals*, Bk. I, tit. iv, chap. xi) are agreed: Panormitanus (*De Consuetudine*, Chap. xi, no. 7), Rochus (*De Consuetudine*, Sect. 3, at the beginning) who deals with it at great length, Antonio de Butrio and others thereon (*De Consuetudine*, Chap. xi), and Cardinal[2] (on *Decretum*, Pt. I, dist. viii, can. vii). Bartolus mentions this view explicitly, in writing against Peter, to whom he alludes (on *Digest*, I. iii. 32, in *Repetition*, Qu. 2, no. 15). Baldus, Jason and others set forth the same opinion on this matter (on *Digest*, I. iii. 32). The Gloss (on *Digest*, L. xvii. 166 [54]) provides an excellent statement of the same tenor.

Panormitanus. Rochus. Antonio de Butrio. Cardinal. Bartolus. Baldus. Jason. Gloss.

Now, even though it may seem to be a mere matter of words, I think that it is necessary for a clear discussion [of prescriptive custom] that we give some attention to the manner in which the jurists just mentioned speak of it, defining it rather from the connotations of the word 'prescription', than from the nature of the custom itself. Thus, Panormitanus says that for a custom to be [prescriptive] means no more

Panormitanus.

[1] [For *praepter* read *praeter*.—Tr.]
[2] [i.e. Gratian.—Tr.]

than that it has been secured through the running of a period of time required for a prescription. Rochus (*De Consuetudine*, Sect. 3, at the beginning), in like manner, says that to assert that a custom ought to be established by prescription, is equivalent to saying that it demands a certain duration of time. Baldus (on *Digest*, I. iii. 32, opposit. 7) states that a prescriptive custom is one which is perfected and firmly grounded through lapse of time. Bartolus, however, explains the term 'validated by prescription' as meaning 'established by custom after the manner of a servitude'. This latter definition would seem to be different from the preceding one, yet both are true when their meaning is properly interpreted.

Rochus.

Bartolus.

3.[1] Therefore, in order to explain better the above assertion and its basis in reason, I note that, just as of a true prescription, so also of a custom, it is true to say that both the custom, and the right which has been acquired thereby, can be validated by prescription. Thus, in the case of a true prescription, a house, a servitude, or an action can be said to be the objects of prescription: consequently, the custom of making use of such a thing is the prescription itself. However, it is not such, unless it has been consummated within a required period of time, along with other circumstances. Therefore, when such is the case, it is also termed a 'prescriptive', to distinguish it from an inchoate custom, or from one imperfect in some other way.

Both custom itself and the right acquired through it can be validated by prescription.

So then, a custom of the sort that we are here discussing, can, in so far as it is a legal entity, be validated by prescription, since prescription has been acquired by means of a custom that has been consummated, that is, by a custom fulfilling the conditions required by law. This is the doctrine of Bartolus, and he bases it upon analogy with a prescription of a servitude. For although there is a difference in the rights acquired in a servitude and in those of an unwritten law, nevertheless, the manner whereby each is established, is—with due proportion—the same. Thus, also, a consuetudinary law may be said to be validated by prescription. 803

Whence, also, it is to be said that the custom of fact itself, through which a legal right is established, in so far as it requires the assistance of the law to attain a certain degree of perfection and consummation, may be termed a prescription: for the right itself cannot be said to have been validated by prescription, unless the approach thereto (so to speak) may be called a prescription. And, therefore, such a custom of fact may be said to be prescriptive, in order to distinguish it from a custom which is inchoate or imperfect; that is, in order to show that it has fulfilled all the conditions called for by the law, and that especially which touches the time of its running. This is the meaning of the words of Baldus and

Baldus.

[1] [The section number is omitted in the Latin text.—Tr.]

Panormitanus (*supra*) and that of the Gloss (on *Digest*, L. xvii. 54) when this Gloss speaks of a firmly grounded custom.

Panormitanus. Gloss.

4. The basis, then, of the contrary opinion is easily destroyed. Primarily, the opinion is based upon an ambiguity in the terms. For, when, earlier in this Book,[1] we distinguished custom from prescription, we also pointed out that these words are sometimes taken in a broad meaning and used interchangeably. For even prescription is a custom brought to its culmination in a certain way; and, every custom brought in like proportion to completion is usually called a prescription; in the same way, a custom can be called a prescription, as well in law as in fact, as has been explained. When, therefore, in an earlier Chapter we distinguished custom from prescription, we were using these two terms in their strict meaning. For the present, however, we assert that it is possible for a custom, even a legal one, to be, and to be spoken of as prescriptive in the broader sense of that term.

Refutation of the contrary opinion.

Our answer to the argument for the contrary opinion is that a custom in its character of a legal rule takes its epithet 'prescriptive' from the character of the custom by which it is acquired; but that a custom of fact takes that epithet from the conditions wherewith it was involved in order to be such: namely, because it is of long duration, is voluntary, is observed by common consent, and the like. So the custom itself can be said to be prescriptive, for the reason that it has that completeness (as it were) by its own intrinsic and essential perfection. Further, we can say almost the same thing of any prescription properly so-called.

Custom and prescription when used in the broad meaning are equivalent to each other; but in their exact meaning they are distinct.

In reply to the confirmatory argument for the contrary assertion, I say that it proves no more than that this custom is called 'prescriptive' owing to conditions different from those which are proper to a true prescription, and that consequently prescription properly so-called and prescriptive custom are not identical. It does not, however, prove that this custom is not prescriptive in the broader meaning of that word [as we have defined it].

5. From this solution of the arguments opposed to ours, it is clear that this use of the adjective 'prescriptive' and this definition of its meaning, indicate that there is a kind of custom which requires, together with the fulfilment of other conditions, a certain duration of time in order that it may be true custom, and be without qualification called such by the law. This is the cardinal point of our present discussion, and that which we must now take up to establish our conclusion.

In the first place, the question may be asked, whether legal custom occasionally requires for its validity the running of a fixed length of

[1] [*Supra*, pp. 448 *et seq.*—Tr.]

time, that is, a period and duration such as are demanded for a true prescription. On this point, it may be noted that the opinion of some theologians denies that a definite time is required for establishing a legal custom, that is, one establishing unwritten law; they hold that this period should be defined at the discretion of a prudent man. This Soto held (*De Iustitia*, Bk. I, qu. vii, art. 2), and his opinion is followed by many of the modern commentators upon St. Thomas (I.–II, qu. 97). They are induced to think so because this period is not fixed by the nature of the matter, as is self-evident; nor, again, is it fixed by canon law, nor by civil—at least by common civil law—hence, [they say,] it is not possible for such period to be defined in any other manner than by the decision of a prudent judgment. The validity of the inference appears self-evident; no other way of fixing the period of time can be thought of. The proof of the minor premiss is that all laws, canonical as well as civil, which designate a certain time for the running of the prescription period, have reference to a private prescription, or to a legal disposition, as in the case of ownerships, servitudes, and of similar rights; hence, the argument runs, the periods fixed by these laws cannot be extended in such wise as to regulate legally the period of time requisite for a legal custom.

Soto.
St. Thomas.

6. The antecedent, as far as canon law is concerned, is proved from the fact that all the laws which are cited on this point clearly refer to prescription properly so called, a fact which I have noted.[1] This can be seen in the entire title concerning custom [, i.e. *Decretals*, Bk. I, tit. iv], in which custom validated by prescription is dealt with only in the last Chapter of this title; and that Chapter makes no mention of the length of time necessary for the running of such custom.

In relation to the civil law, the truth of the statement in the antecedent[2] is a better ascertained fact. Abbas [, i.e. Panormitanus] (*De Consuetudine*, Chap. xi) expressly admits it, and because of it[3] some civilians deny that a custom can be validated by prescription, as I have said. Those who hold the opposite opinion ought to produce a text to prove it. And hence I have referred only to the common law that prevails generally; for the matter might be otherwise in the case of the special law of a particular kingdom. But of this I speak later. The validity of the inference [in proof of the subsidiary argument] is demonstrated from the fact that a true prescription is very different from a custom: so different, that what is determined in the one, cannot, with any foundation, be extended to the other. This is especially true, since with respect to each the reasoning is not the same: for in a prescription, a right is acquired by one

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[1] [See *supra*, Section 2.—Tr.]
[2] [That time is not of the essence of consuetudinary law.—Reviser.]
[3] [The opinion of Panormitanus.—Reviser.]

person against another, contrary to the latter, who is deprived of his own property, or of his right; and it is for this that it has been necessary to fix definitely a certain time within which the [former] owner of a right can and ought to exercise diligence, in order to recover his own property, or to preserve his own rights, so that if he neglects to do so, he may be justly deprived of them. For this reason, then, according to the character of the property involved, and according to the presence[1] or absence of the person prescribed against, a longer[2] or shorter time[3] is usually defined for the establishment of a prescription. In the establishment of a custom, however, no prescriptive right is acquired against an unwilling person; in fact, the custom is founded upon the tacit consent of the prince, as we say below; and hence it has not been necessary to define the length of the period whenever there is sufficient ground for assuming his tacit consent: the mere continuity of the custom for a longer or a shorter period suffices.[4]

7. Nevertheless, I assert that for the prescriptive custom of which the laws speak—at least those in the *Decretals* (Bk. I, tit. iv, chap. xi), previously referred to—a certain, and definite time must be fixed. The secondary question, whether that period should be of this or that number of years, we shall discuss later. This is the opinion of the doctors of both the canon and civil law. The canonists, including Giovanni d'Andrea, Panormitanus, Antoninus and Rochus (*De Consuetudine*,[5] Sect. iii, no. 1), give it as their doctrine in their comments on this chapter.

A definite time is required for a custom obtained by prescription. [Suárez rebuts the argument developed in Sections five and six.]

Giovanni d'Andrea.
Panormitanus.
Antoninus.
Rochus.
Gloss.

This is the doctrine, likewise, of the Gloss and of the Doctors (on *Sext*, Bk. I, tit. ii [tit. iv], chap. ii, and on *Decretum*, Pt. I, dist. viii, can. vii; *ibid*., dist. xi, can. iv; *ibid*., dist xii, can. vii). It is that maintained by Abbas [, i.e. Panormitanus] and Felinus (on *Decretals*, Bk. I, tit. xxxiv, chap. i [, no. 6]). It is set forth as the common teaching by the jurists (on *Digest*, I. iii. 32), by Bartolus (*ibid*., qu. 2, at the beginning, no. 14); by Baldus and Jason (*ibid*., no. 41 [no. 27] and on *Institutes*, I. ii, §9). The teaching of these writers is followed by Gregory López (on *Las Siete Partidas*, Pt. I, tit. ii, law 5, gloss 4 [*glossa* g]), by Burgos de Paz (in Bk. I in *Tauri*., no. 205), by Alexander of Imola (*Consilia*, Vol. II, consil. 66 [consil. 68, no. 1]). It is the opinion, also, of St. Antoninus (Pt. I, tit. xvi, only chap., § 4), Angelus de Clavasio (in his *Summa*, on word *consuetudo*, no. 8), Sylvester ([word *consuetudo*,] Qu. ii [, no. 6]), and Antonius Corduba ([*Quaestiones*,] Bk. I, qu. xii, ad 4).

Panormitanus.
Felinus.
Bartolus.
Baldus.
Jason.
Gregory López.
Burgos de Paz.
Alexander of Imola.
St. Antoninus.
Angelus de Clavasio.
Sylvester.
Corduba.

[1] [Suárez is referring here to the knowledge or ignorance on the owner's part of the act of the person attempting to obtain the prescriptive right.—Tr.]
[2] [For *mais* read *maius*.—Tr.]
[3] [Suárez probably intended to say: 'according to the presence or absence of the person prescribed against, a *shorter or longer* time is usually defined for the establishment of a prescription', since a shorter space of time is usually required for the prescriptive period to run against an owner who is present.—Tr.]
[4] [Reading *sufficit* for *sufficiat*.—Reviser.] [5] [For *De Constitution.* read *De Consuetudine*.—Tr.]

Navarrus.
Molina.

Finally, Navarrus (in *Consilia*, Bk. I, *De Consuetudine*, consil. ii [consil. i]) and Molina (*De Iustitia*, Tract. II, disp. 77), propound the same opinion.

It does not, then, seem safe to dissent on a moral question from an opinion which is so generally received. This is especially true, since this whole question is so intimately dependent upon positive law—in which case, the opinions of those who are experts in that branch of law must have greater weight than the opinions of those who are not thus expert. Again, no convincing argument in support of the opposite assertion can be given.

8. The first proof of our assertion [*supra*, Section 7] is taken from the *Decretals* (Bk. I, tit. IV, chap. xi), where, among the conditions of the custom there mentioned it is specified that it must be the result of prescription. But it cannot be said to be the result of prescription, except in relation to a definite, legitimate time, during which it should continue in order to be established by prescription.

An evasion.

Some reply to the above argument, that such custom is said to be prescriptive, not univocally—as is the case with rights of ownership and other similar rights, which are obtained by prescription—but by analogy only, and because it is modelled upon true prescription in the sense that it is firmly grounded by running for a certain length of time, which if not that fixed by law, is at least that defined as sufficient by a prudent judge.

The evasion is rejected.

But this evasion is arbitrary, and is contrary to all the authorities. Furthermore, it seriously impairs the force and utility of that law [*Decretals*, *ibid.*]. Wherefore, although it may be true that custom is different from prescription, nevertheless, it is necessary that this kind of custom which is spoken of as prescriptive, should accord with true prescription at least in the requirement of a long period of time within which it is said to be established, that is, validated by prescription; otherwise the term has no definite meaning.

When, then, that same law [*Decretals*, *ibid.*] requires that the custom be established by prescription, in language of the same character as that employed in other decrees demanding that a right of election, or other similar right, shall be lawfully established by prescription, we must hold that the law speaks univocally, at least respecting the period of time requisite: otherwise, it would leave the peculiar prescriptive character of the custom unexplained. Therefore, Panormitanus and almost all the writers have made it plain that the custom must be established by prescription, that is, must be obtained by reason of a period of time of length sufficient for a prescription. Even the word prescription itself connotes a fixed length of time: what is left to the free decision [even of a prudent judge] cannot be definite, or prescribed.

The expression 'a long time' legally means at least ten years; nor is the determination of this period left by the law to the judgment of a prudent individual.

9. In the second place, a confirmation of our assertion is to be drawn from the term 'a long continued custom' which is used in that same chapter [*Decretals*, *ibid.*]. This term is taken from the civil law (*Code*, VIII. lii. 1, and from *ibid.*, 2). In other passages, it is spoken of as custom 'of long standing' (*diuturna*), as it is in the *Institutes* (I. ii, § 9) and in

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the *Digest* (I. iii. 33).

The phrase 'a long time', however, or 'long continued', is not an indefinite one in law, nor is it left to the discretion of a prudent individual, but means a period of at least ten years. The phrase, then, 'a long time', taken absolutely, refers to a period marked off, on the one hand, from a period of less than ten years[1]—which is held to be a brief period; and on the other hand, from a period longer than twenty years —which is termed 'very long': hence, the phrase denotes a period from ten to twenty years. According, then, to the variety of the attendant subject-matter or circumstances, the law usually requires a period of ten or twenty years. All of the foregoing is clear both from Rubric in *Code*, VII. xxxiii and from laws 1 and 2 and the following title (*ibid.*, xxxiv). Hence, when a law requires a long time for the sufficient confirmation of a custom, or its validation by prescription, the phrase is not indefinite in its meaning, but definite: its meaning is fixed by law, and it definitely indicates a period of at least ten years.

10. If, then, any one of the conditions of prescriptive custom is to be left to discretion, it must not be that which relates to this requirement of a full ten-year period, for this is (as it were) an essential requisite for custom, as such. This is the sense of Gloss 1 (on *Sext*, Bk. I, tit. IV, chap. iv), where it says that in the canon law a custom validated by prescription is one of forty years' duration, but that for a custom as custom, that is, for one intended to introduce new law, a period of ten years, at least, is required: this period, at least, is understood as referring to a long-continued custom. Accordingly, if any discretion were to be allowed [a place in the determination of the time element in prescriptive custom], it could be only in cases where the custom has run for a period of more than ten years: and then only to determine whether that period should (as it were) be automatically sufficient; or, whether at that point the decision of a prudent judge is required to determine whether this length of time suffices, or whether a longer period should be awaited.

However, not even in such a case should discretion be admitted: partly because it would subject long-continued custom too much to restriction, and would deprive it of a proper certainty without good reason; partly, and this is the most important consideration, because

[1] [See also *infra*, pp. 567 *et seq.*—Tr.]

in whatever way the fixing of the length of time is left to the discretion [of a judge], there will follow not only a destruction of the true character of prescriptive custom but also of every appearance of one, or even of the appellation prescriptive as it is suggestively[1] applied to any custom, as the first argument in support of our assertion sufficiently proves.

The words of *Decretals*, Bk. I, tit. IV, chap. viii, are of no slight support to our position here: 'If such a custom shall have been approved, which does prejudice to the common law.' These words assume that such a custom is not left to the discretion of any one (for if this were so, the custom could hardly or not at all be approved); but that the custom has its essence and formality as custom defined by the law, and, accordingly, a definite time within which it accomplishes its prescriptive effect—as is there noted by the Gloss.

11. Another argument in confirmation of our assertion is this: the contrary opinion assumes that a long continuance of time is not essentially, but only incidentally, required in a custom which the law calls prescriptive. The conclusion is false. Therefore, . . .

The truth of our conclusion in the foregoing proof will be clear from a consideration of the principle on which the contrary opinion rests. Those who follow that opinion hold that the custom is required for the effects attributed to it, only as a sign of the tacit consent of the prince; hence, they conclude that this kind of custom does not call for a fixed number of years, but only for such a length of time as is needed for indicating in the judgment of an upright man the [tacit] consent of the prince. Therefore, I infer that in that opinion[2] the time element is incidentally required, because it is accidental that the token of consent is completed in a longer or shorter time; for a definite length of time is not *per se* demanded as a necessary condition for that manifestation. Therefore, the inference in the opinion aforesaid is obvious.

Its falsity, however, is proved: First—and here the points we have established earlier in this Chapter must be kept in mind—for the reason that it does not leave this kind of custom even a shadow of a prescriptive character: for a prescription of its essence requires time to run in its favour, and time is definitely determined, as is clear from the language of all the laws [that touch upon it]. Again, and the point is most important, this opinion is contrary to the fact that a custom is frequently actually completed and has become prescriptive in cases where the judgment of a prudent man would not be—human law apart—that the custom sufficed as evidence of the consent of the prince. It is clear, then, that such a custom is not a prescriptive one merely because it

[1] [*coloratae*: The term '*coloratus*' means 'giving a colour to' or 'suggestive of'. The phrase '*titulus coloratus*' is frequently used to signify a title to an office that has some specious justification.—REVISER.]

[2] [For *Hinc ergo in foro ex*, read *Hinc ego infero in*.—REVISER.]

has endured a sufficient time to indicate the existence of the prince's consent to the mind of a prudent judge; but rather, it is because it has been validated by prescription, that it indicates the consent of the prince: therefore, such a prescription cannot be said to be established in such a length of time as only the judgment of a prudent mind can determine: therefore, it can be established only in a length of time that is fixed by law. The logical soundness of these conclusions is self-evident. The truth of the antecedent of my proof will be clear from what we shall have to say in Chapter xvi, concerning a custom which is sufficient for the revocation of a law.

Reply to the basis of the contrary opinion.

12. I deny, therefore, the minor of the argument for the contrary opinion, and I assert that this period of time has been defined by positive law, both canonical and civil, each within its own sphere.

The determination of the time necessary can be made in two ways.

This determination of time may, it must be understood, be effected in two ways. In the first, explicitly and specifically: in the manner, that is, of which we are speaking in the present discussion, and which will be explained more in detail in Chapters xv and xvi. We admit that the laws do not explicitly define the period necessary for this particular subject-matter of laws, that is, of legal customs. The reason is that this mode of explicit determination is not a necessary one; there is another that is sufficient.

In the second way, then, the length of time [necessary for the 806[1] validation of a custom by prescription] is determined implicitly, and (as it were) by the proper application of general principles expressed in the language of law itself to the case of custom of this kind. It is in this sense, then, that I assert that a fixed length of time is necessary according to law for a custom to become validated by prescription.

For the law itself has distinguished in general: customs that are immemorial, of very long standing, of long standing, and [lastly] common customs, those, that is, existing for a brief period; and the law has determined beforehand for each of these its own manner of duration or definite period; as we, in company with Panormitanus and others, have noted. This determination by the law is, however, a general one, and applies properly to a custom of fact which can establish a right (*ius*) whether of law, or of ownership, or of any other moral power. This opinion will be seen to be that of Baldus (*Consilia*, Bk. V, cons. 34 [cons. 349,] no. 2) and of Petrus Philippus Corneus (*Consilia*, Bk. IV, cons. 188, no. 10).

Baldus.

In particular, however, respecting a custom which establishes or destroys a legal right, the laws determine that [the period of time] ought to be very long or protracted, or that the custom should be

[1] [Latin text incorrectly has '804'.—TR.]

validated by prescription, as we have shown. Hence, the laws make it clear that a certain definite time is necessary for such a custom. Thus, this declaration of the law is clearly not a mere extension of the principles applicable to a prescription properly so called so as to cover a legal custom; it is derived from a general determination of time requisite, under this or that denomination, in custom itself. The truth of this assertion will be the more clearly realized when it is recalled that the distinction between custom and prescription, as set forth in the argument of the contrary opinion, is not sufficient. For even though in the case of a legal custom, it is not necessary that the period of time be defined, as in the case of prescription, upon the ground that the custom is initiated in opposition to some person who is passively or actively unwilling that the custom be established, nevertheless such a determination of the running time of the custom can be necessary on another ground no less urgent: in order, that is, that we may have a definite and legal token of the consent of the prince, and that a matter so grave, public, and general in character, should not be left to the uncertain decision of a prudent individual: for it is obvious that even unwritten law ought to be as definite and uniform as possible.

This determination of the period of time is further necessary, because it must sometimes take the place of the [express] consent of the prince, so that such consent will be recognized as given in law itself, even if it is evident that it was not personally granted by the prince himself—a point which we shall discuss later.[1]

At least ten years are required for a prescriptive custom.

13.[2] It remains for us to inquire how long is this period of time which is required for prescriptive custom. This definition cannot be properly made in general terms: for a longer or shorter period may be necessary, as the effects and circumstances of the custom vary. Hence, I shall here do no more than state in a general way that a period of at least ten years is required, on the principle that a long time is necessary, a period which, in law, comprises at least ten years. This has been expressly determined by a law of Spain ([*Las Siete Partidas*,] Pt. I, tit. II, law 5), where, speaking of a legal custom, it lays down a period of 'ten or, alternatively, twenty years'. Why this law laid down this alternative requirement will be stated in Chapter xv.

I have used in my assertion the words 'at least', because in some cases, more time is required. In Chapters xv and xvi I shall explain what those cases are. Our assertion, as thus explained, is the common one with all the authorities whom I have cited, and it does not involve any new difficulty except one, and that I shall take up in Chapter xvi, because it is more relevant to the matter of that Chapter.

[1] [The principle of the 'legal consent' of a superior is important. Laws are framed sometimes in such a way that a custom begun and persisted in may automatically receive the consent of the superior.—REVISER.]

[2] [This Section incorrectly numbered '14' in the Latin text.—TR.]

A continuity of time is required in order that the custom may be said to be lawfully validated by prescription.

14.[1] It may, again, be asked whether this period of time must be continuous. I reply that it must be so in order that the custom may, in the definition of the aforesaid last Chapter [*Decretals*, Bk. I, tit. IV, chap. xi], be said to be lawfully prescribed. All the commentators on that law are agreed on this point. And they dwell upon the word 'lawfully', since it signifies that the custom must have the same continuity as that demanded by the laws for prescription: but it is clear that an uninterrupted period is necessary for prescription; the same, therefore, is necessary for a custom valid by prescription. This was the doctrine of Frederick de Senis (*Consilia*, 91, no. 5), who, for the reason we have given, has inserted in his definition of custom the condition that the custom be observed without interruption over the usual length of time.

Frederick de Senis.

Antonio de Butrio holds the same view (*De Consuetudine*, Chap. xi), as does Jason (on *Digest*, I. iii. 32 in *Repetition*, no. 41). This is the teaching, also, of Sylvester (word *consuetudo*, Qu. 5 [, no. 8]) and of Panormitanus (*De Consuetudine*, Chap. xi, no. 19).

Antonio de Butrio. Jason. Sylvester. Panormitanus.

This doctrine is confirmed by the fact that when in law a period of time is put down as necessary for anything, the rule, in cases of doubt and generally, is to suppose that the law requires continuous time—as Lapus (*Allegationes Iuris*, xlvii) has stated. Sylvester (word *religio*, Pt. V, qu. 5 [qu. 4]) supports this opinion, and he cites the language of the Gloss on rubric of *Digest*, XLIV. iii. This view is also that of Navarrus (*Consilia*, 87 [89], *De Regular*., no. 1) and he cites the text of law 1 of the same title of the *Digest*.

Gloss. Navarrus.

These passages just cited, however, prove hardly anything, and although the next to the last Gloss on the aforesaid law 1, gives some indication, [it is not strictly to our point,] since it is speaking of a prescription.

Gloss.

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15.[2] But the question may be asked, in what way or when is a custom held to be interrupted. For in the case of a custom no possession is necessary, nor is any other legal ground required beyond the worthiness of the custom, hence it cannot be interrupted on those grounds, as is the case with a prescription. Nor, [so this question runs, can it be interrupted] for lack of good faith, since that too is unnecessary. My reply is that in a certain sense good faith is necessary in order that a custom may establish law, as I state below. Hence, wherever good faith is necessary for a custom, the latter may be interrupted for the lack of it, as happens in the case of a true prescription. For there is a parity between custom and prescription on this point, as will become more clear from what will be said in Chapter xv.

[1] [This Section incorrectly numbered '15' in the Latin text.—TR.]

[2] [Latin Text incorrectly has '51'.—TR.]

Where, however, good faith is not necessary, custom can be interrupted only by means of actions in opposition to it. Panormitanus thinks that a single contrary action is sufficient to effect this result, because by that act the people give sufficient indication of their unwillingness that this custom be introduced. Thus, if the observance of the custom proceeds in violation of a law, then it may be interrupted by actions in observance of the law. For those actions oppose the custom in question, and they retract the prior will, either of establishing new law, or of revoking the earlier one.

Panormitanus.

Further, the mingling of contrary usages due to contrary acts makes it impossible that a certain tacit will of the prince be inferred—a point of very great importance with respect to the power of the custom to produce its effect, as we shall see. In order that an act may be sufficient to interrupt a custom, on the one hand, it will be necessary that it be done by the whole community in which the custom has been followed—for the acts of a few private individuals do not obviate the consent of the community, and so they cannot interrupt a general custom; or on the other hand, it will certainly be sufficient if an act contrary to the custom be done with the public authority of the one holding the necessary power—as that some individual should be publicly punished for observing the custom, or that a similar official act should be done, whereby it is proved that this custom was not in accord with the will of the prince.

What actions are necessary to interrupt a custom.

16. The second of the two principal assertions of this Chapter must now be made: that not every custom is established by prescription, and that, accordingly, custom may be divided into customs which are validated by prescription, and those which are not. All the writers agree in making this assertion, but only a few explain its meaning in the sense in which we understand it. For we can speak of custom of fact only and custom of law only.

Custom is divided into customs which are and those which are not validated by prescription.

With reference to the first of these the truth of our proposition is self-evident. The aforesaid last chapter [*Decretals*, Bk. I, tit. IV, chap. xi] indicates this sufficiently, in the words, 'unless the custom has been validated by prescription according to law'; for these words clearly imply that there can be a custom that is not legally validated by prescription. Again, from the very fact that a prescriptive custom requires [for its introduction] a certain period of time, it will be clear that before the completion of this period, the custom will not have been validated by means of prescription; and yet it will still be a custom of a definite character. This does not mean that the custom in this latter case initiates law: it exists merely as a series of repeated acts.

With respect to those customs that initiate law, the meaning of

our assertion is that not only custom which has been validated by prescription, but also that which is not prescriptive can sometimes establish law. This is the sense of the assertion as I make it, as it was apparently that of Panormitanus when he said, (in commenting on *De Consuetudine*, Chap. xi), that a prescriptive custom is required by the canon law only when the custom is in opposition to law, but not, however, when the custom is outside law, his meaning being that in such a case a custom can initiate law, and this, even if the custom has not been itself validated by means of prescription.

Panormitanus.

This view of Panormitanus seemed objectionable to Rochus (*De Consuetudine*, Sect. 3, no. 5), and for this reason, apparently, he did not admit the existence of a custom not validated by prescription, except inchoate and imperfect customs, which are not yet in the form in which they are able to establish law; or in the case of certain lines of conduct or customs of a few individuals, which practices are wont to be held up as examples for imitation, and are more accurately termed observances. Rochus (*ibid.*, Pref. no. 23) has a lengthy passage on this distinction.

Rochus.

I understand the above assertion, however, in the sense in which I first stated it: for I think that a legal custom can exist, apart from prescription and from a definite determination of a certain period of time; an example of this kind being a custom which is created with the knowledge and toleration of the prince. This sort of custom initiates law, not after the manner of prescription, but in virtue of a tacit personal consent [of the prince], which consent can be sufficiently indicated by a non-prescriptive custom—as seems to be self-evident. In such a case, the opinion of Soto [Sect. 5] could be valid, an opinion which I attacked inasmuch as he spoke in general terms; and yet even with this limitation in respect of time required for a legal custom, it does not seem that the judgment should be left to the decision of a prudent individual but that some more certain rule will be necessary.[1] This point, however, I shall explain more conveniently in chapters xv and xvi.

A legal custom may exist independent of prescription, and of the determination of a definite period of time.

17. Finally, however, the question may be asked whether this division [of custom][2] in legal usage is analogical, [i.e. not a strict distinction,] in such wise that under the term custom in its absolute sense only prescriptive custom falls, whilst the term is applied to other kinds of custom only when they are adequately explained. This point has been touched upon by Abbas [, i.e. Panormitanus] (on *Decretals*, Bk. I, tit. vi, chap. 808 fifty, no. 9 [no. 4]), Giovanni d'Andrea, and Antonio de Butrio (on

What is the meaning of custom in the absolute sense?

Abbas. Giovanni d'Andrea. Antonio de Butrio.

[1] [In Section 5, Soto is cited as having held that no time is determined by law for the establishment of a legal custom.—REVISER.]

[2] [Into customs validated or not validated by prescription.—TR.]

the same chapter of the *Decretals*). Abbas holds that a custom absolutely so called in law ought, in a doubtful case, to be understood as meaning prescriptive custom. Baldus (*Consilia*, Bk. V, cons. 349, no. 20) inclines to the same opinion, and he is followed by Petrus de Ubaldis (*Super Canonica Episcopali et Parochiali*, Chap. v, no. 2 [no. 13]), by Rochus (*De Consuetudine*, Sect. 3, no. 1) who also cites Baldus (tit. *De Feudorum Cognitione*, Chap. i). Baldus here states that a custom which is not validated by prescription is no custom at all, but a mere will to establish the same.

Rochus.

These authors likewise maintain that this opinion can be proved best from the aforesaid chapter fifty [*Decretals*, Bk. I, tit. vi, chap. fifty]. At the beginning of that chapter, the condition there applied is referred to in these words: 'That the expression of the opinion of those who by law or custom ought not to be present should have no validity'; and later, at the end of the Chapter, we find the words, 'But it is not clear from this [, i.e. from the fact that they did elect,] that the right of election belongs to them by law or by prescriptive custom.' But I do not see how from these words it is to be inferred that the word 'custom', understood in its absolute sense, is to signify only a prescriptive custom. The conclusion seems rather to be, that the word 'custom' is of a general and indifferent character, and that it is for this reason that the words stating that the right has not been obtained by prescription were added in the response, in order to indicate that not any kind of custom, but only that which is prescriptive, could be sufficient for giving the right of election without a law [granting that right].

18. My opinion, then, is that if we keep in mind the true meaning of the word 'custom', we find that it is a general and indifferent term. This was the view held by Giovanni d'Andrea (on *Decretals*, Bk. III, tit. xxviii, chap. ix), and that also of Petrus de Ubaldis, as he records in the passage cited. It is that, also, of the Gloss (on *Sext*, Bk. I, tit. iv, chap. iv, word *consuetudo*), above cited, which refers to the opinions of other writers.

The proposition can be proved, whether we regard custom as one of fact or as unwritten law. First, a custom of fact, does not, of its nature, imply any limits in respect of a definite period of time, either long or short; and it is, therefore, not differentiated by reason of these variations of time. Nor do I find in the law a basis for the other interpretation, even if the word 'custom' is used in the law without a qualifying word. Again, as to custom embodying unwritten law established by a custom that of its nature does not require a determined period for its running, we find that it is law in the strict sense of the term, and that it is consistent with the proper definition of custom exactly as is a custom validated by prescription[1].

[1] [Reading *praescriptae* for *praescripta*.—Reviser.]

Accordingly, I do not see a basis for that general rule[1]; and this chiefly for the reason that all the laws which are cited by the aforesaid authors, deal with true prescription and not with consuetudinary law. Hence, wherever the word custom is used without a qualifying epithet, we must, I think, determine the nature of the custom there spoken of by a careful consideration of the subject-matter of the custom and of the kind of effect with which we are dealing. For, if that effect is such that it can be introduced only by prescription, or through a prescriptive custom, it will be clear that the intention of the author is to refer to a prescriptive custom; if, however, the matter does not demand a prescriptive custom, there is no ground for understanding the term in that restricted sense; rather, it is to be there read either as meaning custom without reference to a distinction in kind, or to custom other than prescriptive, the nature of which is clear from its own context, or from its closer application to other laws. Finally, the above-cited authors say virtually the same thing by reason of the limitations which they attach to their own rule, and by the laws which they cite in justification of these limitations.

CHAPTER IX

CONCERNING THE CAUSES OF CUSTOM AND IN PARTICULAR WHO CAN INTRODUCE IT

1. We have explained, so far as appeared necessary, the nature and essence of custom, both in general and in particular. It remains for us to explain its causes and effects.

The cause of a custom is explained.

First, as to the causes. Almost all of these have been touched upon in explaining the definition and divisions of custom and only its efficient cause remains to be more fully explained.

For in the case of custom, there is no question of any special matter and form of which it is composed; but in so far as the custom is a juridical entity, the matter with which it deals is the same as that of written human law. The written law and unwritten law differ not in the matter with which they deal, but only in the mode of expression employed in their institution. Hence, in consuetudinary law, there is no special form, sensible and external, except the actions [constituting the custom], which must be external and sensible, and these, in so far as they are tokens of consent, may be called the unwritten words by which this kind of law is engraved upon the memory of men. Consequently, no special promulgation is required in this form of law, because custom, through the usage itself, is its own public manifestation and promulgation.

[1] [The rule stated in the opinion of Abbas [, i.e. Panormitanus], laid down near the beginning of Section 17, *supra*, p. 517.—Tr.]

The intrinsic form,[1] however, of this branch of law, is a certain 'will'—which under another aspect is the efficient cause of the obligation created by the custom. Of this we shall speak in a moment. If, however, we consider a custom merely as fact, the matter which constitutes it is the acts themselves in the frequency of which the custom consists. And since the custom should be useful and morally good, its form (as it were) will be its moral goodness and the usefulness in the single acts that make it up, and in their repetition; or, at least, the continuity or uninterrupted repetition of the actions for a sufficient time, can be said to be (as it were) its form. All these elements of custom are in some way connected with its sufficient[2] cause, and we shall discuss them more at length when we come to deal with that.

The final cause of custom, however, is, with due proportion, the same as that of written law, namely, the public utility, or that factor of the custom which makes it morally good; this element, objectively regarded, has the character of purpose, and [as such], in part at least, will be identical with the effects of custom. I shall discuss this cause at greater length in connexion with these effects. The efficient cause, then, is the only one needing elucidation.

The efficient cause of custom is twofold.

2. It is possible, however, at this point, to distinguish proximate and primary, among human causes, for it is of these that we are treating. The proximate cause, I term the men themselves who introduce the customs, for they inaugurate and continue a usage by their acts, thus producing the custom. I name as the primary cause, however, the sovereign power, or the prince if, by chance, his authority is necessary to give force to the custom. Whence the first of these two causes is called the proximate, especially in reference to a custom of fact, for the reason that it effects the custom directly and immediately. Of custom as law, however, the prince is the principal cause. He may also be called the immediate cause by reason of the immediacy of the law-making power exercised, even though he may not be such by reason of the immediacy of his personal agency, as is evident.

Baldus.

Three things must be borne in mind with respect to the proximate cause: the agent, the external action or the frequency of the action, and the internal will or consent. Baldus noted this, as cited in the last Chapter [*supra*, Chap. viii] and added a fourth element—time. This latter is not, however, a cause, but at most is a requisite condition. On this point, we have said something in the preceding Chapter, and we shall discuss it more specifically in those that follow. We must, then, here offer a brief explanation of these three elements [of a proximate cause].

[1] [That is, the formal element which makes custom law.—REVISER.]
[2] [*sufficientis*. Suárez probably intended to write *efficientis* (efficient).—TR.]

A perfect community is necessary for the establishment of a custom.

3. Concerning the first of these [, i.e. the agent], the question is raised: who is capable of introducing custom? In the first place, all maintain that a private person is not adequate therefor; but that a perfect community is required. This is sufficiently evident from the considerations brought forward in the Second Chapter of this Book, on the second division of custom, in which the proof of this point is given. This doctrine is excellently stated in *Digest*, I. iii. 32.

4. An objection, however, may be made, based on the fact that sometimes a private individual or a private community may, by means of a custom, acquire a privilege—as will be pointed out in the following Book.[1] But a privilege is a kind of law and private legal rule. [Therefore, . . .]. Again, it is possible for a person, by virtue of a private custom, to be exempt from a legal obligation. Therefore, such a custom is a legal one. The antecedent of this last proof is evident from the fact that in the correction of his subjects, a bishop is bound by common law to proceed after seeking the advice of his chapter, and yet by custom he can be excused from so doing, as appears in *Sext*, Bk. I, tit. IV, chap. iii. This rule is also derived from *Sext*, Bk. II, tit. XIII, chap. i, where we find the words: 'Since the common law establishes a contrary rule [. . .]'. And this can be proved also, from the reason that the law can be thus annulled only in part, which annulment is called derogation of law (*Digest*, L. xvi. 102). Therefore, by the custom of one person a derogation may be made from the law, at least in regard to the person in question.

A private custom could exempt from common law in two ways.

5. My reply first of all to the first portion of the argument just set forth, is that we are not here concerned with a privilege, which is a private written law, but with law that is unwritten, and which possesses a true legal character. Moreover, I maintain that a privilege is acquired rather through a prescription properly so-called than by means of a true custom of the sort we are here discussing, as we shall see in the next Book.[1] For it is evident that a prescription is introduced by a private person and by a private usage or custom.

Our reply then to the second part of the above contention is that there are only two ways in which a private custom could exempt from an obligation of a common law.[2] In one way, by the obtaining of a prescriptive right through it, the acquisition of which may change the matter of the common law, and consequently may terminate the obligation of that law. Thus, a private custom can exempt, or rather remove the obligation of the common law from a certain person; for there is here no derogation from the common law, but an abolition of

[1] [Not included in these *Selections*.—TR.]
[2] [Reading *excusare* for *excusari*.—REVISER.]

its subject-matter.[1] This may occur even in the natural law through a change of circumstances, as has been frequently stated, and it is a known fact even in prescription. This is the case with the laws cited above, as is clear from the language of the laws themselves.

In the second way, private custom might be conceived *per se* and directly as derogating from the common law by withdrawal from its obligation, but this we maintain is impossible, because a private custom of violating even a positive statute never excuses the fault; on the contrary, it normally rather increases it. And this is the meaning of the laws when they say that no prescription can be established in opposition to rightful obedience, as is clear from the *Decretals* (Bk. II, tit. xxvi, chap. xii), on which the same doctrine is noted by the Gloss. It is held likewise by other commentators on that Chapter, on the principle that no person can be exempt from due obedience by means of his disobedience; nor may one through abuses of his own derogate from the power of a superior, or in any other way diminish that power. Thus, the Doctors also assert that a subject cannot depart from a precept or the wish of his superior, because this act of its nature is a fault of disobedience.[2] On this point, Archidiaconus (on *Sext*, Bk. III, tit. iv, chap. v) may be consulted, and also Felinus (on *Decretals*, Bk. I, tit. ii, chap. viii, no. 30, words *quarto limita*).

Gloss.

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It is not, then, possible for an individual subject to exempt himself from a law by means of his own evil custom. Whence, the fact that a derogation from the law can be partially made by one having the legal power so to do, does not imply that an individual subject, who does not possess such power, can do so; nor is it presumed that a superior has granted the subject a dispensation (as it were) on the ground of his abuse, because a will that would have the effect of weakening discipline would be an unreasonable one, and contrary also to the force and efficacy of all law.

6. Our second assertion here is that a legal custom can be introduced not by any community whatever, but only by one possessing the capacity for legislative authority over itself; or, at least, by a community of sufficient perfection to be the subject of law properly so-called.

By what community the introduction of a legal custom is possible.

This assertion is the commonly accepted one on the point that a perfect community is required for the introduction of a custom: a state, for instance, or a similar community. This conclusion may be drawn from the aforesaid law 32 [*Digest*, I. iii. 32, § 1], where is first stated the principle that an ancient custom has the force of law, and then is added a statement of the ground in reason for the principle,

[1] [Reading *ablatio* for *oblatio*.—Reviser.]
[2] [Reading *inobedientiae* for *obedientiae*—Reviser.]

namely, that the laws themselves derive their force from the fact that they have been accepted by the judgment of the people: the same, therefore, must be said of those unwritten laws of which the people have approved. The reference here is clearly to a perfect community and one having from its first establishment the inherent power to make its own laws. In law 35 [*Digest*, *ibid.*, 35] there is added the clause that 'a custom is introduced by the tacit agreement of the citizens': but the citizens constitute the state; and a state is a perfect community. In law 37 [*ibid.*, 37] such a custom is called a law of the state. The same is laid down in the *Institutes* (I. ii, § 9, and following sections).

7. Whence the assertion is made by the Doctors generally, that only a people which possesses legislative authority can introduce a custom. This statement is made by Bartolus, Jason and others, in commenting on *Digest* (*ibid.*, 32). It is made by Panormitanus, Rochus and others (*De Consuetudine*, Chap. xi). Innocent (on *Decretals*, Bk I, tit. ii, chap. xii), Felinus (on *Decretals*, *ibid.*, chap. vii, no. 25 and on *ibid.*, Bk. II, tit. xxvi, chap. xi) and Navarrus (Comment. *De Spoliis*, Sect. 14, no. 7)—all hold this opinion. The names of other writers who follow this doctrine are set down by Tiraqueau (*De Iure Primogenitorum*, Qu. 16).

Bartolus.
Jason.
Panormitanus.
Rochus.
Innocent.
Felinus.
Navarrus.
Tiraqueau.

Giovanni d'Andrea, for this reason, puts it in the definition of custom (*De Consuetudine*, Chap. xi), that it should be the law of a people which by public authority has power to enact law. Barbatia [*Repertorium*, *De Consuetudine*, No. 9] and others, including Angelus de Clavasio (*Summa*, word *consuetudo*, No. 7), agree with this statement. The latter says that for custom there is required a people competent to enact law. Sylvester ([word *consuetudo*,] Qu. 3) states this doctrine very clearly, but St. Thomas does so even more satisfactorily when he says (in I.–II, qu. 97, art. 3, ad 3) that a community by which a custom can be introduced, should be either a free commonwealth, that is, one possessing sovereign power; or, if it is not a sovereign community, it should have that power by virtue of the tacit consent of the prince to whom it owes allegiance. Accordingly, I chose my words advisedly when I said that there was required a community 'which has the capacity for legislative authority', because it is not necessary that it be in actual possession of this power, for this can be supplied through the permission or tacit consent of the prince. The capacity, however, for such active power is necessary, because it should be a perfect community; but every perfect community, as was stated, has an inherent capacity for such power.

Giovanni d'Andrea.
Barbatia.
Angelus de Clavasio.
Sylvester.
St. Thomas.

8. Panormitanus (*De Consuetudine*, No. 1), develops an objection to this doctrine from the fact that a community of clerics is able to establish a custom opposed to the canons, according to the *Decretals*,

Panormitanus.

(Bk. I, tit. IV, chap. xi), and yet is not able to enact a law contrary to the canons (*Decretum*, Pt. II, causa xxv, qu. ii, can. vii, and other similar canons). He therefore concludes that [legal] custom can be established by a body that does not possess the power of making laws.

We can urge a second objection to the same effect, namely, that a community of lay persons cannot make a law of the Church, as is self-evident, and yet by means of a custom of their own, they may establish a law of the Church, such as a law of fasting, or of the observance of some feast. Again, a community of merchants has not power to make law, yet a custom of theirs can establish a legal rule, as is clear from the observations of Bartolus and others (on *Code*, IV. xviii. 2). Furthermore, women are not able, in the common opinion of writers on the subject, to enact laws; yet a community of women can, through their own custom, introduce a legal rule, as in the case of an institute of nuns. This is the opinion of Bartolus (on *Digest*, I. iii. 32 and on *Code*, VIII. lii. 2). Moreover, many authorities, whom Tiraqueau refers to in *De Iure Primogenitorum* (Qu. 16), say that the custom of one family can make a law for that family, although it has no legislative power.

Bartolus.

Bartolus.

Tiraqueau.

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9. On account of the first objection given above, Panormitanus (tit. *De Consuetudine*, No. 8) rejects the aforesaid definition of Giovanni d'Andrea. Yet an answer to Panormitanus's objection is easily made: in the first place, a clerical community has power to make a law, at least, one not opposed to the canons, and this is enough to give them authority to introduce a custom, and hence, consuetudinary law. Nor is it a difficulty against our doctrine that a clerical community actually have more extensive power to introduce law through custom, than by means of statutes, since it could have that power by special grant of the law and of the Popes—and this for the special reason which is examined by Abbas [, i.e. Panormitanus,] (*ibid.*, Chap. xi, no. 8), by Rochus (*De Consuetudine*, Chap. xi, sect. 3, no. 9) and by other writers on that same Chapter. It is, nevertheless, always true that no custom is introduced, save by one having legislative power. This matter is better explained by the doctrine stated above: it is not necessary that a community be in actual possession of legislative power, but it suffices that it have the capacity for such power. However, this capacity is truly possessed by a clerical community; for the power of enacting statutes contrary to the canons could be given to it, even if the grant has not actually been made.

The answer to the objection.

Abbas.

Rochus.

10. But in that case, a second objection presents itself, namely, that which is based upon the fact that a community of laymen has no capacity to enact a written law of the Church. The first answer to this can be found in my statements in the treatise *De Voto*, Bk. IV, chap. ix:[1] namely, a community of the people, practically,[2] and if we regard only the nature of the case, is capable of legislative power, even in matters of religion and of divine worship; and therefore, even though this power has at present in the Church been raised to a higher order and committed to the rulers of the Church, the people are, nevertheless, permitted by the consent of these prelates to bind themselves in matters of that kind through their own customs, with the tacit assent of their prelates, in the manner which we shall explain in the following Chapter.

An objection.

The answer.

Another reply may be given, namely, that it is sufficient that this community constitute a perfect society, and have of itself a passive capacity for such a law, so as to possess the power of originating a law in a spiritual matter through custom which has the consent, tacit or expressed, of its spiritual superiors. It was to indicate this fact that I included in my assertion these last words: 'or at least that it be such a community as can be the subject of law properly so-called'. For, a twofold capacity may be considered to reside in a community, one to make law, another to receive law. Although at present their earlier power to make ecclesiastical laws does not exist among Christian lay people, nor perhaps, even a capacity to do so, at least according to ordinary law; nevertheless, the laity has a passive capacity—that is, the capacity for receiving such law—and this capacity, I say, is necessary and sufficient, in order that by the custom of such a community, with the tacit consent of its prelate, [legal] custom may be introduced. I say that this capacity is necessary: for no form can be introduced except in matter capable of receiving it; so also the law of a spiritual custom (so to speak) cannot be introduced in its own way except in a subject with a capacity to receive ecclesiastical law. I say that is sufficient, for it is enough that the community be considered as in some way complete and perfect in a particular order: for a community entirely imperfect and restricted has no capacity for law strictly so called, although it can be the subject of a precept, as I have shown in Chapter ix of Book I.[3] But in every perfect community, custom is sufficient for introducing law, if the consent of the ruler is given for the custom.

A twofold [legal] capacity may reside in a community.

11. The answer to the third objection is now clear. For a community of merchants, for instance, can introduce custom in proportion to its capacity for law. Bartolus (on *Code*, IV. xviii. 2) says, that it can enact statutes. On the interpretation that must be given to this remark, I have spoken in

The answer to the third objection.

Bartolus.

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

[2] [In other words: 'as far as the people are concerned, i.e. they are members of the Church and could be given the power'.—Reviser.]

[3] [This is found in Chap. vi. of Book I, *supra*, pp. 73 *et seq.*—Tr.]

Book III.[1] For if that body of merchants be regarded in itself, it has the power to frame conventional statutes[2] only, but not true laws. If, however, it be regarded as united with the prince or as wielding authority granted by him, this merchant body has power to frame statutes of a quasi-municipal character. Hence, it can establish custom, which has, with the same limitations, the force of law.

This seems the evident conclusion to be drawn from the *Code* (VIII. lii. 3), where at the beginning, the Emperor [Justinian] makes the unqualified assertion that an approved custom tenaciously preserved, resembles a law: words that can have application only to a people possessed of the power of making law. He adds immediately, 'and what is known to have been observed by offices, courts, cities, or corporate bodies'—of course, with the consent of the prince, as the Gloss there states. Hence, it is sufficient that a community possess legal capacity, 'together with the tacit consent of the Prince or Prelate'.

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The fourth objection is refuted in the same way: for, a community of women can have a capacity for law, and so a custom among them, accepted by the prelate, can establish law. This is the express teaching of Bartolus (on *Code*, VIII. lii. 2, no. 13).

Solution of the fourth objection.

Bartolus.

The answer to the last objection is that the statement there quoted[3] is false; for a private family cannot establish a true legal custom, since of itself it is essentially without legal capacity, even of a merely passive kind. The reason is that it is a wholly imperfect community, and can never by its own customs introduce a legal rule, even with the consent of the prince. A family as such, and apart from its social relations, has no capacity for law, not even for law imposed upon it by the prince—as I have stated in Chapter ix of Book I.[4] Nor, again, can a family introduce a custom applicable to others, because the custom of one is not binding upon another; nor can it be presumed that it is the will of the prince to bind a perfect community because of the custom of an imperfect portion thereof, as we shall explain in discussing the point next to be taken up. In what manner this principle is relevant to the question of custom abrogating law, will be easily explained in view of this last consideration.

Answer to the last objection.

12. The third principal assertion in this Chapter is the following: For a custom to be established by the people, it is necessary that it be observed by at least the greater part of the community; and such observance is sufficient. This proposition is accepted by all the authorities to whom I have made reference. A full treatment of it is to be found in Bartolus

In order that a custom may be established, it is necessary that it be observed by at least the greater part of the community, and this is sufficient.

Bartolus.

[1] [Chap. iii, *supra*, p. 377.—Tr.]

[2] [That is, statutes which regulate the convention that rule in the merchant body.—Reviser.]

[3] [*Vide* the last sentence of Sec. 8, *supra*, p. 524.—Tr.]

[4] [*Supra*, p. 105.—Tr.]

(on *Code*, *ibid.*, no. 12) and in Rochus (*De Consuetudine*, Sect. 4, from no. 2).

Rochus.

The proof of the first part of this assertion is that the source of a custom ought to be practically the whole community, inasmuch as its custom applies to all; that of the smaller portion of the community is not sufficient for the custom to be imputed without qualification to the community as a whole, or for it to carry with it the consent of the community. Again, for the enactment of a law through the express will of the community, the consent of a minority is not sufficient; nor is it sufficient in elections, and in other acts, which ordinarily are done or can be done by the community as a whole: much less, then, will it suffice for establishing legal custom.

One may object that this rule is to the point, where the consent of the whole community is the real cause of the law, but not so, where the law is established by means of a custom with the consent of the prince. I answer that we must determine whether it is of the express or of the tacit consent of the prince that we are here speaking. If we speak of his express will, then it is true that the prince can enact law, if he so choose, which has regard for the custom of a few persons only, if this seems to him better or more expedient: this, however, will be not consuetudinary law, but rather a written law, or one expressly enacted. If, by the consent of the prince, we here mean tacit consent, then this cannot be reasonably presumed solely on the ground of a custom observed by the smaller portion of a community, even if it has been adequately tolerated: and this, both for the reason that the presumption is not based upon any law, and because the prince is not to be considered as desiring through such an unwritten law to force the consent of a people who do not consent. Rather, the prince is held to give his tacit consent—other conditions having been fulfilled—because the people give theirs and tacitly petition his own. But[1] the consent of a minority in the community is not that of the people as a whole. Therefore, . . .

An objection.

The solution.

13. The second part of the third assertion, namely, that the usage of the larger portion of the community is sufficient for the establishment of custom, is based upon the converse reason: namely, that in every community the consent of a majority thereof is usually sufficient for the validity of its acts in matters where law has not made some special provision [to the contrary]. Thus, in the case of a corporate body, the consent of the major part is held to be that of the whole body. This principle is set forth in the *Digest* (L. i. 19). Felinus, too (on *Decretals*, Bk. I, tit. 11, chap. vi, no. 17), has noted this, adducing many examples. We, also, have already touched upon this point in earlier passages. Therefore, in the present case, the custom of the greater

Felinus.

[1] [Reading *at* instead of *ut*.—Reviser.]

part of the community is to be held as that of the whole community, and hence, this is sufficient.

Almost all the authorities cited above are of this opinion, for they require [for the introduction of custom] no more than this [consent of the majority]. How such consent of a majority is sufficient for a custom in derogation of law, I shall discuss in Chapter xvi. Angelus de Clavasio, indeed, adds (*Summa*, on word *consuetudo*, no. 7) that in that case it is necessary for two-thirds of the community to give their consent. He cites the *Digest* (III. iv. 3 and 4); and accepts the opinion of Panormitanus (*De Consuetudine*, Chap. xi, no. 18), who treats this question at some length.

Angelus de Clavasio.

Panormitanus.

But however the matter is explained, the restriction made, is not necessary in the present case. For if it means that two-thirds of the people should give their consent, and should observe the custom, then this statement is not true, since it is based upon no law. For in the laws just cited, there is no statement to that effect, but only the statement that the presence of two-thirds of any community is necessary for its acts to be held as done in the name of that community. Indeed, the Gloss on those laws notes that the consent of the two-thirds who are present is not necessary, but that the consent of the majority of those present is sufficient. This principle is admitted by Panormitanus in respect of the matter under discussion; and in this sense he reads *Digest*, L. i. 19 and *Decretals*, Bk. III, tit. xi, chap. ii. If, however, that assertion means no more than that the presence of two-thirds of the community is necessary, the requirement would seem to be a superfluous one in the case of a popular custom, since it is obvious that when a custom is a long-continued one, almost the whole of the population is necessarily present.

Gloss.

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Panormitanus.

14. Panormitanus has for this reason added the note that 'it is necessary that at least two-thirds of the community be aware of the custom which is introduced'. But this has rather to do with the other conditions which are requisite with respect to the consuetudinary actions, namely, that they be publicly performed. The necessary consequence of such performance is that if the custom is thus publicly observed by the greater portion of the community, not only that portion of the community, but others also, will have a knowledge of it. However, so general a knowledge of the custom is not essential; for, even though many may be ignorant of it, so long as that custom is known to the larger part of the community, this is sufficient. The reason is that the consent of those who are thus ignorant of it is not necessary, nor is even a knowledge of the custom on their part called for: it is sufficient that this custom be of itself a public one.

Panormitanus.

It is for this reason that Rochus (*De Consuetudine*, Chap. xi, sect. 4, no. 24 [no. 2]) said that a knowledge of the custom by the people, or by a majority of them, is requisite for the validity of a custom. He discusses

this point thoroughly, and strengthens it [by citing authorities]. Gregory López ([on *Las Siete Partidas*,] Pt. I, tit. ii, law 5, gloss 4 [gloss 3]) who is followed by Burgos de Paz (in Law I: *Tauri.*, no. 205), agrees with this view, saying that in a custom observed by the greater portion of the people, there is always a sufficient representation of the whole people, and that the ignorance of it, on the part of some, cannot set up a barrier to its introduction.

Gregory López. Gloss. Burgos de Paz.

It remains that we explain in what manner the computation of this greater portion should be made, or of what persons it must be composed. There is a general agreement on this point, that there should be reckoned in this number only persons who can give consent to consuetudinary law. All infants and all persons mentally defective are therefore excluded. Some would also entirely exclude women on the ground that they can exercise no legislative authority. Among men, they exclude all below the age of twenty-five years. However, I cannot find any basis in law or any justification in reason for the exclusion of the last two groups. This question, however, will be better settled when we come to consider the separate effects of law.

How the reckoning of the 'majority' is to be made.

CHAPTER X

BY WHAT ACTS CUSTOM IS INTRODUCED

1. The assertion of this Chapter is, briefly, that a custom is not introduced except by a repetition of public and voluntary acts, and for the reason that the consent of the people is necessary for the establishment of a custom.

That custom is introduced by repeated actions would seem to be an assertion not requiring proof. First, as to a custom of fact: the custom is essentially nothing more than a repetition of actions; this has been made clear above; and therefore, with respect to such a custom, even though the single actions may be said to be the efficient cause of it, nevertheless, the repetition of or the sum of the acts would rather seem to be the essence of it, and (as it were) its formal element. Then, with respect to custom as law, it is to be remarked that such custom is introduced by one of fact, and hence it also must be initiated through a like repetition of acts. This part, then, of our proposition would seem to be sufficiently established by the fact that by definition, a custom should be instituted by the general conduct of those who employ it. But general conduct arises from the repetition of certain actions by the people.

Custom is established by a repetition of public and voluntary acts.

This part of our proposition may also be proved from the word *consuetudo* (custom): for 'custom' is so called because, as Isidore says

(*Decretum*, Pt. I, dist. I, can. v), it is usage in common. But how can it be common usage except through a repetition of actions? Likewise, a custom is termed long-continued usage (*Decretum*, Pt. I, dist. XI, can. iv, and *Digest*, I. iii. 35). Again (*ibid.*, 32) the people are spoken of as having declared their will by the language of deeds in a custom. But deeds do not exist except by repetition of acts, and this repetition we call 'frequency'. Therefore, . . .

First objection.

2. It may be objected, indeed, that at times a mere omission of an action is sufficient to introduce a custom. I have already pointed out, however, that a moral omission is included under the heading moral acts, and that wherever such omission is sufficient, then a repetition of such omissions is also necessary. When and in what way such omission suffices for establishing custom we shall see in Chapter xvi.

Bartolus. Panormitanus. Second objection.

Secondly, one may object that it is asserted by Doctors of high authority that a single action is sometimes sufficient for introducing a custom, as Bartolus notes (on *Digest*, I. iii. 32 and on *Code*, VIII. lii. 2). Panormitanus (*De Consuetudine*, Chap. xi, no. 17), also accepts this doctrine, with respect to an action that is of its nature permanent in the sense that the act continues in its effect, and endures for sufficient time; thus, by the one bestowal of a benefice, a custom is established in that bestowal, if it has endured in point of fact for a sufficient time (on *Sext*, Bk. III, tit. IV, chap. v). He notes again that by the one act of building a bridge, a [legal] right is acquired, when the bridge has stood for a sufficient time.

However, these and similar examples are matters of prescription, for which indeed, a particular act consisting of a human operation is not *per se* essential; an habitual possession, if I may use the word, is sufficient, together with the fulfilment of the other conditions. The reason is that more commonly, prescription is concerned with persons or things—as has been sufficiently touched upon in the first and second Chapters of this Book—and hence, when a single action is sufficient [to establish a right of prescription], what continues is not the act itself, but its effect or term: the possession of the benefice, for instance, or [continued existence] of the bridge.

Still, the element of frequency of using the bridge or holding the benefice is morally present in these examples and the like. But in custom of the kind of which we are now treating, and generally in custom which has as its matter human acts as such, it is impossible for the custom to be introduced without a multitude and frequency of actions, for the reason that those separate actions do not by themselves endure for a long period of time, and custom should be a protracted [usage]. Whence it is impossible that the custom should be such [, i.e. protracted], except through a succession of actions.

Objection.

One may object that although the individual action is transitory, it may be held to endure morally, so long as it is not revoked, even if it is not repeated.

Solution.

My reply is that this holds true of guilt or continual[1] fault, but not of a custom: for no one is said to observe a custom of stealing merely because he stole upon one occasion, and did not make restitution for a long time thereafter. This principle is especially true because, in the matter of initiating or revoking a law, it is not possible that the people who have performed one act of keeping some feast-day or a fast, for example, should go on for a long time without performing either similar acts, or contrary acts. Therefore, it is true absolutely and without qualification, that for a custom, a frequency of actions is required. Bartolus, in his remarks (on *Code*, VIII. lii. 2, no. 12), sets forth this opinion at some length, as does also the Gloss (on *Decretum*, Pt. I, dist. I, can. v, and on *Decretals*, Bk. I, tit. IV, chap. xi), on which Rochus, treating the matter at length (*De Consuetudine*, Sect. 5 [Sect. 4], no. 36), says that this doctrine is generally received with hardly any dissent.

Bartolus. Gloss. Rochus.

What frequency of actions is required for the establishment of custom.

3. Furthermore, these Doctors raise a question as to what frequency of actions is necessary or sufficient for the establishment of a custom of this character. For certain early jurists said that two actions are enough. Bartolus, in the passage cited above, notes this opinion, and he is followed in Rosella[2] (word *consuetudo*) and by Sylvester (word *consuetudo*, Qu. 4 [Qu. 3]), who accept the opinion but make certain distinctions. These writers cite the *Code* (I. iv. 3) and the *Decretum* (Pt. II, causa xxv, qu. ii, can. xxv), in which they call one repetition of the same criminal act, 'a custom'. But, as Bartolus has rightly said, the word 'custom' must there be understood as meaning a certain usual mode of action, such as is sufficient not for the introduction of a law, but only for the justification of a heavier punishment, and for the prevention of a too facile grant of pardon, and similar effects of fact, rather than of law. Hence, Bartolus and others generally reject this opinion, since no criterion can be found for fixing a definite number, nor do the laws prescribe one. Whence they assert that the matter is to be left to the decision of a prudent judge.

Bartolus. Rosella. Sylvester. Bartolus.

One should have recourse to the judgment of a prudent man.

This opinion of these writers seems to me certain, when it is applied to our subject-matter of legal custom strictly so called, whatever may be the number of acts necessary to establish a true prescription or other effects of 'fact', so to speak.

[1] [Suárez is here using the word *habitualem* in the sense of persisting, not in that 'of frequently taking place'.—REVISER.]

[2] [*Summa Rosella* of Baptista Trovamala.—TR.]

4. The matter may be made clear as follows. Sometimes the custom of which we are speaking must, in order to initiate or abrogate law, be validated by prescription; at other times, that is not necessary. When, therefore, validation of the custom by prescription is called for, the first consideration must be the number of years required therefor, according to the principles we shall lay down in the following Chapters. Attention must then be directed to the question whether, in the successive years, the custom requires one act only or many acts: for, if it requires only one, as in the observance of a certain feast, or of fasting on a particular day, then as many acts are necessary as the number of years required for the running of the prescriptive period. If, however, the custom requires many acts in a fixed number of years, then the number of actions will be proportionate with the number of years necessary for the prescription. It is possible, however, that the number of actions in the successive years may be not an absolutely definite one, but subject to some condition or occasion—as the custom of public prayer, or other like exercise, may find place only upon such and such an occasion or in response to the need of the moment. Thus, the number and frequency of the occasions will indicate the required frequency of the actions—done at the time they are called for, and with no omission of the act on those occasions.

Likewise, in respect of a community, these actions are to be taken as one act, in so far as the community acts either as one in the form of a corporate body or a college, as in electing or ordaining[1] or the like; or, as the whole body or the greater part thereof concur in the action, although each person acts upon his own account, as in observing a feast, or a fast, &c. Therefore, in cases where the whole community participates, few actions are required. For they are multiplied in virtue of the separate actions of the observance of the custom: and this, not only in proportion to the magnitude of the population—in the great numbers of actions which are done at the same time by all the members of the community—but also in proportion to the length of time during which custom is observed, that is, the repetition of those actions on successive occasions by the individuals.

But when there is no requirement of a definite continuity of time, 815 then, just as the length of the period within which the custom must be continued is an arbitrary one, so also is the frequency of the actions, which will be fixed according to the exigencies of the subject-matter, or of the occasions for which the custom must be (as it were) sustained in observance.

Since, also, the custom in question requires the consent of the people and of the prince, such a multiplication of actions will be held

[1] [For *eligendo ordinando* read *eligendo, ordinando*.—Tr.]

sufficient as will make known the consent of the people and the tacit approval of the prince.

Hostiensis. Archidiaconus. Panormitanus. Bartolus.

Hostiensis (in *Summa* [Bk. I, rubric iv, no. 5]) states the doctrine in much the same way—as do Archidiaconus (on *Sext*, Bk. I, tit. II, chap. i), Panormitanus (*De Consuetudine*, Chap. xi, no. 17) and Bartolus (on *Code*, VIII. lii. 2, no. 12). This doctrine is followed by other writers also.

Whether the same assertion holds true of style or custom of judicial acts, I shall discuss at the close of the following Chapter.

Public observance of custom is necessary.

5. From the above discussion, it is evident that it is necessary that the observance of a custom be public, and consequently, that the customary actions be publicly performed: partly in order that all the people or a majority of them may unite in giving their consent to such a custom; and partly also, in order that the custom in question may, in so far as such public observance can do so, be made known to the prince whose consent also is needed.

An act can be public in two ways.

An action, however, can be public in two ways, namely, in fact and in law: as an act is usually said to be notorious in a twofold sense, namely, with a notoriety of fact or law.

What is publicity in fact and at law.

In the former manner, an act is notorious which, although it is the action of a private person and done on private authority, is yet performed publicly in the sight of other persons, and not furtively or in secret. In the latter manner, however, an act is termed a public one which is done by public authority and in a juridical fashion; for example, as the sentence of a judge, and the like.

When, therefore, a custom itself is one observed by private acts, it is certain that in order to establish a consuetudinary law, the acts must—for the reasons just given—be performed publicly, at least after the first-named manner, and with notoriety of fact. The reason is that actions done privily and in secret, indicate, by the fact that they are so done, that they are not performed with the consent of the people nor of the prince; and therefore, unless the acts be public, at least with the notoriety of fact of which we have spoken, they cannot be suitable for the establishment of a public custom. This condition is so stated in [*Las Siete Partidas*,] Pt. I, tit. ii, law 5.

CHAPTER XI

WHETHER JUDICIAL COGNIZANCE OF THE FREQUENCY OF ACTIONS IS REQUISITE FOR THE INTRODUCTION OF A CUSTOM

Is judicial cognizance necessary for the introduction of a custom?

1. Our present Chapter seeks an answer to the question whether it is essential for the introduction of a custom that the sufficiency of the number of acts constituting it be defended or proved in court by the public authority.

Gloss. Gloss. St. Antoninus.

Some authorities assert that it is necessary that the custom be approved by legal decision in its favour.[1] This is the doctrine of the Gloss (on *Decretals*, Bk. I, tit. IV, chap. xi and on *Decretum*, Pt. I, dist. VIII, can. vii; on *Institutes*, I. ii. 9, word *diuturni*), and in the Gloss (on rubric to *Code*, VIII. lii). It is followed by St. Antoninus ([*Summa Theologica*,] Pt. I, tit. xvi, § 4).

This doctrine is founded first, upon *Decretals*, Bk. V, tit. XL, chap. xxv, where a certain custom is alleged to be insufficient, because it was not established by a decision in its favour when impugned. This is noted by the Gloss on that Chapter, which cites in confirmation, the example of a prescription for the validity of which an appeal is necessary, according to the *Digest* (VIII. vi. 18, § 2). 'Thus it would seem,' says the Gloss, 'that it [, i.e. an appeal,] is required in a custom validated by prescription.'

Secondly, the *Digest* (I. iii. 34) is cited in favour of this opinion. That law states that when a custom is cited as proof, the first point to be examined, is 'whether that custom also has been confirmed when impugned'.

Thirdly, this view is favoured by the law of Spain ([*Las Siete Partidas*,] Pt. I, tit. II, law 5), which holds that a custom of ten or twenty years' standing must be observed in the future if, during that period, judgment has been given in accordance with that same custom.

Fourthly, the proof may be added that, until the custom has thus been confirmed, it cannot become sufficiently known and of a public character suitable for its observance to become binding upon other persons, or for it to give a peaceful conscience to those observing it.

Thus, if one asks how many judicial acts are necessary to establish a custom, the answer of the Glosses is that a reaffirmed judgment in conformity with and approving the custom is necessary. The sole proof of this opinion is derived from the *Code* (I. iv. 3).

[1] [i.e. 'custom proved by a judicial decree after it had been disputed' (*Contradictorio judicio*). This term is explained by Panormitanus, in his Commentary *De Consuetudine*, Chap. xi (p. 124 of the Venice edition, 1569). The term means that a judicial decision is given in favour of a custom which has been challenged by a plaintiff. His words are: '*Quod parte contradicente, vel semel saltem fuerit judicatum consuetudinem esse.*'—REVISER.]

A judicial act is not necessary for the introduction of custom.

2.[1] This opinion, however, is false, and the contrary view is the common one among the canonists and the jurists,[2] as is stated by Abbas [, i.e. Panormitanus,] (*De Consuetudine*, Chap. xi, no. 16), and also by Bartolus (on *Code*, VIII. lii. 2 and on *Digest*, I. iii. 32 in *Repetition*, qu. 2). Jason states the same opinion in his comment on the same law (on *Code*, VIII. lii. 2, and on *Digest*, I. iii. 32, no. 51, col. 12), as does Rochus (*De Consuetudine*, Sect. 4, no. 34), where he gives the names of other writers who teach the same doctrine. Gregory López sets forth this view (on *Las Siete Partidas*, Pt. I, tit. II, law 5, *glossa* c), 816 as does Peter de Salazar (*De Consuetudine*, Bk. I, chap. vii).

Abbas. Bartolus. Jason. Rochus. Gregory López. Peter de Salazar.

The first proof of our assertion is that custom does not require for its establishment such a judicial act, either by reason of its nature or from the obligation of positive law: there is, therefore, no ground on which such an act is necessary.

The general inference of this argumentation is clear: every condition or cause requisite for a custom ought to be based upon some law; otherwise, the assertion of such a condition or cause as an essential one is gratuitous and unfounded.

Bartolus.

The proof of the major premiss is derived, first, from the fact that there is no reason in the nature of things why such a judicial act should be necessary. For, as Bartolus says, the general consent of the people, or a greater part thereof, sufficiently manifests popular consent; and the public usage, as such, can of itself be known to the prince, so that his tacit consent may be assumed. Hence, there is no reason why a judicial act should, from the nature of the case, be necessary. As to the second member of our premiss, the positive laws which speak of custom that is reasonable, never require this condition [of a judicial act], but only that it be of a prescriptive, immemorial, or of an ancient character, and the like. This is clear from the *Decretals* (Bk. I, tit. IV, chap. xi) and the *Digest* (I. iii. 32) and other laws of a similar nature.

3. I offer as a second argument, one drawn from reason: this requirement of a judicial act for the establishment of the custom supposes that it has been impugned in the courts: what, however, if in fact the custom is never impugned? If it were not thus challenged, its establishment could never be effected. But that is contrary to all law and to all reason.

It may be said [in reply to this argument] that the custom is not confirmed in a space of ten or twenty years only, if it had not been put to the test of trial in which it was impugned, yet, if the custom lasts for a longer period, say for thirty years or more, then such lapse of time makes up for the required judicial actions. It is the opinion of

[1] [Figure 2 is omitted in Latin text.—TR.]
[2] [Reading in *legistarum* for *legislatorum*.—REVISER.]

Burgos de Paz.

Burgos de Paz (Law I, *Tauri.*, no. 247) that this holds true, at least in Spanish law. But with respect to the common law, this view is untenable, since according to that law a custom of ten years' standing is held to be ancient, and for such a custom to be complete and perfect under the rules of that law, the condition [of a judicial act] is not necessary, as has been proved. Regarding the law of Spain on this point, I shall add a note shortly.

4. I shall add another argument, an excellent one, it seems to me, suggested by Panormitanus. It is that the aforesaid condition [of a second judicial act] involves a certain contradiction. For if a second decision in a trial where custom is impugned, is required, then, either it is impossible that a first just decision favouring the custom can be given, and thus the establishment [by it] of a perfect custom is made impossible, a proposition that our opponents do, of course, deny; or the [second] decision of the court supposes the custom to have been a perfect one before its decision was given—in which case, that decision is clearly not essential to the custom and at most does no more than record it.

The proof of the first member of the foregoing proposition is that, if a [second] judicial decision in favour of the custom is necessary for the establishment of the custom, then no custom can be complete before a first decision is given, since a condition necessary to its perfection is lacking. Yet, such a first decision cannot, therefore, declare the custom be complete; or that an action done in virtue of the custom is valid and permissible; or, finally, that the custom can establish any obligation. The reason is that such a decision must contain error in defiance of the plain truth, even though from the standpoint of those who demand a second judicial declaration, the custom was not a custom before that first decision was given.

From this reasoning, the second member of our proposition also is clear: for, if the custom is truly and justly declared by the court [in a second decision] to be a perfect one, then it was perfect before the declaration. The judicial decision in question does not complete the custom, but merely declares what it is.

Reply to the basis of the contrary position.

5. The reply to the first statement contrary to our thesis,[1] that drawn from the *Decretals* (Bk. V, tit. XL, chap. XXV) is, first, that this law has reference not to a legal custom, but to a prescription of a right of election, which is a very different matter. As to that, the matter can be open to dispute, but upon it no proof applicable to our present subject can be based. In the second place, the words in the *Decretals* (*ibid.*) here referred to are not found in the decision, but in the allegation of the party against whom the case was settled, as is evident from the context. Thirdly, those words are interpolated not in order to suggest that a decision

[1] [*Supra*, p. 534.—Tr.]

in favour of a prescriptive custom impugned is necessary for [the validity] thereof—for this is so clearly false, that it is improbable that this allegation was even put forward—but only to demonstrate that such a custom was not sufficiently proved from the evidence which the contesting party had brought forward.

Panormitanus.

Whence Panormitanus (on *Decretals*, *ibid.*, no. 13) says that the inference to be made from the text of the law is not that which our adversaries here have drawn from it, but rather its opposite. The example, however, which the Gloss brings forward (on *Digest*, VIII. vi. 18), has no bearing upon the present matter, because in that law the custom in question is not a legal custom, but one concerning a prescription of servitude; and, again, because a reference to that law in our present question is irrelevant, for it sets forth, not the manner of acquiring a servitude by prescription, but merely the manner in which the servitude is not lost. As to this latter point, it lays down the principle that the servitude is not lost through non-usage when there is no occasion for its use. The law holds that such non-user is a merely negative non-user and not privative in its effect, a point that we shall more fully explain later in treating of the loss of privileges. Since sometimes, the occasion for the use [of the servitude] does not arise unless a certain previous conditional action takes place, the law makes it clear that prior to the occurrence of such an occasion the servitude is not lost merely on the ground of non-user. The principle has special application to urban servitudes as is shown from the *Digest* (VIII. ii. 6). From that law, therefore, nothing as to the necessity of a further challenge[1] of the prescription, especially in a court of law, can be inferred.

Gloss.

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The answer to the second statement.

6. My reply to the [second] contrary thesis based upon the *Digest* (I. iii. 34), is that this law makes simply the following assertion: for the examination and proof of a custom it is a point of great importance to know whether the custom has ever been confirmed when impugned; and therefore, this point should be determined first [in establishing such proof]. This principle is a valid one in the sense that such judicial decision is of considerable use in the proof of a custom; it is not so in the sense that such judicial decision is demanded to establish the truth and consummation of the custom.

I shall not avail myself of the other, negative reading of the text of the law: namely, that it is of much importance 'whether or not the custom was also confirmed in a contested trial'.[2] Thus stated, the matter is very clear: for a knowledge of such a rejection of a custom can be highly pertinent in a question of its establishment, since through a decision given against the custom, there is an interruption, or a cessation of the presumption of a tacit consent of the commonwealth, or of

[1] [A further challenge, that is, in the sense of an appeal as indicated in the third paragraph of Section 1 of this Chapter; *supra*, p. 534, cf. also note 1 on that page.—Tr.]

[2] [Suárez is here apparently giving a negative paraphrase of the text of the *Digest*.—Tr.]

the prince. The former reading of the law is, however, held to be the genuine one. The Gloss and the Doctors have explained it in various ways, as can be seen by reference to them.

7. We now pass to the third statement namely, that drawn from the law of Spain. As to the meaning of that law, our commentators have some difficulty, and certain of them attempt to interpret it as relating to a prescription. They do so, however, without justification: both because the law very clearly has reference to custom, as will be evident to any one who examines it; and because the interpretation they give the law does not hold even for prescription, or, at least, it involves them in the same difficulty with respect to it.

The answer to the third statement.

Others, however, admit that by the special law of Spain,[1] two judicial decisions rendered in favour of impugned custom are necessary in order that a custom be confirmed. This is the view of Burgos de Paz (Law 1, *Tauri.*, no. 247). But even though the words of the law, literally taken, favour this opinion, the meaning is so absurd that it does not seem admissible, because, as I have said before, this condition involves a contradiction. The reason is that if this requirement of two decisions were to hold, the first decision could never be justly given in favour of the custom, or in accord with its terms.

Burgos de Paz.

We must, then, it seems to me, take two parts of that law separately: the first is, that the custom to which it refers must be one that has been completely established and is having its effect as law; the second is, that such a custom shall be irrevocable by virtue of the rule embodied in that law. For the first of these, therefore, a repeated judicial decision is not necessary—and this is the matter of present concern to us. For the second, such a judicial decision would seem to be necessary—and in this respect, this law would seem to be one peculiar to Spain. Therefore, the question of its present existence as a matter of usage, or that of its interpretation, does not now concern us. And this sense is easily inferred from the words of the law itself: 'If the people shall have observed a custom for ten or twenty years with the knowledge of the sovereign and without his forbidding it, then they are free to follow that custom in the future.' This is the first part of the law; in it nothing more is required for a legal custom. Then, however, follow the words: 'Such a custom is to be observed in the future, if within this same time, a judicial decision shall have been twice given in favour of the aforesaid custom.' This is the second portion of the law, and in it the custom is no longer called one that the people 'are free to follow', but one that is strictly 'to be observed'—and it is for this effect of irrevocable obligation that that condition [of two decisions in favour of the custom] was specifically set down as

Two parts of the law distinguished.

[1] [*Las Siete Partidas*, Pt. I, tit. ii, law 5, previously referred to, *supra*, p. 534.—Tr.]

requisite. This interpretation of that law will become clearer from what we shall have to say in what remains of our present discussion and from that to be taken up in Chapter xvi.

8. Our reply to the fourth statement,[1] drawn from reason, is that, at most, it demonstrates that a decision given in favour of an impugned custom is of value in proof of the custom, and for the publication thereof—and this we readily concede. Nevertheless, before that decision was given, the custom was a true one; and, indeed, while the custom is still in the process of development, such a decision cannot be given in virtue of the custom, as I have already demonstrated. Again, before a judicial decision can be given, the custom must be sufficiently proved; therefore, before such a decision can be given, there can be a moral certitude as to the character and sufficiency of the custom which has been established; indeed, for those who cannot of themselves pass an opinion upon the character and sufficiency of the custom, a probable opinion of the Doctors is adequate proof.

The answer to the fourth statement.

Bartolus, in fact holds (on *Digest*, I. iii. 32, qu. 4), that the opinion of even one learned Doctor is sufficient, and on this point he is followed by many weighty authorities, whose opinions have been very carefully compiled by Mascardi (*De Probationibus*, Concl. 426), and by Sánchez (*De Sancto Matrimonii Sacramento*, Bk. VII, disp. xvii, no. 8).

What is the value of the opinion of a learned Doctor.

Bartolus.

Mascardi. Sánchez.

This view must be understood with the qualification that it holds only if this one Doctor's opinion is not contradicted by that of other authorities; and even in that case it is truer to say that it is necessary that several Doctors of high authority should be in agreement with his opinion concerning the custom, or that the statement of the one Doctor be supported by the weighty reasons of other authorities. This may have been the meaning intended by King Alphonso in (*Las Siete Partidas*, Pt. I, tit. ii, law 5), which states that two concordant decisions are sufficient to establish the certitude and proof of the custom in question in such 818 wise that no decision counter to them is possible, nor fuller proof of the custom demanded. The matter could be very properly settled in this manner, although the basis of the arrangement could not be the common law. For *Code*, I. iv. 3, to which the Glosses above mentioned refer, deals not with this point, but with the need of caution in granting pardon to an individual who commits an offence a second time. This relates solely to a matter of fact, and to the beginning of a custom not strictly so called, or a habit, as I have stated above.

9. Panormitanus, however, basing his opinion upon the teaching of the Doctors of both the canon and civil law, adds that although a decision of a judge is not necessary for a custom, it can nevertheless

Panormitanus.

[1] [*Supra*, p. 534.—Tr.]

be of assistance not only in proving, but also in establishing it. His reason is that if a judge decides against a law, with the knowledge of the people and without their opposing it, the consent of the people with respect to the custom to be introduced is made known. But surely if the judicial decision was just, it had to assume the custom to be a perfect one, and one in derogation of the law: hence, such a decision cannot serve to establish the custom; it can only indicate and strengthen it. If, however, the decision was unjust, it offers no good ground for presuming the consent of the people to the custom, since the people cannot easily resist a judge, or contradict him. From such a decision, then, it is not the consent of the people to the custom, but only their tolerance of it that is to be inferred, since they cannot oppose the decision. Accordingly, Antoninus and Rochus set down a number of conditions that must be fulfilled for such a reason to have any value. I pass over a discussion of those conditions, since, notwithstanding such a judicial decision or judgment, the same number of actions are required for the custom, and the same period of time is necessary for its prescription. For an unjust decision cannot remit any of these requirements—nor is the contrary based on any known legal rule.

Antoninus. Rochus.

Sylvester.

10. Sylvester, on the other hand, asserts (word *consuetudo*, Qu. 4 [, no. 7]) that in the case of judicial acts a judicial decision can assist in the establishment of a custom: 'in such wise that from two decisions, with a proper lapse of time intervening, and with the consent of the people, given either from the beginning or after the event, a valid custom is to be presumed;' and this because these decisions have an aptitude for establishing a custom (*Digest*, V. ii. 5 and XXIX. v. 3, § 1).

This assertion calls, however, for further examination and clarification. For it is certain that just as through extrajudicial acts, in reference to the making of contracts and wills, and in other observances, consuetudinary law can be established respecting actions of a like kind; so, by judicial acts there can be introduced custom respecting similar acts. These latter customs are, as I said above, known as those of 'style'. This contention is clear both from what has been said above, and by parity of reasoning, or even, *a fortiori*. For this reason I add that just as for an extrajudicial custom no decision handed down by a court is required, so neither is one necessary for a judicial custom—for one, that is, arising from judicial acts. The reason is that there are many judicial acts which are distinct from judicial decisions, and such acts can be repeated over a period of time sufficient for the establishment of a custom; and this, without any judicial decision having been given for or against the custom. In such a case, therefore, the custom is established without a judicial decision having been passed upon it; for all the reasons which hold for an extrajudicial custom, hold equally for such acts and such custom.

Indeed, even though these judicial acts are declarations of law and even though they are judicial decisions repeated many times, there will never be necessary a judicial decision which (as it were) reciprocally decides on the custom of giving such decisions. And so, formally, and properly speaking, for the establishment of a judicial custom, there is never required, in addition to the acts themselves that expressly initiate a custom, any decision given in favour of such custom, when it is impugned, nor any decision that a legal rule has been established by that custom. And this is true also if the custom is concerned with this or that way of proceeding to judgment, or with the pronouncing of judgment after one or another style; the custom is introduced, essentially, by the repetition of the acts of judgment themselves. Thus there is no proper, formal distinction between judicial and extrajudicial actions [in respect of the conditions requisite for the establishment of custom].

The opinion of other writers.

11. Yet many writers assert that in the giving of decisions and even in judicial acts, two actions are sufficient for the establishment of a custom. This seems to be Sylvester's opinion in the passage quoted above (Section 10). It is that of the Gloss (on *Digest*, I. iii. 32, word *inveterata*), and of Giovanni d'Andrea (on *Decretals*, Bk. V, tit. XL, chap. XXV), and, that also of Bartolus (on *Digest*, I. iii. 32, in *Repetition*, Qu. 4). Many other writers in speaking of style indicate that two actions are sufficient for the establishment of a style; and a style is, as I have stated above, nothing more than a custom in matters of this special kind. This seems to be the opinion of Decio (on rubric to *Digest*, I. iv, no. 35), where he states that lapse of time is not required for style. Rebuffi (Tr. *De Consuetudine*, in *Repetition*, Art. 2, gloss 13, nos. 10 and 17) even says that usage, or a plurality of acts is not necessary for proof of style, and he cites other authorities in support of his opinion. Cristóbal de Paz (on rubric to law on style, Pt. I, nos. 76 *et seq.*) defends this latter opinion, and he cites Cynus (on *Code*, VIII. lii (liii). 2 [, no. 7]), who states that the authority of style is so great, that even if the style is brought in by a single judge, it will have the force of law, and by style he means one established by general conduct without the aid of written 819 law. Cristóbal de Paz sets forth the same opinion at length (*ibid.*, nos. 86 *et seq.*).

Sylvester. Gloss. Giovanni d'Andrea. Bartolus. Decio. Rebuffi. Cristóbal de Paz.

Much of what Antonio de Butrio has to say on the observance [of style] in his comments (*De Consuetudine*, Chap. xi) would seem to confirm this opinion. Rochus, quoting him (*De Consuetudine*, Pref. no. 27) speaks to the same effect. They assert that a fixed period of time is not required [for the establishment of a style], but that two or three acts are sufficient to make the observance of it binding in judicial actions. And this, especially if such an observance is declarative and interpreta-

Antonio de Butrio. Rochus.